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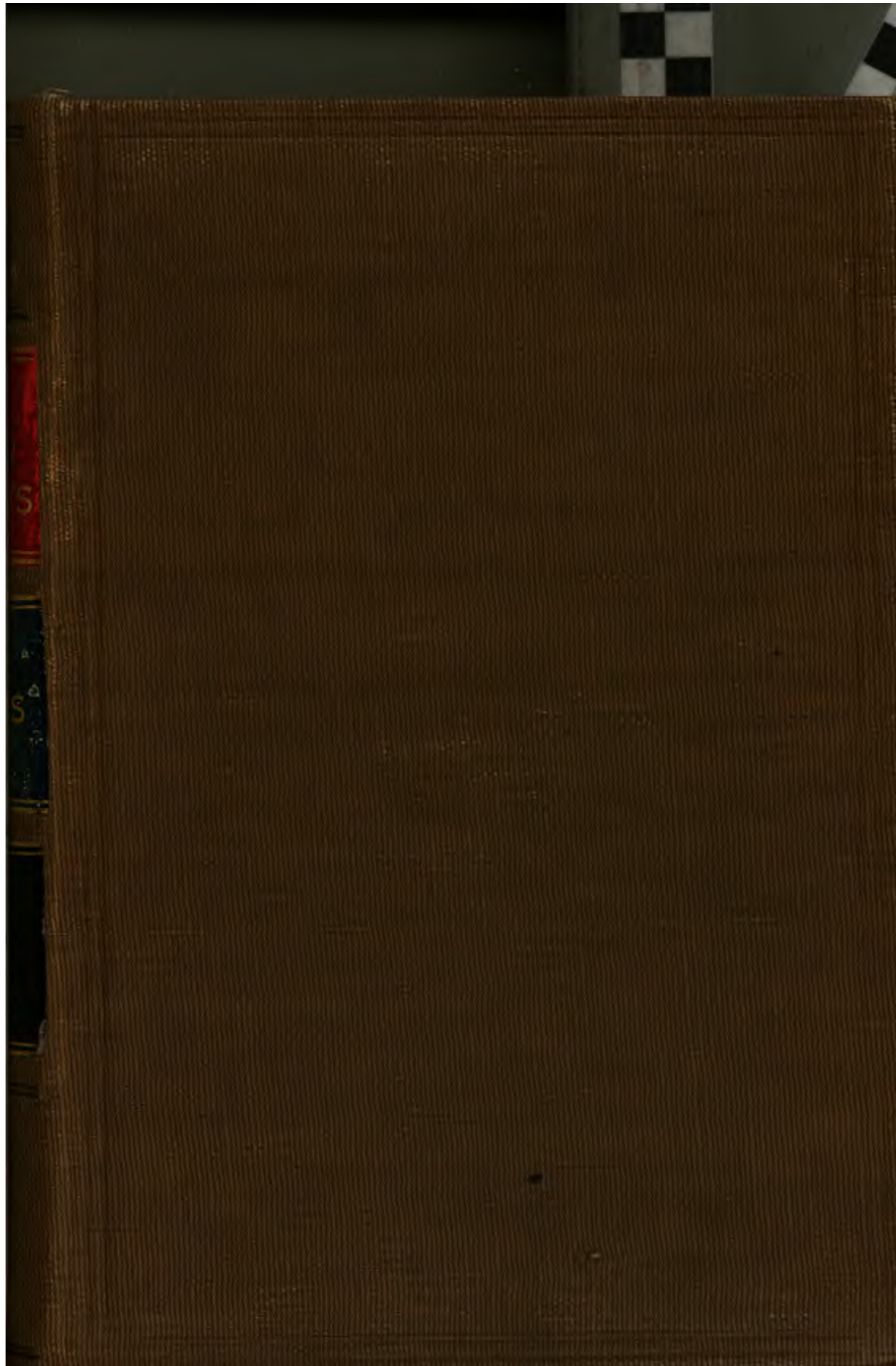
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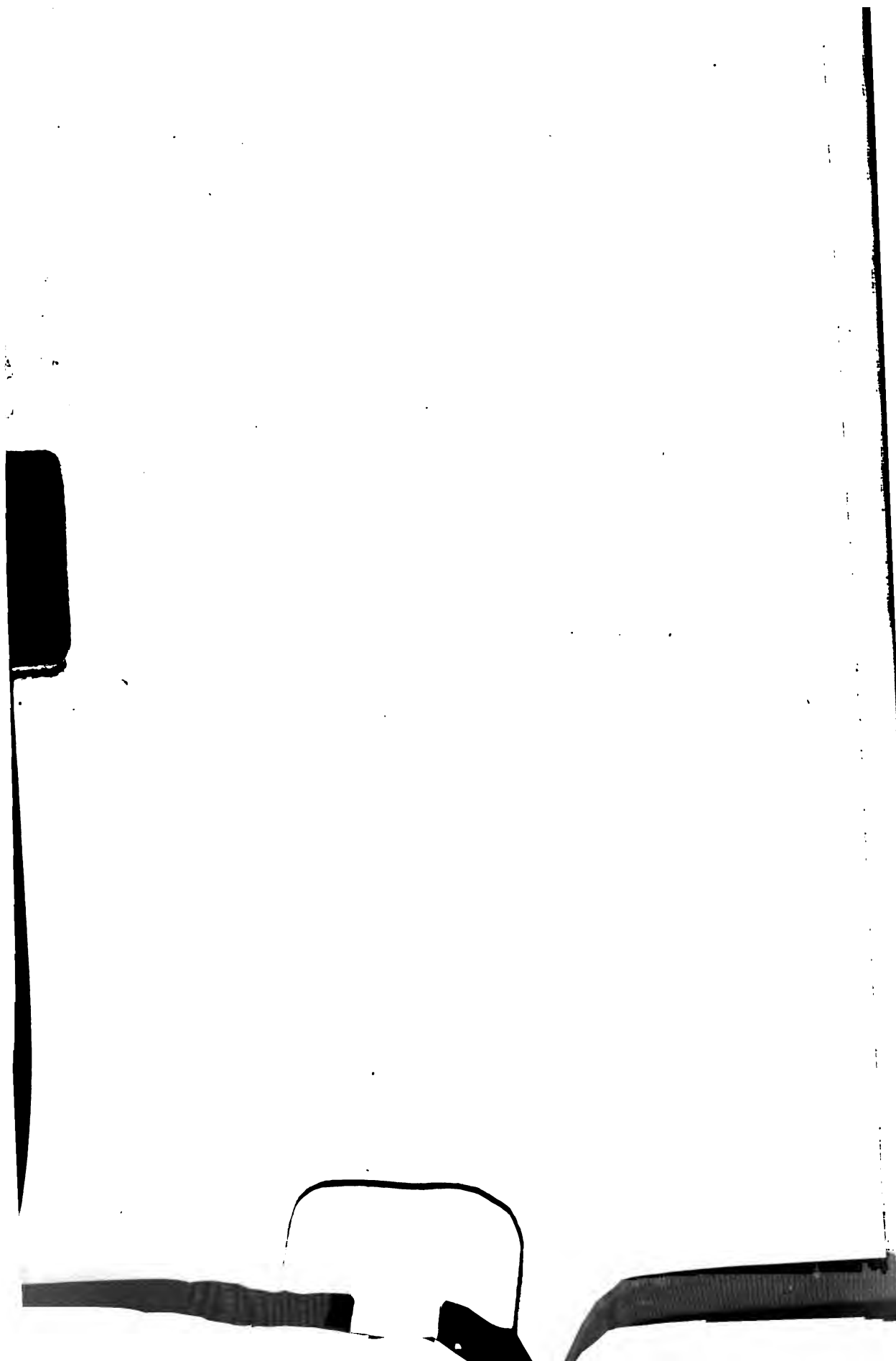
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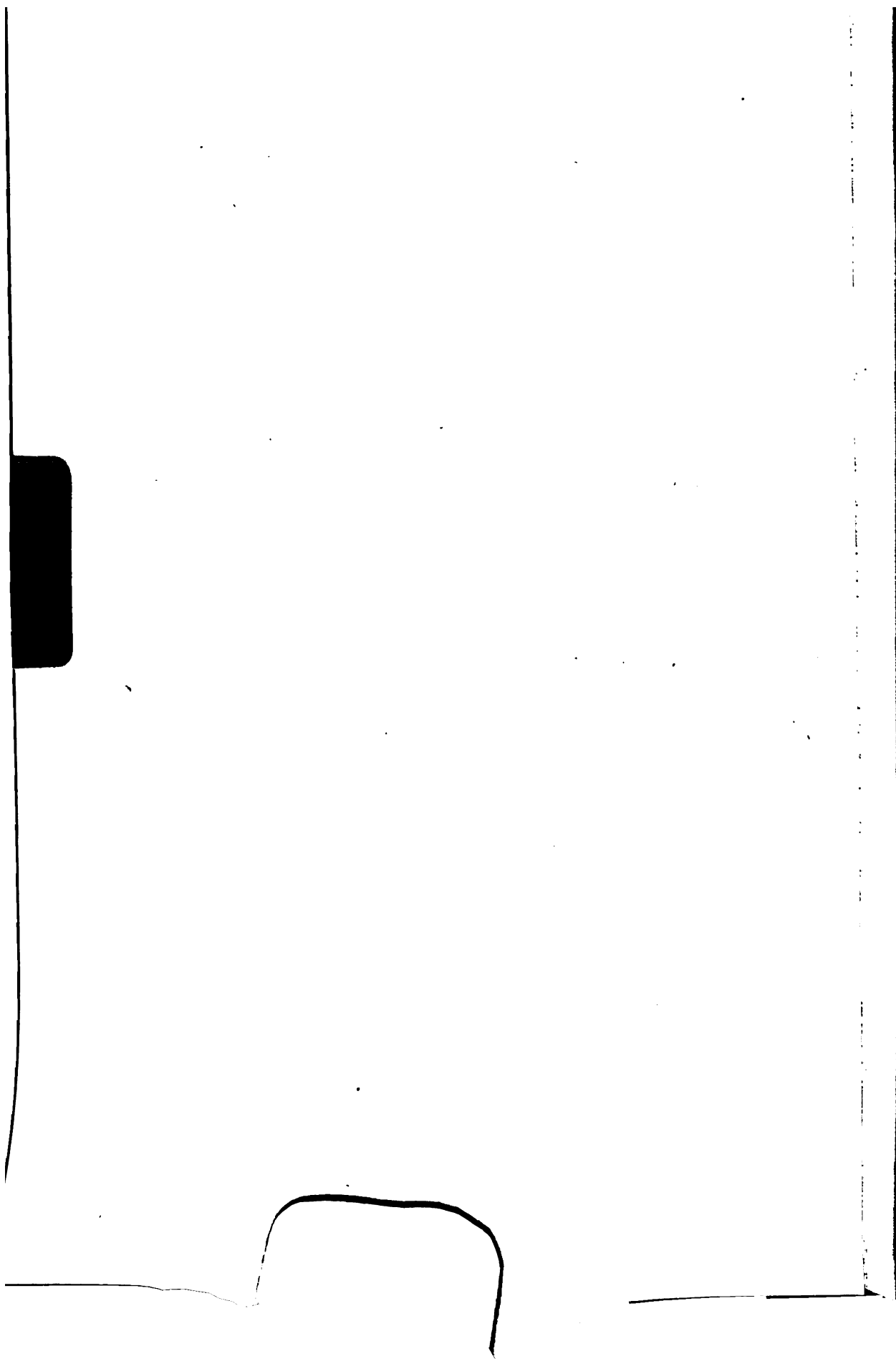
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The Law of Contracts

By

WILLIAM HERBERT PAGE

Professor of Law in the Law School of the University
of Wisconsin; Author of Page on Wills;
Page and Jones on Taxation
by Assessments

SECOND EDITION

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PART V

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§ 2020. Nature of construction. If a question of construction becomes material, this necessarily implies that the contract is in every respect valid and enforceable, at least under one of the constructions contended for. Questions as to the validity and enforceability of the contract can not therefore be involved as a part of a question of construction. They may, of course, be presented in the same case; and a question of construction, when once determined, may also determine the validity of the contract itself. Accordingly, many questions of construction have already been anticipated in connection with the formation of the contract. Still, questions of construction are easy to separate from questions of formation, until we reach the question of what terms of the negotiations constitute the terms of the contract. The line of demarkation between this subject and construction is an arbitrary one.¹ Construction is in reality a part of the contract. The division is solely for necessary convenience in discussion. When we attempt to distinguish questions of construction from those of the operation of the contract, or from those arising out of discharge, the difficulty of making any logical separation of topics is even greater. Operation and discharge are both dependent on the construction of the contract, if there is any dispute as to its meaning. Accordingly, many questions of construction are necessarily left for discussion in connection with discharge.

¹ See §§ 2041 et seq.

§ 2021. Object of construction. The primary object of construction in contract law is to discover the intention of the parties,¹

¹ **United States.** *Great Northern Ry. Co. v. United States*, 236 Fed. 433, 149 C. C. A. 485; *President Suspender Co. v. Macwilliam*, 238 Fed. 159, 151 C. C. A. 235 [affirming decree, *President Suspender Co. v. Macwilliam*, 233 Fed. 433]; *Merrill-Ruckgaber Co. v. United States*, 49 Ct. Cl. 553; *Hongkong & Whampoa Dock Co., Ltd., v. United States*, 50 Ct. Cl. 213.

Arkansas. *Arlington Hotel Co. v. Rector*, 124 Ark. 90, 186 S. W. 622.

Colorado. *Fearnley v. Fearnley*, 44 Colo. 417, 98 Pac. 819.

District of Columbia. *Dudley v. Owen*, 31 D. C. App. 177.

Idaho. *Porter v. Allen*, 8 Ida. 358, 69 Pac. 105, 236.

Illinois. *Gillett v. Teel*, 272 Ill. 106, 111 N. E. 722.

Kentucky. *Chicago Veneer Co. v. Anderson (Ky.)*, 32 Ky. Law Rep. 7, 105 S. W. 108; *Owens v. Georgia Life Insurance Co.*, 165 Ky. 507, 177 S. W. 294.

Louisiana. *Linehan, etc., Co. v. Ry.*, 107 La. 645, 31 So. 1026. "The construction of a contract is nothing more than the gathering of the intention of the parties to it from the words they have used. *Di Sora v. Phillips*, 10 H. L. Cas. 624, 638 [quoted in *Gibbons v. Grinsel*, 79 Wis. 365, 369, 48 N. W. 255].

Maryland. *Phoenix Pad Mfg. Co. v. Roth*, 127 Md. 540, 96 Atl. 762.

Massachusetts. *Morrill & Whiton Construction Co. v. City of Boston*, 186 Mass. 217, 71 N. E. 550.

Nebraska. *Grothe v. Lane*, 77 Neb. 605, 110 N. W. 305.

New Hampshire. *Perry v. New England Casualty Co.*, 78 N. H. 346, 100 Atl. 605.

New Jersey. *Jersey City v. Flynn*, 74 N. J. Eq. 104, 70 Atl. 497.

North Carolina. *Atlantic & N. C. R. Co. v. Atlantic & N. C. Co.*, 147 N. Car. 368, 125 Am. St. Rep. 550, 61 S. E. 185; *Cuthbertson v. Morgan*, 149 N. Car. 72, 62 S. E. 744; *Makuen v. Elder*, 170 N. Car. 510, 87 S. E. 334; *Lewis v. May*, 173 N. Car. 100, 91 S. E. 691; *Ollis v. Drexel Furniture Co.*, 173 N. Car. 542, 92 S. E. 371.

North Dakota. *Wisner v. Field*, 15 N. D. 43, 106 N. W. 38; *Harney v. Wirtz*, 30 N. D. 292, 152 N. W. 803.

Oklahoma. *Kee v. Satterfield*, 46 Okla. 660, 149 Pac. 243; *Barricklow v. Boice*, 50 Okla. 260, 150 Pac. 1094; *Brown v. Coppadge*, 54 Okla. 88, 153 Pac. 817; *Union Trust Co. v. Shelby Downard Asphalt Co.*, 55 Okla. 251, 156 Pac. 903; *Nelson v. Reynolds*, — Okla. —, 158 Pac. 301; *Northwestern Oil & Gas Co. v. Branine*, — Okla. —, 3 A. L. R. 344, 175 Pac. 533.

Oregon. *Northwestern Transfer Co. v. Investment Co.*, 81 Or. 75, 158 Pac. 281; *Corvallis & A. R. R. Co. v. Portland, E. & E. Ry. Co.*, 84 Or. 524, 163 Pac. 1173.

Pennsylvania. *Bubb v. Parker & Edwards Oil Co.*, 252 Pa. St. 26, 97 Atl. 114.

South Dakota. *Trumbauer v. Rust*, 36 S. D. 301, 154 N. W. 801.

Tennessee. *McKay v. Louisville & N. R. Co.*, 133 Tenn. 590, 182 S. W. 874.

Washington. *Hunter v. Wenatchee Land Co.*, 50 Wash. 438, 97 Pac. 494; *Tacoma Mill Co. v. Northern Pacific Ry. Co.*, 89 Wash. 187, 154 Pac. 173; *Loutzenhisser v. Peck*, 89 Wash. 435, 154 Pac. 814.

West Virginia. *Carnegie Natural Gas Co. v. South Penn. Oil Co.*, 56 W. Va. 402, 49 S. E. 548; *Griffith v. Fairmount Coal Co.*, 59 W. Va. 480, 2 L. R. A. (N.S.) 1115, 53 S. E. 24;

as it existed at the time that the contract was made.² The courts should give to a contract such construction as fairminded men of ordinary intelligence would give to it.³ It is not the actual secret intention of the parties to the contract, which the court is to ascertain,⁴ but it is the intention which the law attaches to the words which they have used,⁵ when read in connection with the surrounding facts and circumstances. At the same time the education and mental habits of the parties to the contract may be considered for the purpose of ascertaining the meaning of the language which they have used.⁶

§ 2022. Construction as fact or law. The intention of the parties, which it is the primary object of construction to discover, is a fact. It is frequently said that if the contract is in writing and if the meaning of the parties does not depend upon extrinsic evidence which is in dispute, the question is one of law;¹ but this statement merely means that in such a case the question is one for the court, since it is the function of the court to construe a contract in the first instance, the question of the intention of the

Carper v. United Fuel Gas Co., 78 W. Va. 433, L. R. A. 1917A, 171, 89 S. E. 12.

On the subject of construction generally, see *Construction*, by Thomas Thacher, 6 *Yale Law Journal*, 59; *Considerations Preliminary to the Practice of the Art of Interpreting Writings*, by Albert M. Kales, 28 *Yale Law Journal*, 33; *On the Limits of Rules of Construction*, by Howard W. Elphinstone, 1 *Law Quarterly Review*, 466, and *Interpretation and Construction of Contracts*, 2 *American Law Register* (N. S.), 129.

² *Kee v. Satterfield*, 46 Okla. 660, 149 Pac. 243.

³ *General Accident, Fire & Life Assur. Corp. v. Louisville Home Telephone Co.*, 175 Ky. 96, L. R. A. 1917D, 952, 193 S. W. 1031.

⁴ *Comptograph Co. v. Burroughs Adding Mach. Co.*, 179 Ia. 83, 150 N. W. 465; *Illinois Cent. R. Co. v. Vaughn* (Ky.), 33 Ky. Law Rep. 906, 111 S. W. 707; *Hudson v. Columbian Transfer Co.*, 137 Mich. 255, 109 Am. St. Rep. 679, 100 N. W. 402.

⁵ *Hudson v. Columbian Transfer Co.*, 137 Mich. 255, 109 Am. St. Rep. 679, 100 N. W. 402; *Northwestern Oil & Gas Co. v. Branine*, — Okla. —, 3 A. L. R. 344, 175 Pac. 533.

⁶ *Scotch Mfg. Co. v. Carr*, 53 Fla. 480, 43 So. 427.

¹ *United States. Titus v. Whiteside*, 228 Fed. 965.

Arkansas. *Dugan v. Kelly*, 75 Ark. 55, 86 S. W. 831.

Nebraska. *Kiser v. Denney*, 99 Neb. 3, 154 N. W. 835.

New Jersey. *Grueber Engineering Co. v. Waldron*, 71 N. J. L. 597, 60 Atl. 386.

North Carolina. *Barkley v. Atlantic Coast Realty Co.*, 170 N. Car. 481, 87 S. E. 219.

Oklahoma. *Pressly v. Incorporated Town*, 54 Okla. 747, 154 Pac. 660.

Virginia. *Veitch v. Jenkins*, 107 Va. 68, 57 S. E. 574.

West Virginia. *Riley v. Aetna Insurance Co.*, 80 W. Va. 236, L. R. A. 1917E, 983, 92 S. E. 417.

parties when inferred from the language of the contract and from the undisputed facts.² It is none the less a question of fact in each case because it is to be decided by the court if the facts from which the intention is to be ascertained are not in dispute.

The so-called rules of construction are therefore not rigid rules of law. They do not furnish a standard by which the rights of the parties can be fixed in a uniform and unvarying fashion as soon as the facts are established.³ They are rather statements of the means by which the court will infer the ultimate fact of the intention of the parties from conceded facts of the case which constitute the evidence from which the intention can be ascertained.⁴ It follows, therefore, that construction can not be expressed in a series of rigid rules from which in each case the legal effect of the particular contract can be determined infallibly. The principles which follow are *prima facie* rules for determining the mutual intention of the contracting parties, liable in any particular case to be inapplicable because of some phrase in that contract showing a contrary intention.⁵ They are often used to justify a result which is obtained by the court from a consideration of the contract as a whole rather than as a means of reaching the result. At the same time the rules of construction can not be ignored. The principles which a court employs in ascertaining facts do not amount to rules of law, but they must be understood as being the best and often the only available means of anticipating in advance the action of the courts and in thus ascertaining the rights of the parties. The technical rules of construction have no application as against the evident intention of the parties.⁶

The value of precedents in construction depends largely on the kind of contract involved. Certain kinds, such as bills of lading, insurance policies, and negotiable instruments, are drawn in set forms, and precedents as to construction of a given form are of value in contracts of similar form, their value rapidly lessening as the form to be considered departs from that considered in the precedent. Other contracts are rarely drawn in set forms, and in their construction, precedents are of value chiefly as illustrating

² See §§ 2061 et seq.

³ *Hoffman v. Eastern Wisconsin Ry. & Light Co.*, 134 Wis. 603, 115 N. W. 383.

⁴ *Scotch Mfg. Co. v. Carr*, 53 Fla. 480, 43 So. 427; *Hoffman v. Eastern Wis-*

consin Ry. & Light Co., 134 Wis. 603, 115 N. W. 383.

⁵ *Scotch Mfg. Co. v. Carr*, 53 Fla. 480, 43 So. 427.

⁶ *Edwards v. Jefferson Standard Life Ins. Co.*, 173 N. Car. 614, 92 S. E. 695.

the general principles by which the contract in question must be construed.⁷

The principles of construction are now the same in law and in equity.⁸ The greater liberality shown by equity in ascertaining and enforcing the intention of the parties is now restricted to the application of equitable remedies, such as reformation, rather than to construction in the proper sense of the term.

§ 2023. Intention deduced primarily from words employed.

The intention of the parties in express contracts is, in the first instance, embodied in the words which the parties have used and is to be deduced therefrom.¹ If the contract is in writing, the

⁷"Seldom are any two exactly alike and precedents are of little value." Hoffmann v. Eastern Wisconsin Ry. & Light Co., 134 Wis. 603, 115 N. W. 383.

⁸Jersey City v. Flynn, 74 N. J. Eq. 104, 70 Atl. 497.

¹United States. Rockefeller v. Merritt, 76 Fed. 909, 35 L. R. A. 633, 22 C. C. A. 608; Great Northern Ry. Co. v. United States, 236 Fed. 433, 149 C. C. A. 485; President Suspender Co. v. Macwilliam, 238 Fed. 159, 151 C. C. A. 235 [affirming decree, President Suspender Co. v. Macwilliam, 233 Fed. 433]; Pacific Hardware & Steel Co. v. United States, 49 Ct. Cl. 327.

Alabama. Davis v. Robert, 89 Ala. 402, 18 Am. St. Rep. 126, 8 So. 114.

California. Schroeder v. Ins. Co., 132 Cal. 18, 84 Am. St. Rep. 17, 63 Pac. 1074.

Colorado. McDermith v. Voorhees, 16 Colo. 402, 25 Am. St. Rep. 286, 27 Pac. 250; Jennings v. Brotherhood Acc. Co., 44 Colo. 68, 96 Pac. 982.

Delaware. Adkins v. Campbell, 6 Del. 96, 64 Atl. 628.

Illinois. Atchison, etc., R. R. v. R. R., 162 Ill. 632, 35 L. R. A. 167, 44 N. E. 823; R. F. Conway Co. v. Chicago, 274 Ill. 369, 113 N. E. 703.

Indiana. Cravens v. Cotton Mills, 120 Ind. 6, 16 Am. St. Rep. 298, 21 N. E. 981.

Iowa. Heiple v. Reinhart, 100 Ia. 525, 69 N. W. 871 [superseding, 65 N. W. 331].

Kentucky. Louisville, etc., Ry. v. Ry., 100 Ky. 690, 39 S. W. 42.

Massachusetts. Yorston v. Brown, 178 Mass. 103, 59 N. E. 654.

Michigan. Mathews v. Phelps, 61 Mich. 327, 1 Am. St. Rep. 581, 28 N. W. 108; Hoose v. Ins. Co., 84 Mich. 309, 11 L. R. A. 340, 47 N. W. 587.

Missouri. Mastin v. Stoller, 107 Mo. 317, 17 S. W. 1011; Lovelace v. Protective Association, 126 Mo. 104, 47 Am. St. Rep. 638, 30 L. R. A. 209, 28 S. W. 877.

Nebraska. Jackson v. Phillips, 57 Neb. 189, 77 N. W. 683; McCormick Harvesting Machine Co. v. Brown (Neb.), 98 N. W. 697.

New Hampshire. Perry v. New England Casualty Co., 78 N. H. 346, 100 Atl. 605.

New Jersey. Chism v. Schipper, 51 N. J. L. 1, 14 Am. St. Rep. 668, 2 L. R. A. 544, 16 Atl. 316.

New Mexico. Ellis v. Stone, 21 N. M. 730, L. R. A. 1916F, 1228, 158 Pac. 480.

New York. Smith v. Kerr, 108 N. Y. 31, 2 Am. St. Rep. 362, 15 N. E. 70; Schoonmaker v. Hoyt, 148 N. Y. 425, 42 N. E. 1059; Berry Harvester Co. v. Machine Co., 152 N. Y. 540, 46 N. E. 952.

intention of the parties is to be deduced from the written words if possible.²

While the words used by the parties in their written contract are a part thereof, and each and every one of them must be considered in arriving at the intention of the parties, it does not necessarily follow that every word written on the paper when the contract is executed is a part thereof. Thus where a letter contained a proposition to pay for the manufacture and delivery of goods, and it was accepted by the party to whom it was sent by a letter, the words, "All sales subject to strikes and accidents," printed as part of the letterhead of the reply, do not form any part of the contract.³ This principle is still clearer where the words in question are on some paper other than that on which the contract is written. So if a contract of sale is in writing, the printed bill-head of the invoice of goods is no part thereof.⁴ The same principle applies where the contract is not in writing. Thus A, a manufacturer, had placed a printed warranty on wheels manufactured and sold by him. B bought a wheel and resold it without removing the placard. It was held that B did not thereby adopt A's warranty.⁵ These are really special examples of the application of the general doctrines of offer and acceptance.⁶ Words erased from a contract can not be considered in construing it.⁷

The rule that the intention of the parties is to be ascertained from the words which they have used, applies to oral contracts,⁸

North Carolina. *Finger v. Goode*, 169 N. Car. 72, 85 S. E. 137.

North Dakota. *Harney v. Wirtz*, 30 N. D. 292, 152 N. W. 803.

Ohio. *Travelers' Ins. Co. v. Myers*, 62 O. S. 529, 49 L. R. A. 760, 57 N. E. 458.

Oklahoma. *Brown v. Coppadge*, 54 Okla. 88, 153 Pac. 817; *Union Trust Co. v. Shelby Downard Asphalt Co.*, 55 Okla. 251, 156 Pac. 903.

Virginia. *Crane's Nest Coal & Coke Co. v. Virginia Iron, Coal & Coke Co.*, 105 Va. 785, 54 S. E. 884.

West Virginia. *Griffin v. Fairmount Coal Co.*, 59 W. Va. 480, 2 L. R. A. (N.S.) 1115, 53 S. E. 24.

Wyoming. *McFarland v. R. R., etc., Association*, 5 Wyom. 126, 63 Am. St. Rep. 29, 27 L. R. A. 48, 38 Pac. 347,

677; *Phillips v. Hamilton*, 17 Wyom. 41, 95 Pac. 846.

²*Streator Clay Mfg. Co. v. Henning-Vineyard Co.*, 176 Ia. 297, 155 N. W. 1001; *Union Trust Co. v. Shelby-Downard Asphalt Co.*, 55 Okla. 251, 156 Pac. 903; *Harney v. Wirtz*, 30 N. D. 292, 152 N. W. 803.

³*Summers v. Hibbard*, 153 Ill. 102, 46 Am. St. Rep. 872, 38 N. E. 899.

⁴*Sturm v. Boker*, 150 U. S. 312, 37 L. ed. 1093.

⁵*Pemberton v. Dean*, 88 Minn. 60, 97 Am. St. Rep. 503, 60 L. R. A. 311, 92 N. W. 478.

⁶See §§ 112 and 2040.

⁷*Straub v. Screven*, 19 S. Car. 445; *Watson v. Paschall*, 93 S. Car. 537, 77 S. E. 291.

⁸*Ins. Co. v. Crane*, 134 Mass. 56, 45 Am. Rep. 282.

as well as to contracts in writing.⁹ It is the rule which is recognized and applied by courts of equity,¹⁰ as well as by courts of law.

It is frequently said that if the intention of the parties is so clearly expressed that it can be ascertained from a mere reading of the contract, there is no need for construction.¹¹ In such statement, however, the term "construction" is evidently used in a very restricted sense. In the broad sense of the term, construction involves the discovery of the intention of the parties whether it is easy or difficult to discover such intention. In this sense of the term there is as much room for construction in case of a simple and unambiguous contract, as in the case of a complex and ambiguous contract, although the task is far easier in the former case than in the latter.

§ 2024. Ordinary meaning of word *prima facie* correct. The ordinary meaning of a word is *prima facie* that employed,¹ and

⁹ *Crane's Nest Coal & Coke Co. v. Virginia Iron, Coal & Coke Co.*, 105 Va. 785, 54 S. E. 884.

¹⁰ *Atchison, etc., R. R. v. R. R.*, 162 Ill. 632, 35 L. R. A. 167, 44 N. E. 823; *Wisner v. Field*, 15 N. D. 43, 106 N. W. 38.

¹¹ *United States. Hongkong & Whampoa Dock Co., Ltd., v. United States*, 50 Ct. Cl. 213.

Iowa. Streater Clay Mfg. Co. v. Henning-Vineyard Co., 176 Ia. 297, 155 N. W. 1001.

North Carolina. Finger v. Goode, 169 N. Car. 72, 85 S. E. 137; *Makuen v. Elder*, 170 N. Car. 510, 87 S. E. 334.

Washington. Tacoma Mill Co. v. Northern Pacific Ry. Co., 89 Wash. 187, 154 Pac. 173.

West Virginia. Griffin v. Fairmont Coal Co., 59 W. Va. 480, 2 L. R. A. (N.S.) 1115, 53 S. E. 24.

¹ *United States. Francis Bros. v. Boiler Co.*, 112 Fed. 899; *Fitzgerald v. Bank*, 114 Fed. 474, 52 C. C. A. 276; *Vinton Petroleum Co. v. Sun Co.*, 230 Fed. 105, 144 C. C. A. 403.

Arkansas. Hastings Industrial Co.

v. Copeland, 114 Ark. 415, 169 S. W. 1185.

California. Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712; *Alderson v. Houston*, 154 Cal. 1, 96 Pac. 884.

Florida. Langley v. Owens, 52 Fla. 302, 42 So. 457.

Georgia. Candler v. Georgia Theater Co., 148 Ga. 188, L. R. A. 1918F, 389, 96 S. E. 226.

Iowa. Hill v. Travelers' Ins. Co., 146 Ia. 133, 28 L. R. A. (N.S.) 742, 124 N. W. 898.

Kentucky. Spring Garden Ins. Co. v. Imperial Tobacco Co., 132 Ky. 7, 130 Am. St. Rep. 164, 20 L. R. A. (N.S.) 277, 116 S. W. 234.

Maine. E. A. Strout Co., v. Gay, 105 Me. 108, 24 L. R. A. (N.S.) 562, 72 Atl. 881.

Missouri. Lewis Publishing Co. v. Rural Publishing Co. (Mo.), 181 S. W. 93; *Missouri, etc., Co. v. Bry*, 88 Mo. App. 135.

New Hampshire. Moore v. Ins. Co., 62 N. H. 240, 13 Am. St. Rep. 556.

Ohio. Methodist, etc., Society v. Water Co., 20 Ohio C. C. 578, 10 Ohio C. D. 648.

will be used in construction unless the context,² or admissible evidence,³ shows that another meaning was intended, even if it may not be the accurate meaning,⁴ or even if the ordinary meaning is so colloquial as not to appear in the dictionary.⁵

Such terms as "renewal,"⁶ and "extension,"⁷ are popular and not technical terms. A covenant to operate a "first-class theater" does not include a moving-picture show.⁸ A reference to land as "sold," ordinarily imports a sale which is executed only when the conveyance has been made and delivered.⁹ An instrument whereby the owner of land recites that he has sold the land, and that he will give and execute the documents of conveyance therefor, is a contract of sale and not a conveyance.¹⁰

The meaning at the time that the instrument was executed, rather than the meaning at the time of litigation, controls.¹¹

§ 2025. Context and subject-matter control meaning of word. The context and subject-matter may affect the meaning to be given to the words of a contract,¹ especially if in connection with the

Oregon. Interior Warehouse Co. v. Dunn, 80 Or. 528, 157 Pac. 806.

Utah. Daly v. Old, 35 Utah 74, 28 L. R. A. (N.S.) 463, 99 Pac. 460; Board of Education v. Wright-Osborn Co., 49 Utah 453, 164 Pac. 1033.

Virginia. Roanoke v. Blair, 107 Va. 639, 60 S. E. 75.

Washington. State v. Seattle Electric Co., 71 Wash. 213, 43 L. R. A. (N.S.) 172, 128 Pac. 220.

West Virginia. Carnegie Natural Gas Co. v. South Penn. Oil Co., 56 W. Va. 402, 49 S. E. 548; Hall v. Philadelphia Co., 72 W. Va. 573, 78 S. E. 755.

Wisconsin. Lathers v. Mutual Fire Ins. Co., 135 Wis. 431, 116 N. W. 1.

² Brush, etc., Co. v. Montgomery, 114 Ala. 433, 21 So. 960; Warrum v. White, 171 Ind. 574, 86 N. E. 959; Simmons v. Groom, 167 N. Car. 271, 83 S. E. 471. See § 2025.

³ Atlantic & North Carolina Ry. Co. v. Atlantic & North Carolina Co., 147 N. Car. 368, 125 Am. St. Rep. 550, 23

L. R. A. (N.S.) 223, 15 Am. & Eng. Ann. Cas. 363, 61 S. E. 185. See §§ 2027 et seq.

⁴ Kohl v. Frederick, 115 Ia. 517, 88 N. W. 1055.

⁵ Ullman v. Ry., 112 Wis. 150, 88 Am. St. Rep. 949, 56 L. R. A. 246, 88 N. W. 41 (construction of "accident").

⁶ Guie v. Byers, 95 Wash. 492, 164 Pac. 75.

⁷ Guie v. Byers, 95 Wash. 492, 164 Pac. 75.

⁸ Candler v. Georgia Theater Co., 148 Ga. 188, L. R. A. 1918F, 389, 96 S. E. 226.

⁹ Cutler v. Spens, 191 Mich. 603, 158 N. W. 224; De Bergere v. Chaves, 14 N. M. 352, 51 L. R. A. (N.S.) 50, 93 Pac. 762.

¹⁰ De Bergere v. Chaves, 14 N. M. 352, 51 L. R. A. (N.S.) 50, 93 Pac. 762.

¹¹ Candler v. Georgia Theater Co., 148 Ga. 188, L. R. A. 1918F, 389, 96 S. E. 226.

¹ United States. Hull, etc., Co. v. Coke Co., 113 Fed. 256, 51 C. C. A. 213.

subject-matter the ordinary meaning of the term would give an absurd result.² The subject-matter of a contract to lay pipe for gas may be invoked to aid in determining the meaning of "light" pipe.³ A provision in a lease to the effect that the premises are to be used "for a saloon," may be shown by the context and the remaining provisions of the contract to mean a saloon for the sale of intoxicating liquors.⁴ The use of the word "give" is not of itself conclusive to show that the promise was without consideration, and the context may show that the word "give" meant pay or deliver.⁵ The context may show whether the word "taxes" includes assessments for local improvement or not.⁶ A covenant in a bond issued by a corporation, by which the corporation agrees to pay principal and interest "without any deduction made for or in respect of any taxes, charges or assessments whatsoever,"⁷ or "without any deduction from either such principal or interest for any tax or taxes which" the corporation "may be required to repay or retain therefrom, under any present or future law," the corporation "agreeing to pay such tax or taxes,"⁸ has been held not to

Alabama. Little Cahaba Coal Co. v. Aetna Life Insurance Co., 192 Ala. 42, 68 So. 317.

Colorado. Fearnley v. Fearnley, 44 Colo. 417, 98 Pac. 819.

Illinois. Costello v. Delano, 274 Ill. 426, 113 N. E. 689.

Iowa. Jochimsen v. Johnson, 173 Ia. 553, 156 N. W. 21.

Kansas. Chicago Great Western Ry. Co. v. Kansas City Northwestern R. Co., 75 Kan. 167, 88 Pac. 1085.

Louisiana. St. Landry State Bank v. Meyers, 52 La. Ann. 1769, 28 So. 136.

Minnesota. Halloran v. Schmidt Brewing Co., 137 Minn. 141, L. R. A. 1917E. 777, 162 N. W. 1082.

New Jersey. Thompson v. Trenton Water Power Co., 77 N. J. L. 672, 73 Atl. 410.

New York. First National Bank v. Jones, 219 N. Y. 312, 114 N. E. 349.

North Carolina. Atlantic & N. C. R. Co. v. Atlantic & N. C. Co., 147 N. Car. 368, 125 Am. St. Rep. 550, 61 S. E. 185; Simmons v. Groom, 167 N. Car. 271, 83 S. E. 471.

Pennsylvania. Lehigh, etc., Coal Co. v. Wright, 177 Pa. St. 387, 35 Atl. 919.

Wisconsin. Ullman v. Ry., 112 Wis. 150, 88 Am. St. Rep. 949, 56 L. R. A. 246, 88 N. W. 41.

² Pendleton v. Saunders, 19 Or. 9, 24 Pac. 506; Kentzler v. Accident Association, 88 Wis. 589, 43 Am. St. Rep. 934, 60 N. W. 1002.

³ Columbus Construction Co. v. Crane Co., 98 Fed. 946, 40 C. C. A. 35.

⁴ Halloran v. Schmidt Brewing Co., 137 Minn. 141, L. R. A. 1917E. 777, 162 N. W. 1082.

⁵ Fearnley v. Fearnley, 44 Colo. 417, 98 Pac. 819.

⁶ Chicago Great Western Ry. Co. v. Kansas City Northwestern R. Co., 75 Kan. 167, 88 Pac. 1085.

⁷ Haight v. Pittsburgh, Ft. Wayne & Chicago Ry., 73 U. S. (6 Wall.) 15, 18 L. ed. 818.

⁸ Urquhart v. Marion Hotel Co., 128 Ark. 283, L. R. A. 1917F. 203, 194 S. W. 1.

impose upon the corporation the duty of paying the federal income tax, on the theory that the income tax is not a tax upon the bond or the interest thereon.⁹ It is also urged that the result of the exemptions in the income tax law and of the progressive rate of taxation, makes the amount of tax different for different individuals, according to their wealth.¹⁰ This last reason would, of course, vanish entirely if no exemptions were allowed and if the individual tax was levied at a flat rate. The result seems to be justified only by very technical construction. If the ordinary rule of construction is to determine the intention of the parties as the average reasonable man would understand such intention from the language used,¹¹ it has not been applied in cases of this sort. Under a contract for the sale of a coal business in a certain township, a covenant not to engage in such business for five years will be construed to mean to engage in such business in such township.¹²

§ 2026. General and specific words—*Noscitur a sociis*. If general words are used in connection with specific words, the specific words generally follow the intention of the party with greater exactness, and accordingly the general terms thus used are to be regarded as limited by the specific words,¹ whether the specific words precede the general words,² or follow them.³ A provision to

⁹ *Urquhart v. Marion Hotel Co.*, 128 Ark. 283, L. R. A. 1917F, 203, 194 S. W. 1.

¹⁰ *Urquhart v. Marion Hotel Co.*, 128 Ark. 283, L. R. A. 1917F, 203, 194 S. W. 1.

¹¹ See § 2021.

¹² *Melick v. Foster*, 64 N. J. L. 394, 45 Atl. 911.

¹ *United States. Texas and Pacific Railway Co. v. Dashiell*, 198 U. S. 521, 49 L. ed. 1150.

Arkansas. English v. Shelby, 116 Ark. 212, 172 S. W. 817.

Connecticut. Easterbrook v. Hebrew Ladies' Orphan Society, 85 Conn. 289, 41 L. R. A. (N.S.) 615, 82 Atl. 561.

Illinois. Merle v. Beifeld, 275 Ill. 594, 114 N. E. 369.

Michigan. Cutler v. Spens, 191 Mich. 603, 158 N. W. 224.

Rhode Island. Railton v. Taylor, 20 R. I. 279, 39 L. R. A. 246, 38 Atl. 980.

Washington. Guie v. Byers, 95 Wash. 492, 164 Pac. 75.

West Virginia. Taylor v. Buffalo Collieries Co., 72 W. Va. 353, 79 S. E. 27; *Jones v. Island Creek Coal Co.*, 79 W. Va. 592, 91 S. E. 391; *Berry v. Humphreys*, 76 W. Va. 668, 86 S. E. 568.

Wisconsin. Hoffman v. Eastern Wisconsin Ry. and Light Co., 134 Wis. 603, 115 N. W. 383.

² *Easterbrook v. Hebrew Ladies' Orphan Society*, 85 Conn. 289, 41 L. R. A. (N.S.) 615, 82 Atl. 561; *American Bridge Co. v. Glenmore Distilleries Co. (Ky.)*, 107 S. W. 270, 32 Ky. Law Rep. 873; *Jones v. Island Creek Coal Co.*, 79 W. Va. 532, 91 S. E. 391; *Hoffmann v. Eastern Wisconsin Ry. & Light Co.*, 134 Wis. 603, 115 N. W. 383.

³ *Railton v. Taylor*, 20 R. I. 279, 39 L. R. A. 246, 38 Atl. 980.

the effect that the promisor is not to be responsible for delays due to strikes, fires, floods, or to other circumstances beyond its control, does not apply to a delay in performance due to the promisor's bankruptcy,⁴ or to his inability to secure material.⁵ Such a provision, however, applies to a shortage of freight cars.⁶ General words in a release are limited by the particular description of the injuries.⁷ A release which describes certain injuries and which purports to release the employer from damages and liabilities of every character, "for and on account of the injuries," is to be construed as applying only to the injuries which are described specifically, and not to more serious injuries which develop after.⁸ If the contract, taken as a whole, shows that effect was intended to be given to both the general and the specific term, such effect must be given by the court.⁹ If the context shows that the general words were intended to control,¹⁰ or if an absurd result would follow from permitting the specific words to control,¹¹ effect will be given to the general words. A release which specifies the extent to which the injured party claims to have been injured but which also provides for the release of all demands, rights of action, and causes of action by reason of such injuries, includes other and more serious injuries than those set forth in detail in the release.¹² If the meaning of a

⁴ *Ann Arbor Board of Commerce v. Security Trust Co.*, 225 Fed. 454.

⁵ *American Bridge Co. v. Glenmore Distilleries Co.* (Ky.), 107 S. W. 279, 32 Ky. Law Rep. 873.

⁶ *Hatfield v. Thomas Iron Co.*, 208 Pa. St. 478, 57 Atl. 950.

⁷ *Texas & Pacific Railway Co. v. Dashiell*, 198 U. S. 521, 49 L. ed. 1150.

⁸ *Texas & Pacific Railway Co. v. Dashiell*, 198 U. S. 521, 49 L. ed. 1150.

⁹ *English v. Shelby*, 116 Ark. 212, 172 S. W. 817; *Verbeck v. Peters*, 170 Ia. 610, 153 N. W. 215.

¹⁰ *Verbeck v. Peters*, 170 Ia. 610, 153 N. W. 215; *Emery v. American Ins. Co.*, 177 Ia. 4, 158 N. W. 748; *Hoffmann v. Eastern Wisconsin Ry. & Light Co.*, 134 Wis. 603, 115 N. W. 383.

"The rule contended for, that particularization followed by a general expression will ordinarily be restricted

to the former, is based on the fact in human experience that usually the minds of parties are addressed specially to the particularization, and that the generalities, though broad enough to comprehend other fields if they stood alone, are used in contemplation of that upon which the minds of the parties are centered. It is the foundation of the whole rule *noscitur a sociis*; but if the contrary appear to have been the intent, courts will defeat instead of execute the real contract of the parties by blind submission to any such rule." *Hoffmann v. Eastern Wisconsin Ry. & Light Co.*, 134 Wis. 603, 115 N. W. 383.

¹¹ *Verbeck v. Peters*, 170 Ia. 610, 153 N. W. 215.

¹² *Hoffmann v. Eastern Wisconsin Ry. & Light Co.*, 134 Wis. 603, 115 N. W. 383.

term is clear the context will not be considered.¹³ The rule that general terms will be limited by specific terms and will be regarded as including only things of the kind enumerated in the specific terms, is to be used only in case of an ambiguity.¹⁴

§ 2027. Technical meaning. Words of technical meaning will be given that meaning,¹ unless the context shows that the ordinary meaning was intended.²

Thus "horsepower" in a contract for the sale of waterpower has been held to mean the efficient, and not the theoretical horsepower.³ The term "shaft" when used in a policy of accident insurance with reference to a part of a bone of the human body, will be regarded as having its technical meaning.⁴ If a word has both a technical and an ordinary meaning it will not be presumed that the word is used in its technical sense.⁵

If a word has a definite legal meaning it will be presumed that it is used with such meaning unless the context or the surrounding circumstances show that a different meaning was intended.⁶ If a word has both an ordinary meaning and a technical legal meaning it will be presumed that it was used in its ordinary meaning unless the context shows that the legal meaning was intended.⁷ Terms

¹³ *Washington & O. D. Ry. v. Westinghouse Electric & Manufacturing Co.*, 120 Va. 620, 89 S. E. 131; *Berry v. Humphreys*, 76 W. Va. 668, 86 S. E. 568.

¹⁴ *Washington & O. D. Ry. v. Westinghouse Electric & Manufacturing Co.*, 120 Va. 620, 89 S. E. 131.

¹ *Alabama. Sloss-Sheffield Steel & Iron Co. v. Payne*, 186 Ala. 341, 64 So. 617.

Georgia. Candler v. Georgia Theater Co., 148 Ga. 188, L. R. A. 1918F, 389, 96 S. E. 226.

Iowa. Peterson v. Modern Brotherhood of America, 125 Ia. 562, 67 L. R. A. 631, 101 N. W. 289.

Kansas. Seymour v. Armstrong, 62 Kan. 720, 64 Pac. 612 [affirming, 10 Kan. App. 10, 61 Pac. 675].

South Carolina. Stewart v. Morris, 84 S. Car. 148, 65 S. E. 1044.

² *Atkinson v. Sinnott*, 67 Miss. 502, 7 So. 289; *Erickson v. Green*, 47 Wash.

613, 92 Pac. 449; *Toothman v. Courtney*, 62 W. Va. 167, 58 S. E. 915.

The context may also show that some meaning other than the technical meaning or the ordinary meaning was intended. *Sawyer v. Churchill*, 77 Vt. 273, 107 Am. St. Rep. 762, 59 Atl. 1014; *Toothman v. Courtney*, 62 W. Va. 167, 58 S. E. 915.

³ *Lloyd v. Kehl*, 132 Cal. 107, 64 Pac. 125.

⁴ *Peterson v. Modern Brotherhood*, 125 Ia. 562, 67 L. R. A. 631, 101 N. W. 289.

⁵ *Adams v. Hopkins*, 144 Cal. 19, 77 Pac. 712.

⁶ *Langley v. Owens*, 52 Fla. 302, 42 So. 457; *Atlantic & N. C. R. Co. v. Atlantic & N. C. Co.*, 147 N. Car. 368, 125 Am. St. Rep. 550, 61 S. E. 185; *Lathers v. Mutual Fire Ins. Co.*, 135 Wis. 431, 116 N. W. 1.

⁷ *Alderson v. Houston*, 154 Cal. 1, 96 Pac. 884.

which are technical terms of law are presumed to be employed in such technical sense.⁸ The words "to wit" in a contract which does not appear to have been drawn with technical accuracy, will not be given the meaning which they would have in a technical pleading.⁹

It is accordingly proper to introduce evidence to show that certain words in a written contract have a technical meaning and what that meaning is.¹⁰ Thus evidence is admissible to show the meaning of "watchmakers' material,"¹¹ "dry goods,"¹² "artesian well,"¹³ "standard oil drill and rig and of tools and equipment,"¹⁴ or "levels" as used in plans for building a dam,¹⁵ to "reduce" fire insurance,¹⁶ "order" in a contract of agency for the sale of books,¹⁷ "merchantable timber,"¹⁸ or in the sale of horses, the meaning of "good condition,"¹⁹ or "safe property,"²⁰ or "burlesque" as used in a theatrical contract,²¹ or in contracts for the management of

⁸ *Von Bremen v. Mac Monnies*, 200 N. Y. 41, 32 L. R. A. (N.S.) 293, 21 Am. & Eng. Ann. Cas. 423, 93 N. E. 186; *Roanoke v. Blair*, 107 Va. 639, 60 S. E. 75.

⁹ *Sawyer v. Churchill*, 77 Vt. 273, 107 Am. St. Rep. 762, 59 Atl. 1014.

¹⁰ *Alabama*. *J. C. Lysle Milling Co. v. North Alabama Grocery Co.*, — Ala. —, 77 So. 748.

Arkansas. *Davis v. Martin Stave Co.*, 113 Ark. 325, 169 S. W. 553; *Morris v. Hellums Co.*, 131 Ark. 585, 199 S. W. 927.

Iowa. *Grasmier v. Wolf* (Ia.), 90 N. W. 813; *Becker v. Churdan*, 175 Ia. 159, 157 N. W. 221.

Michigan. *Brown v. Bartlett*, 201 Mich. 263, 167 N. W. 847.

Montana. *Cambers v. Lowry*, 21 Mont. 478, 54 Pac. 816.

Minnesota. *Griffith v. Dowd*, 133 Minn. 305, 158 N. W. 420.

Oklahoma. *Eoff v. Lair*, — Okla. —, 163 Pac. 515.

Pennsylvania. *Hyde & Behman Amusement Co. v. Safe Deposit & Trust Co.*, 247 Pa. St. 146, 93 Atl. 285.

Vermont. *Douglass v. Morrisville*, 89 Vt. 393, 95 Atl. 810.

¹¹ *Maril v. Ins. Co.*, 95 Ga. 604, 51 Am. St. Rep. 102, 30 L. R. A. 835, 23 S. E. 463.

¹² *Wood v. Allen*, 111 Ia. 97, 82 N. W. 431.

¹³ *Hattiesburg Plumbing Co. v. Carmichael*, 80 Miss. 66, 31 So. 536 (whether this implied that the water must rise to the top).

¹⁴ *Eoff v. Lair*, — Okla. —, 163 Pac. 515.

¹⁵ *Douglass v. Morrisville*, 89 Vt. 393, 95 Atl. 810.

¹⁶ *Halsey v. Adams*, 63 N. J. L. 330, 43 Atl. 708 (equivalent to "cancel").

¹⁷ *Newhall v. Appleton*, 114 N. Y. 140, 3 L. R. A. 859, 21 N. E. 105. (The agent was to receive fifteen dollars for each "order" taken. It was held proper to show that "order" meant at least five volumes of the encyclopedia taken and paid for.)

¹⁸ *Dorris v. King* (Tenn. Ch. App.), 54 S. W. 683.

¹⁹ *Elwood v. McDill*, 105 Ia. 437, 75 N. W. 340.

²⁰ *Thompson v. Pruden*, 18 Ohio C. C. 886, 9 Ohio C. D. 857.

²¹ *Hyde & Behman Amusement Co. v. Safe Deposit & Trust Co.*, 247 Pa. St. 146, 93 Atl. 285.

railroads, the meaning of "necessary signals and switchmen,"²² or "other similar appliances,"²³ or "transportation," "switching," or "transfer,"²⁴ or "cotton season,"²⁵ or "guaranteed basis 70c" in a contract for the sale of flour,²⁶ or "a complete piped well,"²⁷ or a "standard oil drill and rig and * * * tools and equipment consisting of boiler, engine, bits, stems," in order to enable the court to determine whether the casing was included in such terms or not,²⁸ or "wet excavation,"²⁹ or "Improved Chicago Pickling" cucumber seed.³⁰

§ 2028. Meaning of word controlled by usage. Usages,¹ such as those of a trade,² may be resorted to, to show the special meanings of words. Evidence of a local usage as to the meaning of the word

²² Louisville, etc., Ry. v. Ry., 174 Ill. 448, 51 N. E. 824.

²³ Chicago, etc., Ry. v. Ry., 113 Wis. 161, 89 N. W. 180 (whether in view of the context, it included a system of interlocking switches).

²⁴ Dixon v. Ry., 110 Ga. 173, 35 S. E. 369.

²⁵ Morris v. Hellums Co., 131 Ark. 585, 199 S. W. 927.

²⁶ J. C. Lysle Milling Co. v. North Alabama Grocery Co., — Ala. —, 77 So. 748.

²⁷ Becker v. Incorporated Town of Churdan, 175 Ia. 159, 157 N. W. 221.

²⁸ Eoff v. Lair, — Okla. —, 163 Pac. 515.

²⁹ Griffith v. Dowd, 133 Minn. 305, 158 N. W. 420.

³⁰ Buckbee v. Hobenadel, 224 Fed. 14, L. R. A. 1916C, 1001.

¹ United States. Metropolitan Exhibition Co. v. Ewing, 42 Fed. 198, 7 L. R. A. 381.

Alabama. Lutz v. Van Heynigen Brokerage Co., — Ala. —, 75 So. 284.

California. Shean v. Weeks, 176 Cal. 592, 169 Pac. 231 (obiter).

Maine. Ross v. Maine Cent. R. Co., 114 Me. 287, 96 Atl. 223.

Minnesota. Paine & Nixon Co. v. United States Fidelity & Guaranty Co., 135 Minn. 9, 159 N. W. 1075.

Virginia. Walker v. Gateway Milling Co., 121 Va. 217, 92 S. E. 826.

Washington. Cormier v. H. H. Martin Lumber Co., 98 Wash. 463, 167 Pac. 1105.

For the elements of usage, see Eames v. H. B. Claffin Co., 239 Fed. 631, 152 C. C. A. 465.

² **California.** Gardiner v. McDonogh, 147 Cal. 313, 81 Pac. 964.

Indiana. Hoerger v. Sidway Mercantile Co., 183 Ind. 610, 109 N. E. 770.

Kansas. Seymour v. Armstrong, 62 Kan. 720, 64 Pac. 612 [affirming, 10 Kan. App. 10, 61 Pac. 675].

Minnesota. Paine & Nixon Co. v. United States Fidelity & Guaranty Co., 135 Minn. 9, 159 N. W. 1075.

New York. Smith v. Clews, 114 N. Y. 190, 11 Am. St. Rep. 627, 4 L. R. A. 392, 21 N. E. 160.

Washington. Cormier v. H. H. Martin Lumber Co., 98 Wash. 463, 167 Pac. 1105.

Under a contract for compensation on a commission, evidence of local usage in that business is admissible to show whether traveling expenses are included or not. Himmel v. Levinstein, 132 Md. 317, 103 Atl. 848.

If a contract provides for paying compensation on a commission basis on "regular prices and regular terms," and the contract does not show what

"cord" in a sale of cedar posts is admissible.³ Evidence of a trade usage as to "subject to strikes" in a contract for the sale of coal;⁴ or as to "winter wheat bran";⁵ or as to "on approval" in the diamond trade;⁶ or that "peas" is a trade-name for a white bean;⁷ that "per 100" means "pounds";⁸ that "8105 pd." refers to the number of a note on the note register of the bank;⁹ that in a memorandum of prices of stock "H." means "high,"¹⁰ and "L." means low;¹¹ that "gross 818, tare 318, net 600," refer to hundredweight and not to pounds,¹² or as to the meaning of the expression "per thousand brick measure."¹³

If the meaning of a written contract is clear, a trade usage can not change the meaning of the words, or add incidents so as to contradict the meaning.¹⁴ Thus a contract with a broker for the sale of certain articles, "seller paying brokerage at ten cents per ton," can not be contradicted to cut down the broker's recovery by showing a usage to pay commissions only on the amount de-

such prices and such terms are, evidence is admissible to show the meaning of such term. *Hoerger v. Sidway Mercantile Co.*, 183 Ind. 610, 109 N. E. 770.

A custom of plumbers as to the use of the term "roughing in," is not binding upon persons who deal with plumbers unless they have knowledge of such custom. *Donaldson v. Brewster*, 103 Wash. 65, 173 Pac. 1018.

Evidence is admissible to explain "heater charges." *Ross v. Maine Cent. R. Co.*, 114 Me. 287, 96 Atl. 223.

Evidence is admissible to show the customary meaning of "straight time" in a contract of employment, and such meaning is then a question of fact. *Cormier v. H. H. Martin Lumber Co.*, 98 Wash. 463, 167 Pac. 1105.

A customary meaning which attaches when a certain form of contract is used does not attach when the same term is used in a different form of contract. *Hart v. Hammett Grocery Co.*, 132 Ark. 197, 200 S. W. 795.

³ *McManus v. Loudon*, 53 Minn. 339, 55 N. W. 139. (Evidence here insufficient to vary the popular meaning.)

⁴ *Hesser, etc., Co. v. Fuel Co.*, 114 Wis. 634, 90 N. W. 1094 (that is, whether local or general strikes were intended).

⁵ *Walker v. Gateway Milling Co.*, 121 Va. 217, 92 S. E. 826.

⁶ *Smith v. Clews*, 114 N. Y. 190, 11 Am. St. Rep. 627, 4 L. R. A. 392, 21 N. E. 160.

⁷ *Gardiner v. McDonogh*, 147 Cal. 313, 81 Pac. 964.

⁸ *Gardiner v. McDonogh*, 147 Cal. 313, 81 Pac. 964.

⁹ *Kossuth County Bank v. Richardson*, 141 Ia. 738, 118 N. W. 906.

¹⁰ *Holbrook v. Quinlan*, 84 Vt. 411, 80 Atl. 339.

¹¹ *Holbrook v. Quinlan*, 84 Vt. 411, 80 Atl. 339.

¹² *Lampert Lumber Co. v. Minneapolis & St. Louis Ry.*, 127 Minn. 195, 149 N. W. 133.

¹³ *Paine & Nixon Co. v. United States Fidelity & Guaranty Co.*, 135 Minn. 9, 159 N. W. 1075.

¹⁴ *Allen v. Nothern*, 121 Ark. 150, 180 S. W. 465; *Deacon v. Mattison*, 11 N. D. 190, 91 N. W. 35.

livered.¹⁵ No usage can be invoked to change rules of law. Thus a usage among brokers that stock certificates are negotiable is invalid.¹⁶

§ 2029. Cipher. If a contract consists in part or all of cipher, extrinsic evidence is admissible to show the meaning of the terms written in cipher contracts by telegraph.¹ Thus the meaning of "Buy three May," may be so explained.² Without such evidence a contract in cipher could have no validity.

§ 2030. Abbreviations. If abbreviations are used in a written contract, extrinsic evidence is admissible to show that they have a meaning in the trade or business to which the subject of the contract relates which is generally recognized and understood among those familiar with such trade or business.¹ Thus extrinsic evidence is admissible to show the meaning of "S/87 wheat,"² "C. L. R. P. oats,"³ "stripped and sample warranted # 208,"⁴ "O. K.,"⁵ "K. D. and released,"⁶ "Care R. R. agt. Callahan,"⁷

¹⁵ *Fairly v. Wappoo Mills*, 44 S. Car. 227, 29 L. R. A. 215, 22 S. E. 108.

¹⁶ *East Birmingham Land Co. v. Dennis*, 85 Ala. 565, 7 Am. St. Rep. 73, 2 L. R. A. 836, 5 So. 317.

¹ *Western Union Telegraph Co. v. Collins*, 45 Kan. 88, 10 L. R. A. 515, 25 Pac. 187.

² *Carland v. Telegraph Co.*, 118 Mich. 369, 74 Am. St. Rep. 394, 43 L. R. A. 280, 76 N. W. 762.

³ *Georgia. Louisville & Nashville Ry. v. Southern Flour & Grain Co.*, 136 Ga. 538, 71 S. E. 884.

⁴ *Illinois. McChesney v. Chicago*, 173 Ill. 75, 50 N. E. 191.

⁵ *Iowa. Kossuth County Bank v. Richardson*, 141 Ia. 738, 118 N. W. 906.

⁶ *Kansas. Western Union Telegraph Co. v. Collins*, 45 Kan. 88, 10 L. R. A. 515, 25 Pac. 187.

⁷ *Minnesota. Maurin v. Lyon*, 69 Minn. 257, 65 Am. St. Rep. 568, 72 N. W. 72; *Lempert Lumber Co. v. Minneapolis & St. Louis Ry.*, 127 Minn. 195, 149 N. W. 133.

Missouri. Springfield First National

Bank v. Fricks, 75 Mo. 178, 42 Am. Rep. 397.

North Dakota. State v. McKone, 31 N. D. 547, 154 N. W. 256.

Oregon. Schucking v. Young, 78 Or. 483, 153 Pac. 803.

Vermont. Holbrook v. Quinlan, 84 Vt. 411, 80 Atl. 339.

² *Berry v. Kowalsky*, 95 Cal. 134, 29 Am. St. Rep. 101, 27 Pac. 286, 30 Pac. 202.

³ *Wilson v. Coleman*, 81 Ga. 297, 6 S. E. 693. ("Car Loads Rust Proof Oats.")

⁴ *Conestoga Cigar Co. v. Finke*, 144 Pa. St. 159, 13 L. R. A. 438, 22 Atl. 868. (In a sale of tobacco.)

⁵ *Penn Tobacco Co. v. Leeman*, 109 Ga. 428, 34 S. E. 679. (To show it amounts to a guaranty.)

⁶ *Mouton v. Ry.*, 128 Ala. 537, 29 So. 602.

⁷ *Savannah, etc., R. R. v. Collins*, 77 Ga. 376, 4 Am. St. Rep. 87, 3 S. E. 416. (To show that the railroad was to deliver the goods to the agent of another company at Callahan.)

or that "c/o W & A" means "care of Western and Atlantic."⁸ Extrinsic evidence is admissible to show that the character "#" is used as indicating pounds.⁹ The meaning of the abbreviation must be understood by both parties, however, if the court is to adopt such meaning as that intended by the parties. Thus "L. & O. Ex. \$20 R. R. val." can not be shown to mean "leaks and outs excepted \$20 railroad valuation," unless such meaning was known to the shipper as well as to the railroad.¹⁰ Even if the contract is one which by the Statute of Frauds must be proved by writing, extrinsic evidence is admissible to show the meaning of abbreviations.¹¹

§ 2031. Grammatical accuracy and punctuation. Unless a contrary intention appears upon the face of the contract, it will be presumed that the contract is drawn grammatically and punctuated properly and that the intention of the parties is to be deduced from the language which is used when such language is construed, if possible, as if it were grammatical and as if the punctuation were proper.¹ However, a construction fair, reasonable and consistent, but involving grammatical inaccuracy, will not yield to a construction more accurately grammatical, but less fair and reasonable.² On the same principle punctuation may be ignored in order to adopt the more reasonable of two construc-

⁸ *Louisville & Nashville Ry. v. Southern Flour & Grain Co.*, 136 Ga. 538, 71 S. E. 884.

⁹ *Schucking v. Young*, 78 Or. 483, 153 Pac. 803.

¹⁰ *Rosenfeld v. Ry.*, 103 Ind. 121, 53 Am. Rep. 500, 2 N. E. 344.

¹¹ *Contract for the sale of realty. Melone v. Ruffino*, 129 Cal. 514, 79 Am. St. Rep. 127, 62 Pac. 93. *Contract for the sale of personalty. New England, etc., Co. v. Worsted Co.*, 165 Mass. 328, 52 Am. St. Rep. 516, 43 N. E. 112. ("F. C. Wool.") *Maurin v. Lyon*, 69 Minn. 257, 65 Am. St. Rep. 568, 72 N. W. 72. (In this case the written memorandum was as follows: "St. Cloud, 7-6-96, sold Maurin Bros., Cold Springs, 5000, 1-0 Jul. Del. 99 C. Duluth" and signed.)

¹ *Allen v. United States Fidelity & Guaranty Co.*, 269 Ill. 234, 109 N. E. 1035; *Perry v. J. L. Mott Iron Works Co.*, 207 Mass. 501, 93 N. E. 798; *Bank v. Redwine*, 171 N. Car. 559, 88 S. E. 878.

² *Connecticut. Connors v. Clark*, 79 Conn. 100, 63 Atl. 951.

Kentucky. General Accident, Fire & Life Assur. Corp. v. Louisville Home Telephone Co., 175 Ky. 96, L. R. A. 1917D, 952, 103 S. W. 1031.

Michigan. Beadle v. Sage Land Co., 140 Mich. 199, 6 Am. & Eng. Ann. Cas. 53, 103 N. W. 554.

North Carolina. Wilkie v. New York Life Insurance Co., 146 N. Car. 513, 60 S. E. 427.

West Virginia. Ketchum v. Spurlock, 34 W. Va. 597, 12 S. E. 832.

tions.³ Thus of the words "lien operation and effect," lien is not supposed to be an adjective because no comma follows.⁴ Still if two constructions are equally probable,⁵ or other means of ascertaining which meaning was intended are lacking,⁶ punctuation may be resorted to.

If the intention of the parties appears from the entire contract, such intention will not be defeated by the fact that the court is obliged to transpose sentences in order that the contract as written may express such intention.⁷

The intelligence and education of the person by whom the contract is drawn have been considered in determining whether a grammatical construction which is less reasonable is to be preferred to a more reasonable construction which is less grammatical.⁸ If the draftsman is educated and intelligent, much greater weight will be given to punctuation and grammar as a means of determining the intention of the parties as expressed in the contract than would be given if the draftsman is ignorant and uneducated.⁹ It would seem, however, that the education and intelligence of the parties to the contract should be the test for determining the weight to attach to punctuation and grammar rather than that of the draftsman if the test in such cases is to be the understanding of the individual parties rather than that of the ordinarily reasonable and intelligent man, since the words are the words of the parties, although they are suggested by the draftsman.

§ 2032. Omissions, errors and surplusage. Words which are omitted by inadvertence from a written contract may be supplied by construction at law, without resort to reformation if the context

³ *United States*. *Ewing v. Burnet*, 36 U. S. (11 Pet.) 41, 9 L. ed. 624; *Holmes v. Ins. Co.*, 98 Fed. 240, 47 L. R. A. 308, 39 C. C. A. 45.

California. *Stoddart v. Golden*, — Cal. —, 3 A. L. R. 1060, 178 Pac. 707.

Illinois. *Allen v. United States Fidelity Co.*, 269 Ill. 234, 109 N. E. 1035.

Nebraska. *Rice v. Lincoln & N. W. Ry.*, 88 Neb. 307, 129 N. W. 425.

West Virginia. *Ketchum v. Spurlock*, 34 W. Va. 597, 12 S. E. 832.

The presence of semicolons between the phrases indicating the different installments in which a debt is payable does not prevent a provision for interest at the end of the sentence from applying to all the installments. *Stod-*

dart v. Golden, — Cal. —, 3 A. L. R. 1060, 178 Pac. 707.

⁴ *Abbott's Estate*, 198 Pa. St. 493, 48 Atl. 435.

⁵ *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 843.

⁶ *Ewing v. Burnet*, 36 U. S. (11 Pet.) 41, 9 L. ed. 624; *Armory Mfg. Co. v. Ry.*, 89 Tex. 419, 59 Am. St. Rep. 65, 37 S. W. 856.

⁷ *Edwards v. Jefferson Standard Life Insurance Co.*, 173 N. Car. 614, 92 S. E. 695.

⁸ *Bank v. Redwine*, 171 N. Car. 559, 88 S. E. 878.

⁹ *Bank v. Redwine*, 171 N. Car. 559, 88 S. E. 878.

shows what words are omitted.¹ Thus the omission of a dollar sign may be supplied from a context which shows that money was contracted for, as the number given will be assumed to refer to dollars as units of value.² So in a promise to pay "twenty-five after date," the surrounding facts may be looked to, to show that "days" was the omitted word.³ So figures showing numbers may be used to supply the numbers omitted from the words in the body of the instrument.⁴ So in a provision, "In case the said party of the first part shall to fully and entirely,"⁵ the word "fail" may be supplied from a corresponding provision containing the phrase, "to be in default." The word "not" may be supplied from the context in case of evident omission.⁶ Errors apparent on the face of the instrument may be corrected at law by construction without resort to equity.⁷ Thus the context may show that "or" means "and."⁸ If one of the parties to a contract is named incorrectly,⁹ or if a reference is made to a party of the second part when the party of the first part is intended,¹⁰ and such mistake can be corrected by means of the context of the contract, it may be thus corrected at law.

If words or phrases appear in a contract which are without meaning when read in connection with the contract as a whole, such words or phrases may be rejected as surplusage and they will

¹Arkansas. *Irwin v. Nichols*, 87 Ark. 97, 112 S. W. 209.

Illinois. *Richelieu Hotel Co. v. Encampment Co.*, 140 Ill. 248, 33 Am. St. Rep. 234, 29 N. E. 1044.

Massachusetts. *Pacific Surety Co. v. Toye*, 224 Mass. 98, 112 N. E. 653.

Minnesota. *Gran v. Spangenberg*, 53 Minn. 42, 54 N. W. 933.

New Jersey. *Sisson v. Donnelly*, 36 N. J. L. 432; *Monmouth Park Association v. Iron Works*, 55 N. J. L. 132, 39 Am. St. Rep. 626, 19 L. R. A. 456, 26 Atl. 140.

²*Richelieu Hotel Co. v. Encampment Co.*, 140 Ill. 248, 33 Am. St. Rep. 234, 29 N. E. 1044.

³*Boykin v. Bank*, 72 Ala. 262, 47 Am. Rep. 408.

⁴*Gran v. Spangenberg*, 53 Minn. 42, 54 N. W. 933.

⁵*Monmouth Park Association v. Iron Works*, 55 N. J. L. 132, 39 Am. St. Rep. 626, 19 L. R. A. 456, 26 Atl. 140.

⁶*Irwin v. Nichols*, 87 Ark. 97, 112 S. W. 209.

⁷*Manson v. Dayton*, 153 Fed. 258, 82 C. C. A. 588; *Siegel, etc., Co. v. Colby*, 176 Ill. 210, 52 N. E. 917 [affirming, 61 Ill. App. 315]; *Kannow v. Farmers' Co-op. Shipping Association*, 76 Neb. 330, 107 N. W. 563.

⁸*Manson v. Dayton*, 153 Fed. 258, 82 C. C. A. 588; *Bettman v. Harness*, 42 W. Va. 433, 36 L. R. A. 566.

⁹*Kannow v. Farmers' Co-op. Shipping Association*, 76 Neb. 330, 107 N. W. 563.

¹⁰*Rapp v. Linebarger*, 149 Ia. 429, 128 N. E. 555 [reversing on rehearing, 125 N. W. 209].

not so operate as to defeat the entire contract.¹¹ Abbreviations,¹² or the sign "etc.,"¹³ may be ignored in construction if without meaning. If a contract provides for delivering property but not for constructing it or setting it in place, a provision in the contract for a specified notice that the foundations were ready for such property is to be rejected as surplusage.¹⁴ If the recital of the consideration refers to the considerations "hereinafter named," such words may be rejected as surplusage if no further consideration is in fact named.¹⁵ Unless the context requires it, the courts can not construe "may" as equivalent to "shall" in a contract.¹⁶

§ 2033. Intention of parties direct as affecting meaning of term. If the parties have used words which have an ordinary meaning free from ambiguity, and no technical meaning is shown, extrinsic evidence is inadmissible to show that the parties used such terms in a sense different from their ordinary meaning, as the only effect of such evidence would be to contradict the legal effect of the language which the parties themselves have used.¹ Thus evidence is not admissible to show the meaning of "to be

¹¹ *American Bridge Co. v. Glenmore Distilleries Co.* (Ky.), 107 S. W. 279, 32 Ky. Law Rep. 873; *Way v. Greer*, 196 Mass. 237, 14 L. R. A. (N.S.) 459, 81 N. E. 1002; *Edwards v. Jefferson Standard Life Ins. Co.*, 173 N. Car. 614, 92 S. E. 695.

¹² *Berry v. Kowalsky*, 95 Cal. 134, 29 Am. St. Rep. 101, 30 Pac. 202.

¹³ *Harrison v. McCormick*, 89 Cal. 327, 23 Am. St. Rep. 469, 26 Pac. 830.

¹⁴ *American Bridge Co. v. Glenmore Distilleries Co.* (Ky.), 107 S. W. 279, 32 Ky. Law Rep. 873.

¹⁵ *Way v. Greer*, 196 Mass. 237, 14 L. R. A. (N.S.) 459, 81 N. E. 1002.

¹⁶ *Crawford v. Northwestern Traveling Men's Association*, 226 Ill. 57, 10 L. R. A. (N.S.) 264, 80 N. E. 736.

¹ *Arkansas. Warmack v. Perkins*, 132 Ark. 378, 201 S. W. 120.

California. Hawley v. Kafitz, 148 Cal. 393, 3 L. R. A. (N.S.) 741, 83 Pac. 248; *Burge v. Albany Nurseries*, 176 Cal. 313, 168 Pac. 343; *Sheam v. Weeks*, 176 Cal. 592, 169 Pac. 231.

Connecticut. Adams v. Turner, 73 Conn. 38, 46 Atl. 247.

Georgia. George W. Muller Bank Fixture Co. v. Georgia Ry. & Electric Co., 145 Ga. 484, 89 S. E. 615.

Michigan. Chase v. Ainsworth, 135 Mich. 119, 97 N. W. 404.

Minnesota. Bell Lumber Co. v. Seaman, 136 Minn. 106, 161 N. W. 383.

Mississippi. Hickman Ebbert Co. v. Asa W. Allen Co., 111 Miss. 161, 71 So. 310.

Pennsylvania. Hartley-Zeigler Co. v. Bacon, 251 Pa. St. 87, 96 Atl. 257.

South Carolina. Kentucky Wagon Mfg. Co. v. People's Supply Co., 77 S. Car. 92, 122 Am. St. Rep. 540, 57 S. E. 676.

Vermont. Whittier v. Parmenter, 90 Vt. 16 [sub nomine, *Whittier v. Montpelier Ice Co.*, 96 Atl. 378].

Washington. Thomson & Stacy Co. v. Evans, 100 Wash. 277, 170 Pac. 578.

Wisconsin. Vogt v. Schienebeck, 122 Wis. 491, 106 Am. St. Rep. 989, 67 L. R. A. 756, 100 N. W. 820.

advertised till sold,"² "f. o. b.,"³ "delivered East St. Louis,"⁴ "wholesale prices,"⁵ or to mine ore at a certain price as long "as we can make it pay."⁶ Under a contract for drilling for gas or oil a provision to pay for "gas" can not be shown to mean only gas from a gas well and not gas from a well producing oil chiefly.⁷ So under a contract concerning "bales" of cotton, it was held that the parties could show what meaning "bales" had by usage, but that they could not show an oral contract between the parties fixing a weight for a "bale."⁸ So under a contract which refers to the "amount" of grading, it can not be shown that "amount" means cost and not quantity.⁹

If, on the other hand, the term used is one which has two or more meanings, evidence of the intention of the parties direct is admissible to show in which sense it was used.¹⁰ So if a written receipt refers to a "due bill," evidence is admissible to show that

The term "market value" can not be modified by extrinsic evidence. *Bockian v. United Candy Co.*, 91 N. J. L. 314, 102 Atl. 393.

A contract which provides for discount for cash if paid at a certain time, can not be modified by extrinsic evidence to show that the parties were agreeing upon a trade discount. *Hickman-Ebbert Co. v. Asa W. Allen Co.*, 111 Miss. 161, 71 So. 310.

If a contract provides that property shall be "fully insured," extrinsic evidence is not admissible to show that the parties mean that it should be insured to three-fourths of its value. *Kentucky Wagon Manufacturing Co. v. People's Supply Co.*, 77 S. Car. 92, 122 Am. St. Rep. 540, 57 S. E. 676.

If a contract for the sale of an article which is known by a definite name provides that it is "guaranteed true to name," extrinsic evidence is inadmissible to explain or contradict the meaning of such term. *Burge v. Albany Nurseries*, 176 Cal. 313, 168 Pac. 343.

In a building contract the word "plans" is unambiguous, and it is proper to exclude evidence to show the meaning of such term. *Hartley-Zeigler Co. v. Bacon*, 251 Pa. St. 87, 96 Atl. 257.

A party who has given notice of termination of a contract for electricity on account of "excessive rates," can not introduce evidence to show his undisclosed intention in making use of such term. *George W. Muller Bank Fixture Co. v. Georgia Ry. & Electric Co.*, 145 Ga. 484, 89 S. E. 615.

² *Wikle v. Johnson Laboratories*, 132 Ala. 268, 31 So. 715.

³ *Vogt v. Schienebeck*, 122 Wis. 491, 106 Am. St. Rep. 989, 67 L. R. A. 756, 100 N. W. 820.

⁴ *Lippert v. Milling Co.*, 108 Wis. 512, 84 N. W. 831.

⁵ *Fawkner v. Wall Paper Co.*, 88 Ia. 169, 45 Am. St. Rep. 230, 55 N. W. 200.

⁶ *Davie v. Mining Co.*, 93 Mich. 491, 24 L. R. A. 357, 53 N. W. 625. (Oral evidence is inadmissible to show that this means "as long as we can make company wages.")

⁷ *Burton v. Oil Co.*, 204 Pa. St. 349, 54 Atl. 266.

⁸ *Stewart v. Cook*, 118 Ga. 541, 45 S. E. 398.

⁹ *Ryan v. Dubuque*, 112 Ia. 284, 83 N. W. 1073.

¹⁰ *England. Bank of New Zealand v. Simpson* [1900], App. Cas. 182.

by such expression the parties intended a certain promissory note.¹¹ If a letter which encloses bills of lading to a bank instructs

United States. *Orvis v. British-American Cotton Co.*, 242 Fed. 835; *Ryan v. Ohmer*, 244 Fed. 31.

Alabama. *Mobile County v. Linch*, — Ala. —, 73 So. 423; *Lutz v. Van Heynigen Brokerage Co.*, — Ala. —, 75 So. 284.

Colorado. *Divine v. George*, — Colo. —, 166 Pac. 242.

Connecticut. *Falletti v. Carrano*, 92 Conn. 636, 103 Atl. 753.

Iowa. *Kelly v. Fejervary*, 111 Ia. 603, 83 N. W. 791; *Kvamme v. Barthell*, 144 Ia. 418, 31 L. R. A. (N.S.) 207, 118 N. W. 766; *Emery v. American Ins. Co.*, 177 Ia. 4, 158 N. W. 748.

Kansas. *Royer v. Western Silo Co.*, 99 Kan. 309, 161 Pac. 654; *Outcault Advertising Co. v. H. G. Waltner Mercantile Co.*, 96 Kan. 689, 153 Pac. 518.

Kentucky. *Westinghouse Electric & Mfg. Co. v. Greenville Coal Co.*, 169 Ky. 280, 183 S. W. 901; *Johnson v. Tackitt*, 173 Ky. 406, 191 S. W. 117; *Macpherson v. Bacon's Executor*, 180 Ky. 773, 203 S. W. 744 (obiter).

Massachusetts. *Elastic Tip Co. v. Graham*, 185 Mass. 597, 71 N. E. 117; *Smith v. Vose & Sons Piano Co.*, 194 Mass. 193, 120 Am. St. Rep. 539, 9 L. R. A. (N.S.) 966, 80 N. E. 527.

Michigan. *Brown v. Bartlett*, 201 Mich. 268, 167 N. W. 847; *Harmon v. Michigan United Traction Co.*, — Mich. —, 168 N. W. 521.

Missouri. *Interior Linseed Co. v. Becker-Moore Paint Co.*, 273 Mo. 433, 202 S. W. 566.

New Jersey. *Streeter v. Seigman* (N. J. Eq.), 48 Atl. 907.

Oklahoma. *Cohee v. Turner*, 37 Okla. 778, 132 Pac. 1082; *Barricklow v. Boice*, 50 Okla. 260, 150 Pac. 1094; *First National Bank v. Womack*, 56 Okla. 359, 156 Pac. 207; *Gilbert v.*

Citizens' National Bank, — Okla. —, L. R. A. 1917A, 740, 160 Pac. 635.

Oregon. *Corvallis & A. R. R. Co. v. Portland, E. & E. Ry. Co.*, 84 Or. 524, 163 Pac. 1173.

Rhode Island. *Phetteplace v. Ins. Co.*, 23 R. I. 26, 49 Atl. 33.

South Dakota. *McFarland v. Hiltzley*, — S. D. —, 166 N. W. 141.

Vermont. *Douglass v. Morrisville*, 89 Vt. 393, 95 Atl. 810.

Washington. *Carstens v. Nut House*, 96 Wash. 50, 164 Pac. 770; *Mountain Timber Co. v. Lumber Insurance Co.*, 99 Wash. 243, 169 Pac. 591; *Bookhout v. Vuich*, 101 Wash. 511, 172 Pac. 740.

Wisconsin. *Andrews v. Robertson*, 111 Wis. 334, 87 Am. St. Rep. 870, 54 L. R. A. 673, 87 N. W. 190; *Zielica v. Worzalla*, 162 Wis. 603, 156 N. W. 623.

A provision for deducting commission from the proceeds of the sale of land may be shown to include commissions due on other sales. *Kvamme v. Barthell*, 144 Ia. 418, 31 L. R. A. (N.S.) 207, 118 N. W. 766.

The instructions which a ticket agent has given to a passenger to whom he sells a ticket may be said to show the construction placed upon the ticket by the carrier, although it can not vary the unequivocal terms thereof. *Mace v. Southern R. Co.*, 151 N. Car. 404, 24 L. R. A. (N.S.) 1178, 66 S. E. 342.

If a contract to furnish support in consideration of the conveyance of realty is ambiguous and there is a doubt as to the application of inheritance tax laws to such a transaction, evidence of the intention of the parties is admissible. *In re Lamb*, 140 Ia. 89, 18 L. R. A. (N.S.) 226, 117 N. W. 1118.

¹¹ *Andrews v. Robertson*, 111 Wis. 334, 87 Am. St. Rep. 870, 54 L. R. A. 673, 87 N. W. 190.

the bank to "hold same in trust for us," extrinsic evidence is admissible to show the terms of the trust and the beneficiaries thereunder.¹² So the meaning which the parties give to "outstanding accounts" may be shown.¹³ So if the term "perch" is shown to have two meanings when used as a measure of stone, the direct intention of the parties may be considered in ascertaining which meaning of the term was intended.¹⁴ The word "cord" as a measure of wood is so ambiguous that oral evidence may be introduced to show the meaning which the parties attached thereto and their real intention.¹⁵ So under a contract providing for "wholesale factory prices," it was held proper to show that the parties intended a scale differing from actual wholesale prices.¹⁶ A contract entered into in Porto Rico before its annexation to the United States for the payment of money, does not contemplate such annexation, and the provision for payment of money is not to be construed literally, but such payment is to be made in United States money at the rate of exchange fixed by Congress.¹⁷ Although a contract provides that work is to be done "in accordance with plans and specifications to be furnished," it may be shown that such plans and specifications were prepared and were attached to the contract when it was executed.¹⁸ Extrinsic evidence is admissible to show the meaning of the term "manufacturing, handling, or shipping" stock of a factory for manufacturing lumber.¹⁹ Under a contract for paying a commission upon sales made

¹² *Gilbert v. Citizens' National Bank*, — Okla. —, L. R. A. 1917A, 740, 160 Pac. 635.

¹³ *McCutskey v. Klosterman*, 20 Or. 108, 10 L. R. A. 785, 25 Pac. 366. (To show that it meant accounts outstanding after charging the bad accounts to profit and loss.)

¹⁴ *Quarry Co. v. Clements*, 38 O. S. 587, 43 Am. Rep. 442. (In this case evidence was admitted to show that the parties had agreed that stone should be furnished at eighteen cents per cubic foot, and that the scrivener who drew the contract of his own motion, stated this rate by the perch and assumed that twenty-five cubic feet made a perch. Accordingly, he stated the rate at four dollars and fifty cents a perch. The evidence showed

that in cellar walls and foundations by the local usage the term "perch" meant sixteen and a half feet; in railroad masonry it meant twenty-five feet; and in bridge masonry, which was the subject of the contract, the term was ambiguous.)

¹⁵ *Maynard v. Render*, 95 Ga. 652, 23 S. E. 194.

¹⁶ *Barrett v. Allen*, 10 Ohio 426.

¹⁷ *Succession of Serralles v. Esbri*, 200 U. S. 103, 50 L. ed. 391.

¹⁸ *Cleveland, C. C. & St. L. Ry. Co. v. Moore*, 170 Ind. 328, 82 N. E. 52 [rehearing denied, *Cleveland, C. C. & St. L. Ry. Co. v. Moore*, 170 Ind. 328, 84 N. E. 540].

¹⁹ *Mountain Timber Co. v. Lumber Insurance Co.*, 99 Wash. 243, 169 Pac. 591.

at a "profit," the term profit does not possess a rigid meaning and extrinsic evidence is admissible to show its meaning.²⁰ A contract for compensating a farm laborer by giving him a share of "the increase of live stock" at a certain "profit," may be explained by showing the meaning of such terms.²¹ The term "car" as a measure of weight may be shown to mean a certain number of pounds.²² Under a contract by which money paid for stock in a corporation was to be repaid if the corporation did not establish a "store," the term "store" is so indefinite that it may be explained by evidence of the parties direct.²³ A contract which warrants the operation of a machine in a mine under normal conditions, may be shown by extrinsic evidence to refer to normal conditions in the mine and not to normal conditions outside of the mine.²⁴ If a contract for the sale of land provides that the vendor is to "clear" a certain area thereof, extrinsic evidence is admissible to show the surrounding circumstances so that the court can ascertain the meaning of the term "clear."²⁵ Under a contract to drill a well so as to "procure water," evidence of the surrounding circumstances and of the conversation of the parties is admissible to show that drinking water and not salt water was intended.²⁶ If a contract to furnish cuts describes them as "Outcault Service De Luxe" cuts, extrinsic evidence is admissible to show the meaning given to such expression by the seller to the purchaser.²⁷ If a provision that a debt shall bear interest from "maturity date" is ambiguous, extrinsic evidence is admissible to show what date is intended.²⁸

It will be seen that some of the cases cited under the second branch of the rule are really contrary to those cited under the first branch. The cases under the second branch are some of them cases where, in spite of the general rule,²⁹ the courts have really given reformation in an action at law under cover of construction.

If the parties agree as to the construction to be given to the contract, the court will adopt such construction without reference

²⁰ *Brown v. Bartlett*, 201 Mich. 268, 167 N. W. 847.

²¹ *Bookhout v. Vuich*, 101 Wash. 511, 172 Pac. 740.

²² *Carstens v. Nut House*, 96 Wash. 50, 164 Pac. 770.

²³ *Divine v. George*, — Colo. —, 166 Pac. 242.

²⁴ *Westinghouse Electric & Mfg. Co. v. Greenville Coal Co.*, 169 Ky. 280, 183 S. W. 901.

²⁵ *Zielica v. Worzalla*, 162 Wis. 603, 156 N. W. 623.

²⁶ *Smith v. Vose & Sons Piano Co.*, 194 Mass. 193, 120 Am. St. Rep. 539, 9 L. R. A. (N.S.) 966, 80 N. E. 527.

²⁷ *Outcault Advertising Co. v. H. G. Waltner Mercantile Co.*, 96 Kan. 689, 153 Pac. 518.

²⁸ *Hill v. Hart*, 23 N. M. 226, 167 Pac. 710.

²⁹ See § 2065.

to the meaning which the court would have given to such contract if the parties had not agreed thereon.³⁰

The terms of a negotiable instrument must appear upon the face thereof,³¹ and uncertain or inconsistent terms can not be added by evidence of the intention of the parties direct.³² It has been said if the amount of a negotiable instrument as expressed in written words is different from the amount set forth in figures, evidence of the actual intention of the parties is inadmissible.³³

§ 2034. Practical construction by parties. If a contract is ambiguous in meaning, the practical construction put upon it by the parties thereto is of great weight, even though the contract is in writing,¹

³⁰ Ormon v. Potter, 46 Colo. 54, 102 Pac. 893.

³¹ See §§ 2305 et seq.

³² Payne v. Commercial National Bank, 177 Cal. 68, L. R. A. 1918C, 328, 169 Pac. 1007.

³³ Payne v. Commercial National Bank, 177 Cal. 68, L. R. A. 1918C, 328, 169 Pac. 1007.

¹ United States. Chicago v. Sheldon, 76 U. S. (9 Wall.) 50, 54, 19 L. ed. 594; Interstate Land Co. v. Land Grant Co., 41 Fed. 275; Pacific, etc., Co. v. Leete, 94 Fed. 968, 36 C. C. A. 587; Fitzgerald v. Bank, 114 Fed. 474, 52 C. C. A. 276; Manhattan Life Ins. Co. v. Wright, 126 Fed. 82; Cook v. Foley, 152 Fed. 41, 81 C. C. A. 237; Bunday v. Huntington, 224 Fed. 847, 140 C. C. A. 415; In re Thomas, 231 Fed. 513; Bransford v. Regal Shoe Co., 237 Fed. 67, 150 C. C. A. 269.

Alabama. Jeffersn Plumbers & Mill Supply Co. v. Peebles, 195 Ala. 608, 71 So. 413; Birmingham Waterworks Co. v. Hernandez, 196 Ala. 438, 71 So. 443; Mobile County v. Linch, — Ala. —, 73 So. 423.

Arkansas. Robbins v. Kimball, 55 Ark. 414, 29 Am. St. Rep. 45, 18 S. W. 457; Watkins Medical Co. v. Williams, 124 Ark. 539, 187 S. W. 653.

California. Hill v. McKay, 94 Cal. 5, 29 Pac. 406; Kennedy v. Lee, 147 Cal. 596, 82 Pac. 257; Woodard v. Glenwood Lumber Co., 171 Cal. 513, 153 Pac. 951.

Colorado. Wyatt v. Irrigation Co.,

18 Colo. 298, 36 Am. St. Rep. 280, 33 Pac. 144.

District of Columbia. Consaul v. Cummings, 24 D. C. App. 36; Harten v. Loffler, 29 D. C. App. 490.

Florida. Scotch Manufacturing Co. v. Carr, 53 Fla. 480, 43 So. 427.

Illinois. Turner v. Osgood Art Color-type Co., 223 Ill. 629, 79 N. E. 306; McLean County Coal Co. v. City of Bloomington, 234 Ill. 90, 84 N. E. 624; Clemens v. Crane, 234 Ill. 215, 84 N. E. 884; Gillett v. Teel, 272 Ill. 106, 111 N. E. 722; Sholl v. Peoria & P. U. Ry. Co., 276 Ill. 267, 114 N. E. 529.

Indiana. Board of Commissioners v. Gibson, 158 Ind. 471, 63 N. E. 982; Vandalia R. Co. v. Terre Haute Vitri-fied Brick Co., 183 Ind. 551, 108 N. E. 953; Smith v. Miami County, 6 Ind. App. 153, 33 N. E. 243.

Iowa. Pratt v. Prouty, 104 Ia. 419, 65 Am. St. Rep. 472, 73 N. W. 1035; In re Lamb, 140 Ia. 89, 18 L. R. A. (N.S.) 226, 117 N. W. 1118; Henry v. Mason City & Ft. D. R. Co., 140 Ia. 201, 118 N. W. 310; Nicholls v. Wetmore, 174 Ia. 132, 156 N. W. 319; Comptograph Co. v. Burroughs Adding Machine Co., 179 Ia. 83, 159 N. W. 465.

Kansas. Baxter Springs v. Power Co., 64 Kan. 591, 68 Pac. 63.

Kentucky. Dalzell v. Dalzell, 170 Ky. 297, 185 S. W. 1107.

Louisiana. Metcalfe v. Green, 140 La. 950, 74 So. 261; Croom v. Noel, 143 La. 189, 78 So. 442.

and, ordinarily, is controlling,² at least if such practical con-

Massachusetts. *Strong v. Carver Cotton Gin Co.*, 197 Mass. 53, 14 L. R. A. (N.S.) 274, 83 N. E. 328; *Mark v. Stuart-Howland Co.*, 226 Mass. 35, 115 N. E. 42; *Schurman v. Improved Plastic Slate Roofing Co.*, 227 Mass. 129, 116 N. E. 530.

Michigan. *Switzer v. Mfg. Co.*, 59 Mich. 488, 26 N. W. 762; *McVickar v. Denison*, 81 Mich. 348, 45 N. W. 659.

Missouri. *Laclede Construction Co. v. T. J. Moss Tie Co.*, 185 Mo. 25, 84 S. W. 76.

Nebraska. *Rathbun v. McConnell*, 27 Neb. 239, 42 N. W. 1042; *Latenser v. Misner*, 56 Neb. 340, 76 N. W. 897; *Fiscus v. Wilson*, 74 Neb. 444, 104 N. W. 856; *School District v. Davis*, 76 Neb. 612, 107 N. W. 842; *Katz-Craig Contracting Co. v. Cozad (Neb.)*, 162 N. W. 490.

New Jersey. *Ryer v. Turkel*, 75 N. J. L. 677, 70 Atl. 68.

New York. *Sattler v. Hallock*, 160 N. Y. 291, 73 Am. St. Rep. 686, 46 L. R. A. 679, 54 N. E. 667; *New York v. New York Ry. Co.*, 193 N. Y. 543, 86 N. E. 565.

Oklahoma. *Guthrie Mill & Elevator Co. v. Howe Grain & Mercantile Co.*, 57 Okla. 613, 157 Pac. 290; *Kelly v. Harris*, — Okla. —, 162 Pac. 219.

Pennsylvania. *Gillespie v. Iseman*, 210 Pa. St. 1, 56 Atl. 266; *Tustin v. Philadelphia & Reading Coal & Iron Co.*, 250 Pa. St. 425, 95 Atl. 595.

South Carolina. *Murray v. Mfg. Co.*, 37 S. Car. 468, 16 S. E. 143; *Williamson v. Loan Association*, 54 S. Car. 582, 71 Am. St. Rep. 822, 32 S. E. 765.

South Dakota. *Blood v. Elevator Co.*, 1 S. D. 71, 45 N. W. 200.

Vermont. *Douglass v. Morrisville*, 89 Vt. 393, 95 Atl. 810.

Virginia. *Hairston v. Hill*, 118 Va. 339, 87 S. E. 573; *Gish v. Roanoke*, 119 Va. 519, 89 S. E. 970.

West Virginia. *Heatherly v. Bank*, 31 W. Va. 70, 5 S. E. 754; *Clark v. Sayers*, 55 W. Va. 512, 47 S. E. 312;

Myers v. Carnahan, 61 W. Va. 414, 57 S. E. 134; *Moore v. Ohio Valley Gas Co.*, 63 W. Va. 455, 60 S. E. 401.

Wisconsin. *Janesville Cotton Mills v. Ford*, 82 Wis. 416, 17 L. R. A. 564, 52 N. W. 764; *Wussow v. Hase*, 108 Wis. 382, 84 N. W. 433.

Wyoming. *J. W. Denio Milling Co. v. Malin*, 25 Wyom. 143, 165 Pac. 1113.

The practical construction of the parties may supplement an ambiguous or uncertain description of realty. *Croom v. Noel*, 143 La. 189, 78 So. 442.

²**United States.** *Philadelphia, etc., Ry. v. Trimble*, 77 U. S. (10 Wall.) 367, 19 L. ed. 948; *Topliff v. Topliff*, 122 U. S. 121, 30 L. ed. 1110; *Russell v. Young*, 94 Fed. 45, 36 C. C. A. 71; *Housekeeper Publishing Co. v. Swift*, 97 Fed. 290, 38 C. C. A. 187; *Lyman v. Ry.*, 101 Fed. 636; *State Trust Co. v. Duluth*, 104 Fed. 632; *Cook v. Foley*, 152 Fed. 41, 81 C. C. A. 237; *Bransford v. Regal Shoe Co.*, 237 Fed. 67, 150 C. C. A. 269.

Alabama. *Jefferson Plumbers & Mill Supply Co. v. Peebles*, 195 Ala. 608, 71 So. 413; *Mobile County v. Lynch*, — Ala. —, 73 So. 423.

Arkansas. *Robbins v. Kimball*, 55 Ark. 414, 29 Am. St. Rep. 45, 18 S. W. 457; *Watkins Medical Co. v. Williams*, 124 Ark. 539, 187 S. W. 653.

California. *Kennedy v. Lee*, 147 Cal. 596, 82 Pac. 257; *Mitau v. Roddan*, 149 Cal. 1, 6 L. R. A. (N.S.) 275, 84 Pac. 145.

Colorado. *Wyatt v. Irrigation Co.*, 18 Colo. 298, 36 Am. St. Rep. 280, 33 Pac. 144; *Buckeye, etc., Co. v. Carlson*, 16 Colo. App. 446, 66 Pac. 168.

Florida. *Webster v. Clark*, 34 Fla. 637, 43 Am. St. Rep. 217, 27 L. R. A. 126, 16 So. 601; *Shouse v. Doane*, 39 Fla. 95, 21 So. 807; *Scotch Manufacturing Co. v. Carr*, 53 Fla. 480, 43 So. 427.

Illinois. *Hall v. Bank*, 133 Ill. 234, 24 N. E. 546; *Street v. Storage Co.*, 157 Ill. 603, 41 N. E. 1108; *Work v. Welsh*, 160 Ill. 468, 43 N. E. 719; *Mueller v. University*, 195 Ill. 236, 88 Am.

struction has lasted for a long period of time.³ If the contract

St. Rep. 194, 63 N. E. 110 [affirming, 95 Ill. App. 258]; *Turner v. Osgood Art Colortype Co.*, 223 Ill. 629, 79 N. E. 306; *Gillett v. Teel*, 272 Ill. 106, 111 N. E. 722; *Clemens v. Crane*, 234 Ill. 215, 84 N. E. 884.

Indiana. *Pate v. French*, 122 Ind. 10, 23 N. E. 673; *Ingle v. Norrington*, 126 Ind. 174, 25 N. E. 900; *Vincennes v. Gaslight Co.*, 132 Ind. 114, 16 L. R. A. 485, 31 N. E. 573; *Cambria Iron Co. v. Trust Co.*, 154 Ind. 291 [sub nomine, *Union Trust Co. v. Ry.*, 48 L. R. A. 41, 55 N. E. 745, 56 N. E. 665]; *Vandalia R. Co. v. Terre Haute Vittrified Brick Co.*, 183 Ind. 551, 108 N. E. 953; *Smith v. Miami Co.*, 6 Ind. App. 153, 33 N. E. 243.

Iowa. *Pratt v. Prouty*, 104 Ia. 419, 65 Am. St. Rep. 472, 73 N. W. 1035.

Kansas. *Enterprise Carriage Mfg. Co. v. Cruzan*, 63 Kan. 411, 65 Pac. 647;; *J. B. Ehrsam & Sons Mfg. Co. v. Jackman*, 73 Kan. 435, 85 Pac. 559, 91 Pac. 486; *Pittsburgh Vittrified Paving and Building Brick Co. v. Bailey*, 76 Kan. 42, 12 L. R. A. (N.S.) 745, 90 Pac. 803.

Kentucky. *Trapp v. Conley (Ky.)*, 28 Ky. Law Rep. 475, 89 S. W. 514.

Louisiana. *Metcalfe v. Green*, 140 La. 950, 74 So. 261.

Maryland. *Citizens,' etc., Co. v. Doll*, 35 Md. 89, 6 Am. Rep. 360.

Massachusetts. *Fogg v. Ins. Co.*, 64 Mass. (10 Cush.) 337; *Schurman v. Improved Plastic Slate Roofing Co.*, 227 Mass. 129, 116 N. E. 530.

Michigan. *Burtis v. Munising Co.*, 126 Mich. 685, 86 N. W. 124.

Minnesota. *Luverne First National Bank v. Jagger*, 41 Minn. 308, 43 N. W. 70.

Mississippi. *Powell v. Russell*, 88 Miss. 549, 41 So. 5.

Missouri. *Ellis v. Harrison*, 104 Mo. 270, 16 S. W. 198; *Knisely v. Leathe (Mo.)*, 178 S. W. 453; *Williamson v. Ry.*, 85 Mo. App. 103.

Nebraska. *Paxton v. Smith*, 41 Neb. 56, 59 N. W. 690; *Davis v. Creamery*, 9 Neb. 471, 27 N. W. 436; *Hale*

v. Sheehan, 52 Neb. 184, 71 N. W. 1019; *Lawton v. Fonner*, 59 Neb. 214, 80 N. W. 808; *Fiscus v. Wilson*, 74 Neb. 444, 104 N. W. 856; *School District v. Davis*, 76 Neb. 612, 107 N. W. 842; *Katz-Craig Contracting Co. v. Cozad*, 101 Neb. 189, 162 N. W. 490.

New Jersey. *Helme v. Strater*, 52 N. J. Eq. 591, 30 Atl. 333; *Dwyer v. Bonitz (N. J. Eq.)*, 31 Atl. 172.

New York. *Woolsey v. Funk*, 121 N. Y. 87, 24 N. E. 191; *Sattler v. Hallock*, 160 N. Y. 291, 73 Am. St. Rep. 686, 46 L. R. A. 679, 54 N. E. 667.

Ohio. *Methodist, etc., Society v. Water Co.*, 20 Ohio C. C. 578, 10 Ohio C. D. 648.

Oklahoma. *Guthrie Mill & Elevator Co. v. Howe Grain & Mercantile Co.*, 57 Okla. 613, 157 Pac. 290; *Kelly v. Harris*, — Okla. —, 162 Pac. 219.

South Carolina. *Murray v. Mfg. Co.*, 37 S. Car. 468, 16 S. E. 143; *Williamson v. Loan Association*, 54 S. Car. 582, 71 Am. St. Rep. 822, 32 S. E. 765.

Utah. *Woodward v. Edmunds*, 20 Utah 118, 57 Pac. 848.

Texas. *Heidenheimer v. Cleveland (Tex.)*, 17 S. W. 524.

Vermont. *Douglass v. Morrisville*, 89 Vt. 393, 95 Atl. 810.

Virginia. *Mutual, etc., Association v. Taylor*, 99 Va. 208, 37 S. E. 854; *Citizens' Bank v. Taylor*, 104 Va. 164, 51 S. E. 159; *Gish v. Roanoke*, 119 Va. 519, 89 S. E. 970.

West Virginia. *Myers v. Carnahan*, 61 W. Va. 414, 57 S. E. 134.

Wisconsin. *Hosmer v. McDonald*, 80 Wis. 54, 49 N. W. 112.

Wyoming. *J. W. Denio Milling Co. v. Malin*, 25 Wyom. 143, 165 Pac. 1113. "There is no surer way to find out what the parties meant than to see what they have done." *Brooklyn Life Ins. Co. v. Dutcher*, 95 U. S. 269, 273, 24 L. ed. 410 [quoted in *Sattler v. Hallock*, 160 N. Y. 291, 301, 73 Am. St. Rep. 686, 46 L. R. A. 679, 54 N. E. 667].

³ *Dalzell v. Dalzell*, 170 Ky. 297, 185 S. W. 1102.

can fairly be regarded as ambiguous the practical construction which is placed thereon by the parties will control, although without such practical construction another construction might have seemed more natural.⁴ The practical construction placed upon the contract by the parties is, at least, of great weight,⁵ although it is not always conclusive.⁶ The fact that the practical construction is placed upon the contract by the acts of the parties thereto a considerable period of time after the contract was made, does not prevent such practical construction from being given full effect.⁷

The practical construction by the parties may determine whether an ambiguous instrument is a partnership contract or not;⁸ whether the contract is one of consignment or sale;⁹ whether the vendee of stock has an equal interest therein with the other parties;¹⁰ what undivided interests in land are transferred by a contract;¹¹ what constitutes a "first-class place of amusement";¹² what is "any extension of time";¹³ what right of inspection exists under a contract of sale;¹⁴ whether a buyer of a portion of a crop had the right to make inspection and selection of such crop,¹⁵ in accordance with what standard of weight or measure payment should be made;¹⁶ whether a contract of employment was entire or divisible;¹⁷ whether the instrument in question abrogates a pre-existing contract or not,¹⁸ and whether the instrument in question is a binding contract or not.¹⁹ If a contract does not show clearly whether it was to terminate when the charter of the obligor expired, the fact that annual payments were made thereafter is to

See also, *Bunday v. Huntington*, 224 Fed. 847, 140 C. C. A. 415.

⁴ *Pittsburgh Vitrified Paving and Building Brick Co. v. Bailey*, 76 Kan. 42, 12 L. R. A. (N.S.) 745, 90 Pac. 803.

⁵ *Consaul v. Cummings*, 24 D. C. App. 36; *Moore v. Ohio Valley Gas Co.*, 63 W. Va. 455, 60 S. E. 401.

⁶ *Meissner v. Standard Ry. Equipment Co.*, 211 Mo. 112, 109 S. W. 730.

⁷ *Powers v. World's Fair Min. Co.*, 10 Ariz. 5, 86 Pac. 15.

⁸ *Webster v. Clark*, 34 Fla. 637, 43 Am. St. Rep. 217, 27 L. R. A. 126, 16 So. 601.

⁹ *In re Thomas*, 231 Fed. 513.

¹⁰ *Stewart v. Pierce*, 116 Ia. 733, 89 N. W. 234.

¹¹ *Clark v. Sayers*, 55 W. Va. 512, 47 S. E. 312.

¹² *Leavitt v. Improvement Co.*, 54 Fed. 439.

¹³ *Borden v. Fletcher's Estate*, 131 Mich. 220, 91 N. W. 145.

¹⁴ *Mitau v. Roddan*, 149 Cal. 1, 6 L. R. A. (N.S.) 275, 84 Pac. 145.

¹⁵ *Mitau v. Roddan*, 149 Cal. 1, 6 L. R. A. (N.S.) 275, 84 Pac. 145.

¹⁶ *Trapp v. Conley (Ky.)*, 28 Ky. Law Rep. 475, 89 S. W. 514.

¹⁷ *Powell v. Russell*, 88 Miss. 549, 41 So. 5.

¹⁸ *Jenkins v. Jensen*, 24 Utah 108, 91 Am. St. Rep. 783, 66 Pac. 773.

¹⁹ *Kling v. Bordner*, 65 O. S. 86, 61 N. E. 148.

be considered as showing that the parties did not intend that the contract should terminate then.²⁰ The conduct of the parties to a contract for the sale of automobiles may be considered in determining whether the party who agreed to take automobiles had bound himself to take more than enough to fill orders.²¹ A contract by which A permitted a railway company to make use of a branch track to A's coal mine for all purposes except "coal mine," is so far ambiguous that the practical construction of the parties may be considered in determining whether the railway company may transport coal which was not mined by A over such track in either direction.²² In some states, where it is doubtful whether a signature was intended to bind the agent or the principal, the subsequent conduct of the parties may be relied upon to show that it was intended to bind the principal and not the agent.²³

If a charter of a street railway company, which consists of a special statute, contains contractual provisions, the practical construction which is placed upon such charter by the city and the street railway company may control, even if the courts would have construed it differently but for such practical construction.²⁴ So a city ordinance, if a contract, may be construed in the light of the practical construction placed thereon by the parties.²⁵ If the parties have entered into two or more contracts with reference to the same general subject-matter, and in such contracts they have used language which is substantially identical, the practical construction which is placed by the parties upon one of the contracts is to be considered in determining the construction of the other contract.²⁶ If, however, the contracts do not deal with a similar subject-matter, or if the terms of the contracts are different, the construction which the parties have placed upon one contract will not affect the meaning of the other contract.²⁷

The practical construction which the parties have placed upon a contract is to be considered only if the contract is ambiguous.²⁸

²⁰ *Arlington Hotel Co. v. Rector*, 124 Ark. 90, 186 S. W. 622.

²¹ *Nicholls v. Wetmore*, 174 Ia. 132, 156 N. W. 319.

²² *Sholl v. Peoria & P. U. Ry. Co.*, 276 Ill. 267, 114 N. E. 529.

²³ *State v. Cass County*, 60 Neb. 566, 83 N. W. 733.

²⁴ *New York v. New York Ry. Co.*, 193 N. Y. 543, 86 N. E. 565.

²⁵ *Vincennes v. Gaslight Co.*, 132 Ind. 114, 16 L. R. A. 485, 31 N. E. 573.

²⁶ *Ceballos v. United States*, 214 U. S. 47, 53 L. ed. 904.

²⁷ *Furman v. Feibleman & Lehman Co.*, 88 N. J. L. 711, 96 Atl. 886.

²⁸ *Alabama. Twin Tree Lumber Co. v. Ensign*, 193 Ala. 113, 69 So. 525.

Kansas. Autem v. Mayer Coal Co., 98 Kan. 379, 158 Pac. 13.

If the contract is clear and free from ambiguity, the evident intention of the parties as manifest therein must be followed, although it is contrary to the practical construction which the parties have put upon such contract,²⁹ even if such practical construction has been acquiesced in for a long period of time.³⁰ Even if parts of the contract are ambiguous, the practical construction of the parties can not be considered if the contract taken as a whole is clear.³¹

The conduct of the parties which is relied upon as showing the practical construction which they have placed upon the contract, must of itself be harmonious, uniform and free from ambiguity.³²

Pennsylvania. Sternbergh v. Brock, 225 Pa. St. 279, 24 L. R. A. (N.S.) 1078, 74 Atl. 166; Tustin v. Philadelphia & Reading Coal & Iron Co., 250 Pa. St. 425, 95 Atl. 595.

Virginia. Dillard v. Jefferies, 118 Va. 81, 86 S. E. 844.

Washington. Bartlett Estate Co. v. Fairhaven Land Co., 49 Wash. 58, 15 L. R. A. (N.S.) 590, 94 Pac. 900; Blanck v. Pioneer Mining Co., 93 Wash. 26, 159 Pac. 1077.

²⁹ **United States.** Philadelphia, etc., Ry. v. Trimble, 77 U. S. (10 Wall.) 367, 19 L. ed. 948; Davis v. Shafer, 50 Fed. 764; Cold Blast Transportation Co. v. Nut Co., 114 Fed. 77, 57 L. R. A. 696, 52 C. C. A. 25; Lesamis v. Greenberg, 225 Fed. 449, 140 C. C. A. 481.

Alabama. Gadsden, etc., Ry. v. Improvement Co., 128 Ala. 510, 29 So. 549; Twin Tree Lumber Co. v. Ensign, 193 Ala. 113, 69 So. 525.

California. Pierce v. Merrill, 128 Cal. 464, 79 Am. St. Rep. 56, 61 Pac. 64.

Illinois. Ingraham v. Mariner, 194 Ill. 269, 62 N. E. 609; Sholl v. Peoria & P. U. Ry. Co., 276 Ill. 267, 114 N. E. 529; Western Railway Equipment Co. v. Iron Co., 91 Ill. App. 28.

Indiana. Diamond Plate Glass Co. v. Tennell, 22 Ind. App. 132, 52 N. E. 168.

Iowa. Comptograph Co. v. Burroughs Adding Machine Co., 179 Ia. 83, 159 N. W. 465.

Kansas. Autem v. Mayer Coal Co., 98 Kan. 379, 158 Pac. 13.

Massachusetts. Menage v. Rosenthal, 175 Mass. 358, 56 N. E. 579.

Minnesota. St. Paul, etc., Ry. v. Blackmar, 44 Minn. 514, 47 N. W. 172.

Missouri. Meissner v. Standard Ry. Equipment Co., 211 Mo. 112, 109 S. W. 730; C. D. Smith Drug Co. v. Saunders, 70 Mo. App. 221.

Oregon. Howell v. Johnson, 38 Or. 571, 64 Pac. 659.

Pennsylvania. Sternbergh v. Brock, 225 Pa. St. 279, 24 L. R. A. (N.S.) 1078, 74 Atl. 166.

South Carolina. Fass v. Atlantic Life Insurance Co., 105 S. Car. 107, 89 S. E. 558.

Vermont. Arnold v. Farr, 61 Vt. 444, 17 Atl. 1004.

Washington. Bartlett Estate Co. v. Fairhaven Land Co., 49 Wash. 58, 15 L. R. A. (N.S.) 590, 94 Pac. 900; Blanck v. Pioneer Mining Co., 93 Wash. 26, 159 Pac. 1077.

³⁰ **Northeastern Ry. v. Hastings** [1900], App. Cas. 260, 69 L. J. Ch. N. S. 516, 82 L. T. 429. (Here a construction placed upon a continuous contract for forty years was disregarded.)

³¹ **Lesamis v. Greenberg**, 225 Fed. 449, 140 C. C. A. 481.

³² **Ingraham v. Mariner**, 194 Ill. 269, 62 N. E. 609; *State, ex rel., v. Water Supply Co.*, 19 N. M. 36, L. R. A.

Vague, general and ambiguous conversations between the parties are of little weight in ascertaining the practical construction which they have placed upon the contract.³³ If the conduct of one party shows that he has placed one construction upon the contract, while the conduct of the other party shows that he has placed a different construction on the contract, such conduct is of no value in determining the meaning of the contract.³⁴

In order to amount to a practical construction of a contract, the conduct upon which reliance is had must be the conduct of the parties to the contract or of parties who are personally interested therein; and it must be the conduct of those who are cognizant of the actual intention of the parties.³⁵ The acquiescence of certain consumers can not bind others as to the proper construction of the power of a water company to make rules.³⁶ Failure of a public corporation to object to a rule made by a water company which imposes a burden upon consumers, does not amount to a practical construction of such contract.³⁷

Little if any weight can be given to a practical construction adopted by the successors in office of the public officers who made the contract on behalf of the city.³⁸

§ 2035. Practical construction distinguished from new contract. In some of the cases in which the practical construction of the parties has been considered, the words and the conduct of the parties suggest a new contract almost as much as they suggest a construction of an existing contract.¹ The acceptance by one party of the interpretation which the adversary party places upon a contract, is treated as an agreement as to the meaning of the contract which will be binding upon both.² The practical con-

1915A, 246, 140 Pac. 1059; *Ellis v. Stone*, 21 N. M. 730, L. R. A. 1916F, 1228, 158 Pac. 480.

³³ *Ingraham v. Mariner*, 194 Ill. 269, 62 N. E. 609.

³⁴ *Ellis v. Stone*, 21 N. M. 730, L. R. A. 1916F, 1228, 158 Pac. 480.

³⁵ *State, ex rel., v. Water Supply Co.*, 19 N. M. 36, L. R. A. 1915A, 246, 140 Pac. 1059.

³⁶ *State, ex rel., v. Water Supply Co.*, 19 N. M. 36, L. R. A. 1915A, 246, 140 Pac. 1059.

³⁷ *State, ex rel., v. Water Supply Co.*,

19 N. M. 36, L. R. A. 1915A, 246, 140 Pac. 1059.

³⁸ *Cincinnati v. Coke Co.*, 53 O. S. 278, 41 N. E. 239 [reversing, 8 Ohio C. C. 429, 6 Ohio C. D. 278].

¹ *Birmingham Waterworks Co. v. Hernandez*, 196 Ala. 438, 71 So. 443; *Mark v. Stuart-Holland Co.*, 226 Mass. 35, 115 N. E. 42.

For an example of a new contract, see *Shopper Publishing Co. v. Skat Co.*, 90 Conn. 317, 97 Atl. 317.

² *Mark v. Stuart-Holland Co.*, 226 Mass. 35, 115 N. E. 42; *Shopper Pub-*

struction which is put upon a contract by the parties is to be regarded, however, as distinct from evidence tending to show the existence of a new contract.³

The difference between the practical construction of a contract by the acts and conduct of the parties and a new contract between the parties, either expressly or by fair implication, consists in the fact that if the question is one of construction, the construction thus placed upon the contract must be one of which in its original form it is fairly susceptible, while if the parties have entered into a new contract, a modification of the terms of the original contract is the very purpose for which they enter into the new contract. Evidence of the practical construction which the parties have placed upon a contract is admissible only when the contract is ambiguous.⁴ Evidence of a new contract, on the other hand, is admissible without any reference to the ambiguity of the original contract.⁵ Such evidence is a mere aid in construction and it is not governed by the rules such as the Statute of Frauds, which would have applied to the formation of the contract originally, or to the discharge of the contract by a new contract. Accordingly, if the question is one of construction, no particular form or means of proof is necessary, while if the transaction amounts to a new contract, the rules as to form of the contract, method of proof, and the like, which would apply to the original contract, may apply to the new contract,⁶ or it may be necessary that such new contract should be executed in some specified form in order to operate as a discharge of the original contract.⁷

§ 2036. Actual intention as affecting construction. Whether the intention of the parties which the courts are to ascertain is the intention which the particular parties to the contract actually entertained as a matter of fact or whether it is the standardized intention which the law would say that the ordinarily reasonable man would attach to the words of the contract under the circumstances of the particular case, is a question which is occasionally presented for adjudication. In the great majority of cases there is nothing to show that the parties to the contract used language

Lishing Co. v. Skat Co., 90 Conn. 317, 97 Atl. 317.

See also, *Snead v. Merchants' Loan & Trust Co.*, 225 Ill. 442, 9 L. R. A. (N.S.) 1007, 80 N. E. 237.

³*Lesamis v. Greenberg*, 225 Fed. 449,

140 C. C. A. 481; *Sholl v. Peoria & P. U. Ry. Co.*, 276 Ill. 267, 114 N. E. 529.

⁴See § 2034, this section.

⁵See §§ 2447 et seq.

⁶See §§ 2462 et seq.

⁷See §§ 2461 et seq.

in any way different from that in which the ordinarily reasonable man would use such language in connection with that subject-matter and under the circumstances of the particular case. Occasionally, however, one or both parties have attached a special meaning to the terms of the contract and the courts are obliged to determine how far the special meaning which the parties have attached must be recognized and given full effect. If a contract is plain and unambiguous, it is said that the parties who execute such contract are presumed to know its legal effect.¹ If a promise is so ambiguous as to be susceptible of more than one interpretation and the promisor knows which of these possible meanings the promisee attaches to the promise, that meaning will be adopted by the court in construing the contract.² The same rule applies where the promisor has reason to suppose that the promisee understands the ambiguous promise in a particular sense.³ Neither party can

¹ **Batesville Cotton Oil Co. v. Southern Ry. Co.**, 103 S. Car. 494, 88 S. E. 360; **Klock Produce Co. v. Robertson**, 90 Wash. 260, 155 Pac. 1044.

² **United States. American Loan & Trust Co. v. Ry.**, 47 Fed. 343; **Allen-West Commission Co. v. Patillo**, 90 Fed. 628, 33 C. C. A. 194.

Colorado. Fearnley v. Fearnley, 44 Colo. 417, 98 Pac. 819.

Georgia. Reeves v. Daniel, 143 Ga. 569, 85 S. E. 756.

Illinois. Snead v. Merchants' Loan & Trust Co., 225 Ill. 442, 9 L. R. A. (N.S.) 1007, 80 N. E. 237.

Iowa. Chicago Lumber Co. v. Mfg. Co., 80 Ia. 369, 45 N. W. 893; **Wood v. Allen**, 111 Ia. 97, 82 N. W. 451.

Michigan. Manley v. Saunders, 27 Mich. 347.

Montana. Blankenship v. Decker, 34 Mont. 292, 85 Pac. 1035.

Nebraska. Flory v. Supreme Tribe, 98 Neb. 160, 152 N. W. 295; **Schroeder v. Nielson**, 39 Neb. 335, 57 N. W. 993; **Patterson v. First National Bank**, 78 Neb. 228, 110 N. W. 721.

New Jersey. Empire Rubber Mfg. Co. v. Morris, 73 N. J. L. 602, 65 Atl. 450.

New York. Barlow v. Scott, 24 N. Y. 40; **Hoffman v. Ins. Co.**, 32 N. Y. 405, 413, 88 Am. Dec. 337.

North Carolina. Kendrick v. Ins. Co., 124 N. Car. 315, 70 Am. St. Rep. 592, 32 S. E. 728.

Oklahoma. American Soda Fountain Co. v. Gerrer's Bakery, 14 Okla. 258, 73 Pac. 115.

West Virginia. McNeer v. Chesapeake & O. Ry. Co., 76 W. Va. 803, 86 S. E. 887.

See also, **Newburger-Morris Co. v. Talcott**, 219 N. Y. 505, 3 A. L. R. 287, 114 N. E. 846. In some states, as in Iowa, this rule has been enacted as a statute.

³ **North Carolina. Kendrick v. Ins. Co.**, 124 N. Car. 315, 70 Am. St. Rep. 592, 32 S. E. 728.

Delaware. Weishut v. Layton, 5 Del. 364, 93 Atl. 1057.

Montana. Blankenship v. Decker, 34 Mont. 292, 85 Pac. 1035.

Nebraska. Flory v. Supreme Tribe, 98 Neb. 160, 152 N. W. 295; **Richey v. Omaha & L. Ry. & Light Co.**, 100 Neb. 847, 161 N. W. 575.

West Virginia. McNeer v. Chesapeake & O. Ry. Co., 76 W. Va. 803, 86 S. E. 887.

rely upon the representations of the other as to the legal effect of such instrument.⁴ The secret intention of one of the parties can not control the construction of the contract.⁵ A contract to deliver first government grade New Zealand creamery butter by government certificate attached, means a first grade of butter as inspected and certified by an inspector of the New Zealand government.⁶ On the other hand, the object of construction is to ascertain the intention of the parties,⁷ and it is frequently said that the court must consider what the parties mutually understood to be the meaning of the language which they used.⁸ This rule applies to express contracts as well as to implied ones,⁹ and to written contracts as well as to oral ones.¹⁰ A letter is to be construed, if possible, in the sense in which the writer must have known that the recipient would understand it.¹¹ It is said not to apply to mere negotiations as distinguished from offers intended on acceptance to become contracts.¹² If the promisor interprets the contract before the promisee has accepted it, or before a formal contract has been signed, the parties are bound by the interpretation thus given.¹³ A case of this sort presents features which resemble the modification of the offer or of the original contract fully as much as the construction of a contract. If A employs technical terms in a contract, but he has reason to believe that B understands that such terms have their non-technical meaning, the court will give such terms a non-technical meaning, although without such mis-

See also, *Newburger-Morris Co. v. Talcott*, 219 N. Y. 505, 3 A. L. R. 287, 114 N. E. 846.

⁴ *Batesburg Cotton Oil Co. v. Southern Ry. Co.*, 103 S. Car. 494, 88 S. E. 360. See §§ 394 et seq.

⁵ *Rouss v. Creglow*, 103 Ia. 60, 72 N. W. 429; *Newcomb v. Kloeblen*, 77 N. J. L. 791, 39 L. R. A. (N.S.) 724, 74 Atl. 511; *Harney v. Wirtz*, 30 N. D. 292, 152 N. W. 803; *McGarry v. Superior Portland Cement Co.*, 95 Wash. 412, 163 Pac. 928.

⁶ *Klock Produce Co. v. Robertson*, 90 Wash. 260, 155 Pac. 1044.

⁷ See § 2021.

⁸ *Davis v. Patrick*, 141 U. S. 479, 35 L. ed. 826; *Orvis v. British-American Cotton Co.*, 242 Fed. 835; *Mobile County v. Lynch*, — Ala. —, 73 So. 423;

Jones & Laughlin Steel Co. v. Graham, 273 Ill. 377, 112 N. E. 967.

"In the interpretation of contracts * * * regard must be given to the intention of the parties and their version of its meaning." *Hairston v. Hill*, 118 Va. 339, 87 S. E. 573.

⁹ *Lull v. Bank*, 110 Ia. 537, 81 N. W. 784.

¹⁰ *Cobb v. McElroy*, 79 Ia. 603, 44 N. W. 824; *Hill v. Hart*, 23 N. M. 226, 167 Pac. 710.

¹¹ *Empire Rubber Mfg. Co. v. Morris*, 73 N. J. L. 602, 65 Atl. 450.

¹² *Patton v. Arney*, 95 Ia. 664, 64 N. W. 635.

¹³ *Snead v. Merchants' Loan & Trust Co.*, 225 Ill. 442, 9 L. R. A. (N.S.) 1007, 80 N. E. 237.

understanding on the part of B the technical meaning would have been adopted.¹⁴ The actual understanding of one of the parties with reference to the time of performance which was known to the other, has been considered when the contract is final as to the time,¹⁵ although such evidence was introduced on the theory that it tended to show what was a reasonable time for performance.¹⁶ If the contract calls for performance which is to be satisfactory to one of the parties, evidence of the actual understanding of what might be necessary for complete performance is admissible if known to the adversary party.¹⁷ If it is fairly doubtful whether an instrument was intended as an option or as a complete contract, the fact that one party expended a considerable amount of labor and capital in reliance thereon and to the knowledge of the adversary party is to be regarded as tending to show that the transaction created a contract and not an option.¹⁸ A statutory provision to the effect that if the terms of an agreement have been intended in a different sense by the parties thereto that sense is to prevail against either party in which he had reason to suppose that the party understood it, has been held not to apply to a contract which is so worded as to be plain and unambiguous.¹⁹ A contract is said to be ambiguous only when a person of competent skill and information would regard it as ambiguous.²⁰ If an instrument purports to be a chattel mortgage, the secret intention of the mortgagee that it should also apply to realty can not affect its meaning.²¹ The rule that the meaning which one party attaches to a contract and which the other party knows that he attaches, is regarded as the true meaning, has been laid down without the qualification that the contract must be ambiguous.²² It is quite likely, however, that the court regarded either of such constructions as fairly capable of being drawn from the language which was used. If a principal gives

¹⁴ *Richey v. Omaha & L. Ry. & Light Co.*, 100 Neb. 847, 161 N. W. 575.

¹⁵ *United Iron Works v. Wagner*, 89 Wash. 293, 154 Pac. 460.

¹⁶ *United Iron Works v. Wagner*, 89 Wash. 293, 154 Pac. 460.

¹⁷ *Janssen v. Muller*, 38 S. D. 611, 162 N. W. 393.

¹⁸ *Hairston v. Hill*, 118 Va. 339, 87 S. E. 573.

¹⁹ *Rouss v. Creglow*, 103 Ia. 60, 72 N. W. 429; *Peterson v. Modern Brotherhood*, 125 Ia. 562, 67 L. R. A. 631,

101 N. W. 289; *Inman Mfg. Co. v. American Cereal Co.*, 133 Ia. 71, 12 Ann. Cas. 387, 8 L. R. A. (N.S.) 1140, 110 N. W. 287; *Comptograph Co. v. Burroughs Adding Machine Co.*, 179 Ia. 83, 159 N. W. 465.

²⁰ *Comptograph Co. v. Burroughs Adding Machine Co.*, 179 Ia. 83, 159 N. W. 465.

²¹ *Harney v. Wirtz*, 30 N. D. 292, 152 N. W. 803.

²² *Reeves v. Daniel*, 143 Ga. 569, 85 S. E. 756.

ambiguous instructions to his agent and the agent adopts one of such instructions and acts thereon, the principal can not disavow the act of the agent, although the principal intended the other meaning to such instructions and although he did not know in advance the meaning which the agent attached to such instructions.²³ The power of the court to ascertain the true intention of the parties as distinguished from the intention of the parties as evidenced from the words of the contract, is limited in case of written contracts by the parol evidence rule which is discussed subsequently.²⁴ If the parties have entered into a valid oral contract and in reducing such contract to writing the contract as written fails to express the true intention of the parties, as evidenced by their oral contract, the right of the party who is injured by such mistake in expression depends upon his right to reformation in equity,²⁵ or in some cases it is his right to avoid the contract entirely for fraud or mistake.²⁶ If the contract as reduced to writing is unambiguous, a court of law can give no relief under guise of construction.²⁷ If the other party does not know of the construction placed upon the contract, the understanding of the one party has no legal effect.²⁸ Thus where A's attorney drew the contract and A directed its phraseology, but by inadvertence of counsel it was so worded that B's understanding was *prima facie* expressed, though it might possibly have been consistent with A's meaning, A's intention can not control.²⁹ If the meaning of the contract is clear, the understanding of one party as to its meaning does not affect its construction,³⁰ unless it operates as estoppel by inducing the other party to act.³¹

§ 2037. Priority of clauses. A rule sometimes laid down, though rarely observed, is that in case of conflict between two

²³ Ireland v. Livingston [1871], L. R. 5 H. L. 395; Very v. Levy, 54 U. S. (13 How.) 345, 14 L. ed. 173; Winne v. Niagara Fire Ins. Co., 91 N. Y. 185; Maidment v. Frazier, 90 Vt. 520, 98 Atl. 987.

²⁴ See §§ 2137 et seq.

²⁵ See §§ 2211 et seq.

²⁶ See §§ 223 et seq.

²⁷ See § 2065.

²⁸ Dobbins v. Cragin, 50 N. J. Eq. 640, 23 Atl. 172; Newcomb v. Kloeblen, 77

N. J. L. 791, 39 L. R. A. (N.S.) 724, 74 Atl. 511.

²⁹ Dobbins v. Cragin, 50 N. J. Eq. 640, 23 Atl. 172.

³⁰ Crass v. Scruggs, 115 Ala. 258, 22 So. 81; Rouss v. Creglow, 103 Ia. 60, 72 N. W. 429; Peterson v. Modern Brotherhood, 125 Ia. 562, 67 L. R. A. 631, 101 N. W. 289; Comptograph Co. v. Burroughs Adding Machine Co., 179 Ia. 83, 159 N. W. 465.

³¹ Crass v. Scruggs, 115 Ala. 258, 22 So. 81.

clauses that first in place is to control,¹ at least if the first clause is in harmony with the rest of the contract.² This rule has little to recommend, as a contract is entered into as an entirety and not word by word. It is used to justify meanings reached by the application of other principles of construction, and its practical value is slight. It is said that the rule that the first of two irreconcilable clauses shall prevail is "a rule of last resort to be applied only 'when all reasonable modes of reconciling the apparent repugnancy have failed.'"³ This rule is also subordinate to the rule that the intention of the parties deduced from the entire instrument is to prevail over the apparent intention of the separate parts of the instrument.⁴ This rule will yield to a statutory provision to the effect that the written part of an instrument shall prevail over the printed part.⁵

§ 2038. Contract construed as a whole. Since the object of construction is to ascertain the intention of the parties, the contract must be considered as an entirety. The problem is not what the separate parts of the contract mean, but what the contract means when considered as a whole.¹ The separated parts of a contract have but little weight when compared with the contract taken as

¹ *Vickers v. Electrozone Commercial Co.*, 67 N. J. L. 665, 52 Atl. 467; *Brady v. Carolina Steel Bridge & Construction Co.*, 76 S. Car. 297, 56 S. E. 964; *Smith v. Clinkscals*, 102 S. Car. 227, 85 S. E. 1064; *Wisconsin, etc., Bank v. Wilkin*, 95 Wis. 111, 60 Am. St. Rep. 86, 69 N. W. 354.

² *Brady v. Carolina Steel Bridge & Construction Co.*, 76 S. Car. 297, 56 S. E. 964.

³ *Smith v. Clinkscals*, 102 S. Car. 227, 85 S. E. 1064 [quoting, *Bowman v. Lobe*, 14 Rich. Eq. (S. Car.) 271].

⁴ *Smith v. Clinkscals*, 102 S. Car. 227, 85 S. E. 1064. See § 2038.

⁵ *Urbany v. Carroll*, 176 Ia. 217, 157 N. W. 852.

¹ *United States*. *O'Brien v. Miller*, 168 U. S. 287, 42 L. ed. 469; *United States v. Utah, Nevada and California Stage Co.*, 199 U. S. 414, 50 L. ed. 251; *Leschen & Sons Rope Co. v. Mayflower*

Gold Min. & R. Co., 173 Fed. 855, 97 C. C. A. 465, 35 L. R. A. (N.S.) 1; *Merrill-Ruckgaber Co. v. United States*, 49 Ct. Cl. 553; *Ackerlind v. United States*, 49 Ct. Cl. 635; *P. Sanford Ross, Inc., v. United States*, 50 Ct. Cl. 168; *Hongkong & Whampoa Dock Co., Ltd., v. United States*, 50 Ct. Cl. 213.

Alabama. *Brush, etc., Co. v. Montgomery*, 114 Ala. 433, 21 So. 960.

Arkansas. *Mississippi Home Insurance Co. v. Adams*, 84 Ark. 431, 106 S. W. 209; *Irwin v. Nichols*, 87 Ark. 97, 112 S. W. 209; *Arlington Hotel Co. v. Rector*, 124 Ark. 90, 186 S. W. 622.

Colorado. *Sterling v. Hurd*, 44 Colo. 436, 98 Pac. 174.

Illinois. *Siegel, etc., Co. v. Colby*, 176 Ill. 210, 52 N. E. 917 [affirming, 61 Ill. App. 315]; *McLean County Coal Co. v. Bloomington*, 234 Ill. 90, 84 N. E. 624.

Iowa. *Sinclair v. National Surety Co.*, 132 Ia. 549, 107 N. W. 184; *Leath-*

a whole.² A contract must be thus construed even if the separate parts are clear and free from ambiguity.³ Thus the name given by the parties to the contract is not conclusive, and if, considering

ers v. Geitz, 135 Ia. 145, 124 Am. St. Rep. 263, 112 N. W. 191.

Kentucky. Chicago Veneer Co. v. Anderson (Ky.), 105 S. W. 108, 32 Ky. Law Rep. 7.

Louisiana. Tete v. Lanaux, 45 La. Ann. 1343, 14 So. 241; St. Landry State Bank v. Meyer, 52 La. Ann. 1769, 28 So. 136.

Maine. Bell v. Jordan, 102 Me. 67, 65 Atl. 759.

Massachusetts. Morrill & Whiton Construction Co. v. Boston, 186 Mass. 217, 71 N. E. 550; New England Cotton Yarn Co. v. Laurel Lake Mills, 190 Mass. 48, 112 Am. St. Rep. 309, 76 N. E. 231.

Michigan. Thomson Electric Welding Co. v. Peerless Wire Fence Co., 190 Mich. 496, 157 N. W. 67.

Nebraska. Ballou v. Sherwood, 32 Neb. 666, 49 N. W. 790, 50 N. W. 1131; Jackson v. Phillips, 57 Neb. 189, 77 N. W. 683.

New Jersey. Ohism v. Schipper, 51 N. J. L. 1, 14 Am. St. Rep. 668, 2 L. R. A. 544, 16 Atl. 316; Monmouth Park Association v. Iron Works, 55 N. J. L. 132, 39 Am. St. Rep. 626, 19 L. R. A. 456, 26 Atl. 140.

New Mexico. Ellis v. Stone, 21 N. M. 730, L. R. A. 1916F, 1228, 158 Pac. 480.

New York. Sattler v. Hallock, 160 N. Y. 291, 73 Am. St. Rep. 686, 46 L. R. A. 679, 54 N. E. 667; First National Bank v. Jones, 219 N. Y. 312, 114 N. E. 349.

North Carolina. Wilkie v. New York Mutual Life Insurance Co., 146 N. Car. 513, 60 S. E. 427; Atlantic & N. C. R. Co. v. Atlantic & N. C. Co., 147 N. Car. 368, 125 Am. St. Rep. 550, 61 S. E. 185; Lewis v. May, 173 N. Car. 100, 91 S.

E. 691; Ollis v. Drexel Furniture Co., 173 N. Car. 542, 92 S. E. 371.

North Dakota. Elliott Supply Co. v. Green, 35 N. D. 641, 160 N. W. 1002.

Ohio. German Fire Ins. Co. v. Roost, 55 O. S. 581, 60 Am. St. Rep. 711, 36 L. R. A. 236, 45 N. E. 1097.

Oklahoma. Gilfillan v. Bartlesville, 46 Okla. 428, 148 Pac. 1012; Brown v. Coppage, 54 Okla. 88, 153 Pac. 817.

Oregon. Corvallis & A. R. R. Co. v. Portland, E. & E. Ry. Co., 84 Or. 524, 163 Pac. 1173.

South Carolina. Smith v. Clink-scales, 102 S. Car. 227, 85 S. E. 1064.

Tennessee. Arbuckle v. Kirkpatrick, 98 Tenn. 221, 60 Am. St. Rep. 854, 36 L. R. A. 285, 39 S. W. 3; McKay v. Louisville & N. R. Co., 133 Tenn. 590, 182 S. W. 874.

Texas. Cook v. Smith, 107 Tex. 119, 3 A. L. R. 940, 174 S. W. 1094.

Utah. McKay v. Barnett, 21 Utah 239, 50 L. R. A. 371, 60 Pac. 1100; Sterling v. Head Camp, Pacific Jurisdiction. Woodmen of the World, 28 Utah 526, 80 Pac. 1110.

Washington. Erickson v. Green, 47 Wash. 613, 92 Pac. 449; Hunter v. Wenatchee Land Co., 50 Wash. 438, 97 Pac. 494; Tacoma Mill Co. v. Northern Pacific Ry. Co., 89 Wash. 187, 154 Pac. 173.

West Virginia. Carnegie Natural Gas Co. v. South Penn Oil Co., 56 W. Va. 402, 49 S. E. 548.

Wisconsin. Kentzler v. Accident Association, 88 Wis. 589, 43 Am. St. Rep. 934, 60 N. W. 1002.

² Tacoma Mill Co. v. Northern Pacific Ry. Co., 89 Wash. 187, 154 Pac. 173.

³ O'Brien v. Miller, 168 U. S. 287, 42 L. ed. 469; New England Cotton Yarn Co. v. Laurel Lake Mills, 190 Mass. 48, 112 Am. St. Rep. 309, 76 N. E. 231.

it as a whole, it is evidently an instrument of a sort different from that which the parties have called it, it must be treated as what it is and not what it is called.⁴ If the character of the contract is clear, the fact that it is called a "guaranty" does not alter its legal character.⁵ Thus an instrument called a "special selling factor appointment" may be construed as a contract of sale,⁶ or an instrument called a lease may be construed as a conditional sale, the title being reserved for security.⁷ So money paid by an insurer to an insured equal in amount to the loss under the policy may be construed as payment, though it was called a "loan" by the contract under which it was paid, which provided that so much thereof as might be recovered from the carrier, whose liability for the loss was then under investigation, should be repaid by the insured to the insurer.⁸ So the fact that the language used in the instrument under consideration is in part appropriate and peculiar to a certain kind of instrument is not of itself conclusive that the instrument is of that kind.⁹

§ 2039. General paramount intent controls special intent. The contract being construed as a whole, it follows that one part of it may affect the construction of a different part.¹ An illustration of

⁴ **United States.** *Hervey v. Locomotive Works*, 93 U. S. 664, 23 L. ed. 1003; *Herryford v. Davis*, 102 U. S. 235, 244, 26 L. ed. 160.

California. *Stockton Savings Society v. Purvis*, 112 Cal. 236, 53 Am. St. Rep. 210, 44 Pac. 561.

Mississippi. *Dederick v. Wolfe*, 68 Miss. 500, 24 Am. St. Rep. 283, 9 So. 350.

Missouri. *Simpson v. Van Laningham*, 267 Mo. 286, 183 S. W. 324.

Tennessee. *Singer Mfg. Co. v. Cole*, 72 Tenn. (4 Lea) 439, 40 Am. Rep. 20; *Cowan v. Mfg. Co.*, 92 Tenn. 376, 21 S. W. 603; *Arbuckle v. Kirkpatrick*, 98 Tenn. 221, 60 Am. St. Rep. 854, 36 L. R. A. 285, 39 S. W. 3.

⁵ *Simpson v. Van Laningham*, 267 Mo. 286, 183 S. W. 324.

⁶ *Arbuckle v. Kirkpatrick*, 98 Tenn. 221, 60 Am. St. Rep. 854, 36 L. R. A. 285, 39 S. W. 3.

⁷ *Fidelity, etc., Co. v. R. R.*, 86 Va. 1, 19 Am. St. Rep. 858, 9 S. E. 759.

⁸ *Lancaster Mills v. Cotton Press Co.*, 89 Tenn. 1, 24 Am. St. Rep. 586, 14 S. W. 317.

⁹ *Burlington University v. Barrett*, 22 Ia. 60, 92 Am. Dec. 376; *Lauck v. Logan*, 45 W. Va. 251, 31 S. E. 986.

The use of the term "quit-claim" and language appropriate to a quit-claim deed is not conclusive. *Cook v. Smith*, 107 Tex. 119, 3 A. L. R. 940, 174 S. W. 1094.

¹ **United States.** *Chesapeake and Ohio Canal Co. v. Hill*, 82 U. S. (15 Wall.) 94, 21 L. ed. 64; *A. Leschen & Sons Rope Co. v. Mayflower Gold Mining & Reduction Co.*, 173 Fed. 855, 97 C. C. A. 465, 35 L. R. A. (N.S.) 1.

California. *Todd v. Superior Court*, — Cal. —, 184 Pac. 684.

Florida. *Pensacola Gas Co. v. Lotze*, 23 Fla. 368, 2 So. 609.

Minnesota. *Lindley v. Groff*, 37 Minn. 338, 34 N. W. 26.

Mississippi. *Isler v. Isler*, 110 Miss. 419, 70 So. 455.

this is found where the contract as a whole shows a given intention, but certain words or phrases if taken literally will defeat such intention. In such case the particular words or phrases will, if possible, be construed in such a way as to be consistent with the general intention.²

§ 2040. Every part of contract given effect if practicable. The parties have inserted each provision in the contract, and accordingly, if possible, a contract should be so construed as to give effect to each provision inserted therein.¹ A part of a contract will not be ignored as inconsistent with the general intent if by reasonable method of interpretation effect can be given to such part of the

Nebraska. Ballou v. Sherwood, 32 Neb. 666, 49 N. W. 790, 50 N. W. 1131.

New Jersey. Chism v. Schipper, 51 N. J. L. 1, 14 Am. St. Rep. 668, 2 L. R. A. 544, 16 Atl. 316.

North Dakota. Harney v. Wirtz, 30 N. D. 292, 152 N. W. 803.

South Dakota. Finke v. Finke, 37 S. D. 46, 156 N. W. 595.

Utah. Daly v. Old, 35 Utah 74, 28 L. R. A. (N.S.) 463, 99 Pac. 460.

Wisconsin. Smith v. Merrill, 134 Wis. 227, 114 N. W. 508.

² **United States.** United States v. Utah, Nevada and California Stage Co., 199 U. S. 414, 50 L. ed. 251; Succession of Serralles v. Esbri, 200 U. S. 103, 50 L. ed. 391; Rockefeller v. Merritt, 76 Fed. 909, 35 L. R. A. 633, 22 C. C. A. 608; Speed v. Ry., 86 Fed. 235, 30 C. C. A. 1; Erickson v. United States, 107 Fed. 204; Leschen & Sons Rope Co. v. Mayflower Gold Min. & R. Co., 173 Fed. 855, 97 C. C. A. 465, 35 L. R. A. (N.S.) 1.

California. Stockton Savings Society v. Purvis, 112 Cal. 236, 53 Am. St. Rep. 210, 44 Pac. 561; Todd v. Superior Court. — Cal. —, 184 Pac. 684.

Illinois. Seaver v. Thompson, 189 Ill. 158, 59 N. E. 553; Whalen v. Stephens, 193 Ill. 121, 61 N. E. 921 [affirming, 92 Ill. App. 235].

Indiana. Kennedy v. Kennedy, 150 Ind. 636, 50 N. E. 756.

Kansas. Garden City v. Heller, 61 Kan. 767, 60 Pac. 1060.

Minnesota. Sprague Electric Co. v. Hennepin County, 83 Minn. 262, 86 N. W. 332; Lawton v. Joesting, 96 Minn. 163 [sub nomine, Security Trust Co. v. Joesting, 104 N. W. 830].

Mississippi. Isler v. Isler, 110 Miss. 419, 70 So. 455.

New Jersey. Chism v. Schipper, 51 N. J. L. 1, 14 Am. St. Rep. 668, 2 L. R. A. 544, 16 Atl. 316.

North Dakota. Harney v. Wirtz, 30 N. D. 292, 152 N. W. 803.

Oklahoma. Giffillan v. Bartlesville, 46 Okla. 428, 148 Pac. 1012.

South Dakota. Finke v. Finke, 37 S. D. 46, 156 N. W. 595.

Tennessee. Arbuckle v. Kirkpatrick, 98 Tenn. 221, 60 Am. St. Rep. 854, 36 L. R. A. 285, 39 S. W. 3.

Vermont. Collins v. Lavelle, 44 Vt. 230.

Wisconsin. Smith v. Merrill, 134 Wis. 227, 114 N. W. 508.

¹ **United States.** Guerini Stone Co. v. Carlin Construction Co., 240 U. S. 264, 60 L. ed. 636; Rushing v. Manhattan Life Insurance Co., 224 Fed. 74, 139 C. C. A. 520; Ackerlind v. United States, 49 Ct. Cl. 635; P. Sanford Ross, Inc., v. United States, 50 Ct. Cl. 168.

contract as well as to the remaining parts thereof.² Thus a clause in a building contract providing that no lien should be taken thereunder is not repugnant to a subsequent provision requiring the contractor to show by sufficient evidence that the premises are free of liens.³ A provision in a contract between the principal contractor and a subcontractor for compensation to the subcontractor for damage due to the failure of the general contractor to provide materials, is not rendered inoperative by another provision to the

Alabama. Manchester Sawmills Co. v. Arundel Co., 197 Ala. 505, 73 So. 24.

Arkansas. Arlington Hotel Co. v. Rector, 124 Ark. 90, 186 S. W. 622.

Colorado. Grimes v. Barndollar, 58 Colo. 421, 148 Pac. 256.

Florida. First National Bank v. Ry., 36 Fla. 183, 18 So. 345.

Illinois. McLean County Coal Co. v. Bloomington, 234 Ill. 90, 84 N. E. 624; R. F. Conway Co. v. Chicago, 274 Ill. 369, 113 N. E. 703.

Iowa. Sinclair v. National Surety Co., 132 Ia. 549, 107 N. W. 184; Comptograph Co. v. Burroughs Adding Machine Co., 179 Ia. 83, 159 N. W. 465.

Louisiana. Continental Bank & Trust Co. v. Times Publishing Co., 142 La. 209, L. R. A. 1918B, 632, 76 So. 612.

Michigan. Thomson Electric Welding Co. v. Peerless Wire Fence Co., 190 Mich. 496, 157 N. W. 67; Cutler v. Spens, 191 Mich. 603, 158 N. W. 224.

Mississippi. Home Mutual Fire Insurance Co. v. Pittman, 111 Miss. 420, 71 So. 739.

Missouri. Snoqualmi Realty Co. v. Moynihan, 179 Mo. 629, 78 S. W. 1014.

Nebraska. Lawton v. Fonner, 59 Neb. 214, 80 N. W. 808; McGavock v. Bank, 64 Neb. 440, 90 N. W. 230; Ricketts v. Buckstaff, 64 Neb. 851, 90 N. W. 915.

North Carolina. Makuen v. Elder, 170 N. Car. 510, 87 S. E. 334.

North Dakota. Harney v. Wirtz, 30 N. D. 292, 152 N. W. 803.

Ohio. German Fire Ins. Co. v. Roost, 55 O. S. 581, 60 Am. St. Rep. 711, 36 L. R. A. 236, 45 N. E. 1097.

Oklahoma. Brown v. Coppadge, 54 Okla. 88, 153 Pac. 817; Union Trust Co. v. Shelby Downard Asphalt Co., 55 Okla. 251, 156 Pac. 903.

Oregon. Chrisman v. Ins. Co., 16 Or. 283, 18 Pac. 466.

Pennsylvania. Philadelphia v. River Front R. Co., 133 Pa. St. 134, 19 Atl. 356; Commonwealth, etc., Co. v. Ellis, 192 Pa. St. 321, 73 Am. St. Rep. 816, 43 Atl. 1034.

South Carolina. Smith v. Smith, 33 S. Car. 210, 11 S. E. 761; Smith v. Clinkscales, 102 S. Car. 227, 85 S. E. 1064; Friedheim v. Hildie Co., 104 S. Car. 378, 89 S. E. 358.

South Dakota. Dustin v. Interstate Business Men's Accident Association, 37 S. D. 635, L. R. A. 1917B, 319, 159 N. W. 395.

Utah. McKay v. Barnett, 21 Utah 239, 50 L. R. A. 371, 60 Pac. 1100.

West Virginia. Carnegie Natural Gas Co. v. South Penn Oil Co., 56 W. Va. 402, 49 S. E. 548.

Wisconsin. Polebitzke v. John Week Lumber Co., 163 Wis. 322, 158 N. W. 62.

² Rushing v. Manhattan Life Insurance Co., 224 Fed. 74, 139 C. C. A. 520.

³ Commonwealth, etc., Co. v. Ellis, 192 Pa. St. 321, 73 Am. St. Rep. 816, 43 Atl. 1034.

effect that the subcontractor is not to be liable for liquidated damages if his delay in performance is due to the general contractor.⁴

The rule that every part of the contract must be given effect applies to a contract that is partly written and partly oral.⁵

§ 2041. Headings and marginal annotations as part of contract.

Whether a printed letterhead or billhead is to be regarded as a part of the contract which is written underneath so as to modify the meaning and effect thereof, is a question upon which there has been some conflict of authority. In the greater number of cases it has been held that a billhead or a letterhead is not a part of the contract which is written underneath.¹ In most of the cases in which this result has been reached, however, the terms or conditions which appeared in the letterhead were inserted in such a way that they were not fairly called to the attention of the adversary party and there was no evidence to show that such terms were in fact brought to his notice.² An unqualified acceptance of an offer is not qualified or affected by a provision in the letterhead upon which such acceptance was written to the effect that contracts were contingent upon exigencies of interpretation and accidents beyond the control of the seller.³ A notice on a letterhead that all orders were subject to delays arising from strikes was held not a part of a contract written thereunder.⁴ Terms printed at the head of a bill can not be considered as a waiver of express provisions of the written contract for the sale of such goods, which contract is contained in a letter mailed on the same day as that on which the goods are shipped.⁵

In some jurisdictions the letterhead has been considered in determining the identity of the parties or of the subject-matter if

⁴ *Guerini Stone Co. v. Carlin Construction Co.*, 240 U. S. 264, 60 L. ed. 636.

⁵ *Wood v. Perkins*, 57 Fed. 238.

¹ *Sturm v. Boker*, 150 U. S. 312, 38 L. ed. 1093; *Summers v. Hibbard*, 153 Ill. 102, 46 Am. St. Rep. 872, 38 N. E. 899; *R. J. Menz Lumber Co. v. McNeeley*, 58 Wash. 223, 28 L. R. A. (N.S.) 1007, 108 Pac. 621; *Amherst Investment Co. v. Meacham*, 69 Wash. 284, 124 Pac. 682.

² *Sturm v. Boker*, 150 U. S. 312, 38 L. ed. 1093; *Summers v. Hibbard*, 153

Ill. 102, 46 Am. St. Rep. 872, 38 N. E. 899; *R. J. Menz Lumber Co. v. McNeeley*, 58 Wash. 223, 28 L. R. A. (N.S.) 1007, 108 Pac. 621; *Amherst Investment Co. v. Meacham*, 69 Wash. 284, 124 Pac. 682. See § 112.

³ *R. J. Menz Lumber Co. v. McNeeley*, 58 Wash. 223, 28 L. R. A. (N.S.) 1007, 108 Pac. 621.

⁴ *Summers v. Hibbard*, 153 Ill. 102, 46 Am. St. Rep. 872, 38 N. E. 899.

⁵ *Millhiser v. Erdmann*, 103 N. Car. 27, 9 S. E. 582.

the contract was ambiguous.⁶ In these cases, however, the ambiguity was probably of such a character that extrinsic evidence as well as the letterhead would have been admitted in order to identify the parties or the subject-matter.⁷ If a contract is signed by "A, president," and the body of the letter sometimes uses the pronoun "I" and sometimes the pronoun "we," the heading of the letter which showed the bank of which he was president may be considered for the purpose of determining whether the contract was his personal contract or that of the bank,⁸ and it may be considered for the purpose of relieving A from personal liability upon such contract.⁹ It has been held that a printed heading on an order blank may be looked to to show that the order was taken as a publisher and not as an engraver.¹⁰

It seems to be held that the party to whom the offer was sent may treat the provision in the heading, if it was inserted by the adversary party, as a part of the contract,¹¹ although the party who sent such offer might not have been able to take advantage of the provision in the letterhead which he himself had inserted.¹² If this statement implies that in the one case both parties knew of such provision in the heading and treated it as a part of the contract, while in the second case the party to whom the offer was sent did not know of such provision and, accordingly, it was not to be regarded as a term of the contract for any purpose, no fault can be found with the result. If it is intended as a suggestion that the person to whom an offer is made may take advantage of a term which was not communicated to him in case he discovers such term after he had accepted the offer, while at the same time he would not be bound by such term if he did not wish to take advantage of it, no authority for such result is found in the principles of con-

⁶ *Yorston v. Brown*, 178 Mass. 103, 59 N. E. 654; *Ellis v. Stone*, 21 N. M. 730, L. R. A. 1916F. 1228, 158 Pac. 480.

If a contract written under the letterhead of a railway is signed, A, "general manager," it may be taken as the contract of the railway. *Raleigh & G. R. Co. v. Pullman Co.*, 122 Ga. 700, 50 S. E. 1008.

⁷ *Yorston v. Brown*, 178 Mass. 103, 59 N. E. 654; *Ellis v. Stone*, 21 N. M. 730, L. R. A. 1916F. 1228, 158 Pac. 480.

⁸ *Ellis v. Stone*, 21 N. M. 730, L. R. A. 1916F. 1228, 158 Pac. 480.

⁹ *Ellis v. Stone*, 21 N. M. 730, L. R. A. 1916F. 1228, 158 Pac. 480.

¹⁰ *Yorston v. Brown*, 178 Mass. 103, 59 N. E. 654.

¹¹ *Yorston v. Brown*, 178 Mass. 103, 59 N. E. 654.

¹² *Sturm v. Boker*, 150 U. S. 312, 38 L. ed. 1093. So of provision in bill head. *Schenck v. Saunders*, 79 Mass. (13 Gray) 37.

tract law and the result can be justified, if at all, only on the theory of estoppel; and in the particular case no grounds of estoppel are suggested.

A memorandum which is printed upon the margin is more likely to be brought to the attention of one to whom it is made than a similar provision which is found in a letterhead or billhead. Accordingly, it is generally assumed that a note or memorandum upon the margin of a written contract is to be regarded as a part thereof,¹³ at least if it is written or printed so clearly and legibly that it is brought to the attention of the person to whom the offer is made as fully and completely as are the remaining provisions of such written offer. If A has made an offer to B, and B has replied by sending what purports to be an order for the goods which A had offered, a condition printed on the margin of such offer to the effect that the acceptance of such offer must be acknowledged promptly was to be regarded as a part thereof if it was printed in clear type and if it was as prominent as the written matter contained in the written order.¹⁴ In a number of cases marginal annotations have been ignored;¹⁵ but for special reasons which do not require the rejection of all marginal memoranda merely because they appear on the margin. A memorandum upon the margin may be ignored if it is inconsistent with itself,¹⁶ or if it is uncertain.¹⁷ A specific promise to pay the entire amount on or before a certain date will not be regarded as modified by a marginal memorandum to the effect that certain small amounts "will be paid" on designated dates prior to the date of maturity named in the body of the contract.¹⁸ If a term is set forth in the body of the contract in words and an inconsistent provision appears in the margin in figures, the court has rejected the marginal annotation

¹³ *Franklin Savings Institution v. Reed*, 125 Mass. 365; *Poel v. Brunswick-Balke-Collender Co.*, 216 N. Y. 310, 110 N. E. 619.

¹⁴ *Poel v. Brunswick-Balke-Collender Co.*, 216 N. Y. 310, 110 N. E. 619.

¹⁵ *Massachusetts. Way v. Batchelder*, 129 Mass. 361.

Nebraska. Fisk v. McNeal, 23 Neb. 726, 8 Am. St. Rep. 162, 37 N. W. 616.

New York. B. F. Sturtevant Co. v. Fireproof Film Co., 216 N. Y. 199, L. R. A. 1916D, 1069, 110 N. E. 440.

North Dakota. Union State Bank v. Benson, 38 N. D. 396, L. R. A. 1918C, 345, 165 N. W. 509.

Wisconsin. Krouskop v. Shontz, 51 Wis. 204, 37 Am. Rep. 817, 8 N. W. 241.

¹⁶ *Way v. Batchelder*, 129 Mass. 361.

¹⁷ *Union State Bank v. Benson*, 38 N. D. 396, L. R. A. 1918C, 345, 165 N. W. 509; *Krouskop v. Shontz*, 51 Wis. 204, 37 Am. Rep. 817, 8 N. W. 241.

¹⁸ *Union State Bank v. Benson*, 38 N. D. 396, L. R. A. 1918C, 345, 165 N. W. 509.

on the theory that words in the body of the contract overcome memoranda in figures.¹⁹ A marginal annotation in small type which is not fairly brought to the attention of the person to whom the offer is made, is not to be regarded as a part of the offer.²⁰ A provision in the margin of an offer in small type to the effect that all proposals were subject to the approval of the executive officer, was held not to be a part of the offer.²¹

§ 2042. Covenant implied from writing equivalent to written promise. Since a contract is to be construed as a whole, terms which can be inferred from a consideration of the entire instrument are as much a part of the contract as if expressly set forth therein.¹ Thus a provision requiring notice may be equivalent to a covenant to give notice.² So the "assumption" of debts includes a promise to pay them,³ and a provision that "bills bear interest after maturity" includes a contract to pay interest.⁴ A's promise to pay his proportion of the cost of draining a mine is equivalent

¹⁹ *Fisk v. McNeal*, 23 Neb. 726, 8 Am. St. Rep. 162, 37 N. W. 616.

²⁰ *B. F. Sturtevant Co. v. Fireproof Film Co.*, 216 N. Y. 199, L. R. A. 1916D, 1069, 110 N. E. 440.

²¹ *B. F. Sturtevant Co. v. Fireproof Film Co.*, 216 N. Y. 199, L. R. A. 1916D, 1069, 110 N. E. 440.

¹ *United States. San Juan v. St. John's Gas Co.*, 195 U. S. 510, 49 L. ed. 299; *United States v. Ansonia Brass and Copper Co.*, 218 U. S. 452, 54 L. ed. 1107.

California. *Pringle v. Wilson*, 156 Cal. 313, 24 L. R. A. (N.S.) 1090, 104 Pac. 316.

Colorado. *Fisk Mining & Milling Co. v. Reed*, 32 Colo. 506, 77 Pac. 240.

Connecticut. *Lawler v. Murphy*, 58 Conn. 294, 8 L. R. A. 113, 20 Atl. 457.

Illinois. *Grimley v. Davidson*, 133 Ill. 116, 24 N. E. 439.

New York. *New England, etc., Co. v. R. R. Co.*, 91 N. Y. 153; *Jugla v. Trouttet*, 120 N. Y. 21, 23 N. E. 1066; *Nicoll v. Sands*, 131 N. Y. 19, 29 N. E. 818.

Ohio. *Legler v. United States Fidelity and Guaranty Co.*, 88 O. S. 336, 103 N. E. 897.

Texas. *Jones v. Gammel-Statesman Publishing Co.*, 100 Tex. 320, 8 L. R. A. (N.S.) 1197, 99 S. W. 701.

Washington. *Toellner v. McGinnis*, 55 Wash. 430, 24 L. R. A. (N.S.) 1082, 104 Pac. 641.

Wisconsin. *Fergen v. Lyons*, 162 Wis. 131, 155 N. W. 935.

² *Wells v. Alexander*, 130 N. Y. 642, 15 L. R. A. 218, 29 N. E. 142.

³ *Lenz v. Ry.*, 111 Wis. 198, 86 N. W. 607.

If a threat is made to "proceed to collect" an account due from a contractor who is working for a railroad unless such debt due from him is paid, a letter from the railroad to the effect that it "expects to settle all bills" of the contractor does not necessarily import a promise to pay such account. *Cleveland, C., C. & St. L. Ry. Co. v. Shea*, 174 Ind. 303, 91 N. E. 1081.

⁴ *Braun v. Hess*, 187 Ill. 283, 79 Am. St. Rep. 221, 58 N. E. 371.

to a request that such drainage shall be continued.⁵ A covenant between A, who possessed the material for a volume of the supreme court reports, and B, a publisher, by which B agreed to publish such reports and to deliver them to the state within a certain time after A delivered such material to B, is equivalent to a covenant on A's part to deliver such material.⁶

This principle is often invoked where questions of mutuality are concerned. If the consideration relied upon for one executory promise is another, such other must itself be binding to constitute a legal obligation and a valuable consideration. Although the promise relied upon as a consideration may not be expressly stated in any clause of the contract, still if it appears from the entire contract that such promise is intended, it will be as binding and as much a valuable consideration as though it were expressly stated.⁷ Thus a promise to pay for realty agreed to be conveyed,⁸ or to permit the use of certain realty in consideration of the lease of other realty,⁹ may be implied from the entire contract. So a clause "machines to be returned by B to A at the termination of the contract on her repayment of their original cost," binds A to accept such machines and to repay their original cost.¹⁰

§ 2043. Written and printed provisions. If the contract is written in part and printed in part, as where it has been filled in upon a printed form, the parties usually pay much more attention to the written parts than to the printed parts. Accordingly, if the written provisions can not be reconciled with the printed the written provisions control,¹ at least if there is no evidence tending to show that the printed provisions express the real intentions of

⁵ *Fisk Mining & Milling Co. v. Reed*, 32 Colo. 306, 77 Pac. 240.

⁶ *Jones v. Gammel-Statesman Publishing Co.*, 100 Tex. 320, 8 L. R. A. (N.S.) 1197, 99 S. W. 701.

⁷ *Lawler v. Murphy*, 58 Conn. 294, 8 L. R. A. 113, 20 Atl. 457; *Haines v. Dearborn*, 199 Pa. St. 474, 49 Atl. 319.

⁸ *Haines v. Dearborn*, 199 Pa. St. 474, 49 Atl. 319.

⁹ *Stubblefield v. Imbler*, 33 Or. 446, 54 Pac. 198.

¹⁰ *Norfolk, etc., Co. v. Arnold*, 64 N. J. L. 254, 45 Atl. 608 [reversing, 44 Atl. 192].

¹ *England. Alsager v. Dock Co.*, 14 M. & W. 794; *Robertson v. French*, 4 East 130.

United States. Hagan v. Ins. Co., 186 U. S. 423, 46 L. ed. 1229; *Thomas v. Taggart*, 209 U. S. 385, 52 L. ed. 845; *Lipschitz v. Napa Fruit Co.*, 223 Fed. 698, 139 C. C. A. 228.

Alabama. Thornton v. R. R., 84 Ala. 109, 5 Am. St. Rep. 337, 4 So. 197.

Illinois. Adams Express Co. v. Pinckney, 29 Ill. 392; *People v. Dulaney*, 96 Ill. 503; *Holmes v. Parker*, 125 Ill. 478, 17 N. E. 759 [affirming, 25 Ill. App. 225]; *Summers v.*

the parties.² The written parts are "the immediate language and terms selected by the parties themselves for the expression of their meaning,"³ and accordingly must control in case of conflict. Thus where in a land contract the written and printed portions are at variance as to the character of deed to be given, the written controls.⁴ The same principle applies where a contract has been filled in in writing upon the blanks in a typewritten form.⁵ The written part will, however, prevail only in so far as the intention of the parties to modify the printed portion by the written can fairly be inferred,⁶ and the two provisions will be construed together if possible.⁷ If the two provisions are reconcilable they will be con-

Hibbard, 153 Ill. 102, 46 Am. St. Rep. 872, 38 N. E. 899; *Chicago v. Weir*, 165 Ill. 582, 46 N. E. 725 [affirming, 67 Ill. App. 247].

Iowa. *Urbany v. Carroll*, 176 Ia. 217, 157 N. W. 852; *Commercial National Bank v. May*, -- Ia. --, 174 N. W. 646.

Michigan. *Mansfield Machine Works v. Lowell*, 62 Mich. 546, 29 N. W. 105.

Minnesota. *Frost's, etc., Co. v. Ins. Co.*, 37 Minn. 300, 5 Am. St. Rep. 846, 34 N. W. 35; *Murray v. Pillsbury*, 59 Minn. 83, 60 N. W. 844.

Nebraska. *Union Pacific Ry. v. Graddy*, 25 Neb. 849, 41 N. W. 809; *Davis v. Creamery Co.*, 48 Neb. 471, 67 N. W. 436; *First National Bank v. Greenlee*, 102 Neb. 180, L. R. A. 1918D, 224, 166 N. W. 559.

New York. *Heyn v. New York Life Insurance Co.*, 192 N. Y. 1, 84 N. E. 725.

Nevada. *Eager v. Mathewson*, 27 Nev. 220, 74 Pac. 404.

Oklahoma. *West v. Tilley*, 57 Okla. 315, 157 Pa. St. 283.

Pennsylvania. *Duffield v. Hue*, 129 Pa. St. 94, 18 Atl. 566; *Dick v. Ireland*, 130 Pa. St. 299, 18 Atl. 735; *Commonwealth, etc., Co. v. Ellis*, 192 Pa. St. 321, 73 Am. St. Rep. 816, 43 Atl. 1034.

West Virginia. *Gabbert v. Edwards Oil Co.*, 76 W. Va. 718, 86 S. E. 671.

Wisconsin. *Gilbert v. Stockman*, 76 Wis. 62, 20 Am. St. Rep. 23, 44 N. W. 845.

If a printed blank form of note provides "pay to the order of" and the blank is filled in with the name of the payee and the word "only," the written word "only" prevails over the printed words and the note is non-negotiable. *First National Bank v. Greenlee*, 102 Neb. 180, L. R. A. 1918D, 224 166 N. W. 559.

² *Lipschitz v. Napa Fruit Co.*, 223 Fed. 698, 139 C. C. A. 228.

³ *Summers v. Hibbard*, 153 Ill. 102, 109, 46 Am. St. Rep. 872, 38 N. E. 899.

⁴ *Gilbert v. Stockman*, 76 Wis. 62, 20 Am. St. Rep. 23, 44 N. W. 845.

⁵ *Sprague Electric Co. v. Hennepin County*, 83 Minn. 262, 86 N. W. 332.

If typewriting is used to fill blanks in a printed form, and part of such typewriting is marked out, and a corresponding part written above with a pen, the handwriting prevails over the typewriting. *Acme Coal Co. v. Northrup National Bank*, 23 Wyom. 66, L. R. A. 1915D, 1084, 146 Pac. 593.

⁶ *Eastern Bridge & Structural Co. v. Curtis Building Co.*, 89 Conn. 571, 94 Atl. 921; *Frost, etc., Co. v. Ins. Co.*, 37 Minn. 300, 5 Am. St. Rep. 846, 34 N. W. 35; *Hardie-Tynes Foundry & Machine Co. v. Glen Allen Oil Mill*, 84 Miss. 259, 36 So. 262.

⁷ *Eastern Bridge & Structural Co. v. Curtis Building Co.*, 89 Conn. 571, 94 Atl. 921; *J. B. Ehrsam & Sons Mfg.*

strued together and neither will give way to the other.⁸ If a printed contract contains a provision excusing delay in delivery for strikes, fires, and the like, and the blank for the date of delivery is not filled in, a written addition to the contract fixing the date of delivery and providing for a forfeiture of a certain amount per day, for default in delivery, is not inconsistent with the provision for excusing delivery in the case of strikes, fires, and the like.⁹

The rule that the written parts of a contract prevail over the printed parts, has been adopted by statute in some jurisdictions.¹⁰ Such statute has been held to apply to the contracts of public corporations which by statute must be in writing.¹¹ Under such statute the rule that the written portions control the printed portions takes precedence over the rule that the first of two contradictory provisions will prevail.¹² The value of the rule that the first provision of a contract should prevail over a subsequent provision is very doubtful,¹³ and if it is to be recognized at all, it should be recognized as inferior in value to the other more substantial rule for ascertaining the intentions of the parties.

It is ordinarily easier to make a mistake in writing figures than in writing words, and for this reason it has been held that if there is an inconsistency between an amount as expressed in words and an amount as expressed in figures, the contract will not be regarded as invalid for uncertainty and the amount as expressed in words will prevail over the amount as expressed in figures.¹⁴ This rule naturally applies most frequently to cases in which the contract is one for the payment of money.¹⁵ It has been used as a reason for rejecting marginal annotations in figures in favor of words in the body of the instrument.¹⁶

Co. v. Jackman, 73 Kan. 435, 85 Pac. 559, 91 Pac. 486; Hardie, etc., Co. v. Oil Mill, 84 Miss. 259, 36 So. 262.

⁸ Gabbert v. Edwards Oil Co., 76 W. Va. 718, 86 S. E. 671.

⁹ Hardie Tynes Foundry & Machine Co. v. Glen Allen Oil Mill, 84 Miss. 259, 36 So. 262.

¹⁰ Urbany v. Carroll, 176 Ia. 217, 157 N. W. 852.

¹¹ Urbany v. Carroll, 176 Ia. 217, 157 N. W. 852.

¹² Urbany v. Carroll, 176 Ia. 217, 157 N. W. 852.

¹³ See § 2037.

¹⁴ United Surety Co. v. Summers, 110 Md. 95, 72 Atl. 775; Romine v. Haag (Mo.), 178 S. W. 147.

¹⁵ Romine v. Haag (Mo.), 178 S. W. 147.

¹⁶ Fisk v. McNeal, 23 Neb. 726, 8 Am. St. Rep. 162, 37 N. W. 616.

§ 2044. Incorporation of writing by reference. Since a contract must be construed as a whole, effect must be given to writings incorporated in the contract by reference.¹ An instrument which is in the form of a promissory note but which states that it is given for "rent * * * as per contract" of a certain date, incorporates such contract, and if such contract shows that such payment is not due unconditionally, but only in case of the performance of the contract, the instrument itself is not negotiable.² A contract for the transportation of goods which refers to the request which the shipper has made for such transportation, incorporates such request and accordingly operates as a limitation of the liability of the shipper to the value of the goods which was stated in such request.³ The parties may, if they choose, adopt an existing contract in writing by an express reference thereto.⁴ If a contract by which A agrees to sell to B a part of A's rights under A's contract with C, and the contract with A and B refers in express terms to the contract between A and C, both of such contracts must be construed together.⁵ A reference in a building contract to drawings and specifications made by a specified architect, "signed by the parties and hereto annexed," is to be regarded as applicable to a number of pages of specifications and sheets of drawings which are fastened together and are attached to the contract and are signed by the parties upon the last page.⁶ The

¹ **Alabama.** Sewall v. Henry, 9 Ala. 24; Piedmont, etc., Co. v. Motor Co. (Ala.), 12 So. 768; Mobile County v. Linch, — Ala. —, 73 So. 423.

California. Howe v. Schmidt, 151 Cal. 436, 90 Pac. 1056; Donlon v. Southern P. Co., 151 Cal. 763, 11 L. R. A. (N.S.) 811, 91 Pac. 603.

Georgia. Butler v. Tifton, T. & G. Ry. Co., 121 Ga. 817, 49 S. E. 763.

Illinois. Chicago, etc., Bank v. Trust Co., 190 Ill. 404, 83 Am. St. Rep. 138, 60 N. E. 586 [affirming, 92 Ill. App. 366].

Indiana. State, ex rel., v. Common Council, 138 Ind. 455, 37 N. E. 1041.

Kentucky. Katterjohn v. Nahm (Ky.), 106 S. W. 1179, 32 Ky. Law Rep. 727.

Maine. Bradstreet v. Rich, 72 Me. 233; Bradstreet v. Rich, 74 Me. 303.

New York. Hicks v. Assurance Co., 162 N. Y. 284, 48 L. R. A. 424, 56 N. E. 743.

Oregon. Spande v. Indemnity Co., 61 Or. 220, 117 Pac. 973.

Virginia. Cary v. Holt's Executors, 120 Va. 261, 91 S. E. 188.

² **Continental Bank & Trust Co. v. Times Publishing Co.**, 142 La. 209, L. R. A. 1918B, 632, 76 So. 612.

³ **Donlon v. Southern P. Co.**, 151 Cal. 763, 11 L. R. A. (N.S.) 811, 91 Pac. 603.

⁴ **Butler v. Tifton, T. & G. Ry. Co.**, 121 Ga. 817, 49 S. E. 763.

⁵ **Cary v. Holt's Executors**, 120 Va. 261, 91 S. E. 188.

⁶ **Howe v. Schmidt**, 151 Cal. 436, 90 Pac. 1056.

agent of an insurance company agreed to issue a standard policy. Such policy was not issued. In an action by the insured after loss for damages caused by breach of such contract it was held that the standard form of policy was a part of such contract, and hence the insured was bound to show that the same proof of loss had been made as if the policy had issued.⁷ However, a contract to give a mortgage "in your usual form" does not give the right to insert "unusual terms and conditions" different from those used before.⁸

It is not necessary that the writing thus incorporated should be signed.⁹ Thus a reference to specifications may incorporate them.¹⁰ So in a contract to paint certain houses "according to the annexed specifications," a letter showing the kind of paint, the quality, and the manner of its application may be "specifications."¹¹

The contract between a contractor and a subcontractor may adopt by reference the original contract between the principal contractor and his employer.¹² If the specific provisions of the contract between the contractor and the subcontractor in such case are inconsistent with the provisions of the contract between the principal contractor and his employer, the provisions of the contract between the contractor and the subcontractor control.¹³ So a reference to an unsigned bill of sale,¹⁴ or to a blank unsigned warranty on the back of the contract,¹⁵ or a provision that the contract is to be performed according to the city ordinances,¹⁶ in each case incorporates such unsigned instrument into the contract. So an ambiguous reference in a later contract to an earlier one may be explained by the contents of such earlier one.¹⁷

⁷ *Hicks v. Assurance Co.*, 162 N. Y. 284, 48 L. R. A. 424, 56 N. E. 743.

⁸ *Peabody v. Dewey*, 153 Ill. 657, 27 L. R. A. 322, 39 N. E. 977 (such as a provision for payment in gold).

⁹ *White v. McLaren*, 151 Mass. 553, 24 N. E. 911; *Coe v. Tough*, 116 N. Y. 273, 22 N. E. 550.

¹⁰ *Lake View v. MacRitchie*, 134 Ill. 203, 25 N. E. 663; *Katterjohn v. Nahm* (Ky.), 106 S. W. 1179, 32 Ky. Law Rep. 727; *White v. McLaren*, 151 Mass. 553, 24 N. E. 911; *Watson v. O'Neill*, 14 Mont. 197, 35 Pac. 1064.

See also, *Cleveland, C. C. & St. L. Ry. Co. v. Moore*, 170 Ind. 328, 82 N. E. 52 [rehearing denied, *Cleveland, C. C. & St. L. Ry. Co. v. Moore*, 170 Ind. 328, 84 N. E. 540].

¹¹ *McGeragle v. Broemel*, 53 N. J. L. 59, 20 Atl. 857.

¹² *McGregor v. J. A. Ware Construction Co.*, 188 Mo. 611, 87 S. W. 981; *Expanded Fire Proofing Co. v. Noel Construction Co.*, 87 O. S. 428, 101 N. E. 348.

¹³ *Fire-Proofing Co. v. Construction Co.*, 87 O. S. 428, 101 N. E. 348.

¹⁴ *Coe v. Tough*, 116 N. Y. 273, 22 N. E. 550.

¹⁵ *Grieb v. Cole*, 60 Mich. 397, 1 Am. St. Rep. 533, 27 N. W. 579.

¹⁶ *Philadelphia v. Jewell*, 135 Pa. St. 329, 19 Atl. 947, 20 Atl. 281. (Hence it incorporates an ordinance requiring the work to be finished in two years.)

¹⁷ *Mjones v. Bank*, 45 Minn. 335, 47 N. W. 1072.

In accordance with the doctrine of offer and acceptance,¹⁸ such writing can be considered a part of the contract only if communicated to the adversary party.¹⁹ If a contract incorporates another writing by reference, such other writing must be offered in evidence to prove the entire contract which incorporates it.²⁰

§ 2045. Reference for specific purpose. If a reference is made to another instrument for a specific purpose, such reference incorporates such instrument for that purpose only.¹ A reference in a contract between the principal contractor and the subcontractor, to the contract between the principal contractor and his employer for the purpose of ascertaining the quantity of material, does not embody the remaining provisions of such contract.² A reference in a contract entered into between the principal contractor for a building and a subcontractor to the drawings and specifications contained in the original contract, does not incorporate other provisions of the original contract, such as a provision for the suspension of the work whenever the party for whom the building was being constructed might wish to suspend it; and such clause in the original contract does not justify the principal contractor in suspending the work of the subcontractor without paying damages therefor.³ A provision in the principal contract to the effect that the decision of the engineer should be final,⁴ and a provision to the effect that no allowance should be made for extras unless they are ordered in writing,⁵ or a provision for arbitration of disputes between the principal contractor and his employer,⁶ is not incorporated into the contract between the principal contractor and

¹⁸ See §§ 110 et seq.

¹⁹ *Tichnor v. Hart*, 52 Minn. 407, 54 N. W. 369.

²⁰ *Spande v. Indemnity Co.*, 61 Or. 220, 117 Pac. 973.

¹ *United States*. *Woodruff v. Hough*, 91 U. S. 596, 23 L. ed. 332; *Guerini Stone Co. v. P. J. Carlin Construction Co.*, 240 U. S. 264, 60 L. ed. 636.

California. *Neuval v. Cowell*, 36 Cal. 648; *Mannix v. Tryon*, 152 Cal. 31, 91 Pac. 983.

Connecticut. *Beattie v. McMullen*, 80 Conn. 160, 67 Atl. 488.

Minnesota. *Short v. Van Dyke*, 50 Minn. 286, 52 N. W. 643; *Noyes v. Butler*, 98 Minn. 448, 108 N. W. 839.

Pennsylvania. *Warren-Ehret Co. v. Byrd*, 220 Pa. St. 246, 69 Atl. 751.

Washington. *Young v. Borzone*, 26 Wash. 4, 66 Pac. 135.

² *Noyes v. Butler*, 98 Minn. 448, 108 N. W. 839.

³ *Guerini Stone Co. v. Carlin Construction Co.*, 240 U. S. 264, 60 L. ed. 636.

⁴ *Modern Steel Structural Co. v. English Construction Co.*, 129 Wis. 31, 108 N. W. 70.

⁵ *Beattie v. McMullen*, 80 Conn. 160, 67 Atl. 488.

⁶ *Warren-Ehret Co. v. Byrd*, 220 Pa. St. 246, 69 Atl. 751.

the subcontractor by a general reference to such contract. A reference to plans incorporates them only as plans, and does not incorporate a provision inserted by the city engineer forbidding assignment of the contract and providing for deduction for delay.⁷

§ 2046. Different writings construed together. To have two or more writings construed together it is not necessary that one of them should refer to the other in express terms. If two or more writings are executed at the same time, between the same parties and concerning the same subject-matter, they may be construed together as a part of the same contract,¹ at least in the absence of

⁷ *Young v. Borzone*, 26 Wash. 4, 23, 66 Pac. 135, 421.

¹ *United States. Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 843.

Alabama. *Prichard v. Miller*, 86 Ala. 500, 5 So. 784.

California. *Flinn v. Mowry*, 131 Cal. 481, 63 Pac. 724 [modified, 63 Pac. 1006]; *Meyer v. Weber*, 133 Cal. 681, 65 Pac. 1110; *Getz v. Federal Salt Co.*, 147 Cal. 115, 109 Am. St. Rep. 114, 81 Pac. 416.

Colorado. *Weston v. Estey*, 22 Colo. 334, 45 Pac. 367; *Gibbs v. Wallace*, 58 Colo. 364, 147 Pac. 686.

Florida. *Howard v. Ry.*, 24 Fla. 560, 5 So. 356.

Idaho. *Hunt v. Capital State Bank*, 12 Ida. 588, 87 Pac. 1129.

Illinois. *Hunter v. Clarke*, 184 Ill. 158, 75 Am. St. Rep. 160, 56 N. E. 297 [affirming, 83 Ill. App. 100]; *Chicago, etc., Bank v. Trust Co.*, 190 Ill. 404, 83 Am. St. Rep. 138, 60 N. E. 586 [affirming, 92 Ill. App. 366].

Kansas. *Phelps-Bigelow Windmill Co. v. Piercy*, 41 Kan. 763, 21 Pac. 793; *Wichita University v. Schweiter*, 50 Kan. 672, 32 Pac. 352; *Kurt v. Lanyon*, 72 Kan. 60, 82 Pac. 459.

Kentucky. *Smith v. Theobald*, 86 Ky. 141, 5 S. W. 394; *Shuttleworth v. Development Co. (Ky.)*, 60 S. W. 534; *Forman v. Mutual Life Insurance Co.*,

173 Ky. 547, L. R. A. 1918F, 330, 191 S. W. 279.

Massachusetts. *Makepeace v. College*, 27 Mass. (10 Pick.) 298; *Washburn, etc., Mfg. Co. v. Salisbury*, 152 Mass. 346, 25 N. E. 724.

Michigan. *Eberts v. Selover*, 44 Mich. 519, 38 Am. Rep. 278, 7 N. W. 225; *Sutton v. Beckwith*, 68 Mich. 303, 13 Am. St. Rep. 344, 36 N. W. 79; *McNamara v. Gargett*, 68 Mich. 454, 13 Am. St. Rep. 353, 36 N. W. 218; *Cutler v. Spens*, 191 Mich. 603, 158 N. W. 224.

Minnesota. *Myrick v. Purcell*, 95 Minn. 133, 103 N. W. 902.

Mississippi. *Floyd v. Arky*, 89 Miss. 162, 42 So. 569.

Missouri. *Gwin v. Waggoner*, 98 Mo. 315, 11 S. W. 227; *Jennings v. Todd*, 118 Mo. 296, 40 Am. St. Rep. 373, 24 S. W. 148; *National Bank v. Flanagan Mills & Elevator Co.*, 268 Mo. 547, 188 S. W. 117.

Nebraska. *Nebraska Hardware Co. v. Humphrey Hardware Co.*, 81 Neb. 693, 116 N. W. 659.

New York. *Hills v. Miller* 3 Paige (N. Y.) 254, 24 Am. Dec. 218; *Mott v. Richtmeyer*, 57 N. Y. 49; *Palmer v. Palmer*, 150 N. Y. 139, 55 Am. St. Rep. 653, 44 N. E. 966.

Oklahoma. *Brake v. Blain*, 49 Okla. 486, 153 Pac. 158.

evidence to the contrary.² If an instrument is a condition precedent to the contract which it is sought to enforce, the two must be construed together.³ Thus a note and the contract under which it was made,⁴ especially if the note refers to the contract;⁵ a land contract and a deed;⁶ a note and the mortgage by which such note is secured;⁷ a deed, mortgage and note;⁸ a building and loan association note, mortgage and contract;⁹ a deed and a chattel mortgage;¹⁰ a contract and a chattel mortgage;¹¹ an agency contract with an insurance company and a mortgage to the insurance company which are part of the transaction;¹² a land contract and a bond;¹³ a deed and a lease;¹⁴ a lease and a contract;¹⁵ a will,

Oregon. *Bradtfeldt v. Cooke*, 27 Or. 194, 50 Am. St. Rep. 701, 40 Pac. 1.

Pennsylvania. *Title Guaranty & Surety Co. v. Lippincott*, 252 Pa. St. 112, 97 Atl. 201.

South Dakota. *Norbeck & Nicholson Co. v. Nielsen*, 39 S. D. 410, 164 N. W. 1033.

Texas. *Dallas National Bank v. Davis*, 78 Tex. 362, 14 S. W. 706.

Utah. *Sterling v. Head Camp, Pacific Jurisdiction, Woodmen of the World*, 28 Utah 526, 80 Pac. 1110.

West Virginia. *Rhoades v. R. R.*, 49 W. Va. 494, 87 Am. St. Rep. 826, 55 L. R. A. 170, 39 S. E. 209; *Smith v. Board of Education*, 76 W. Va. 239, 85 S. E. 513.

Wisconsin. *Hannig v. Mueller*, 82 Wis. 235, 52 N. W. 98; *Security Trust & Life Ins. Co. v. Ellsworth*, 129 Wis. 349, 109 N. W. 125.

See, however, *Luellen v. New York Life Insurance Co.*, 201 Mich. 512, L. R. A. 1918F, 340, 167 N. W. 950.

If an indemnity bond is given against liability on an official bond, the official bond is incorporated in the indemnity bond. *Title Guaranty & Surety Co. v. Lippincott*, 252 Pa. St. 112, 97 Atl. 201.

² *Weber v. Rothchild*, 15 Or. 385, 3 Am. St. Rep. 162, 15 Pac. 650.

³ *Nebraska Hardware Co. v. Humphrey Hardware Co.*, 81 Neb. 693, 116 N. W. 659.

⁴ *Beach's Appeal*, 58 Conn. 464, 20 Atl. 475; *Seieroe v. Bank*, 50 Neb. 612, 70 N. W. 220.

⁵ *Solomon Solar Salt Co. v. Barber*, 58 Kan. 419, 49 Pac. 524.

⁶ *Western Union Telegraph Co. v. Louisville & N. R. Co.*, 238 Fed. 26, 151 C. C. A. 102 [reversing decree, *Western Union Telegraph Co. v. Louisville & N. R. Co.*, 229 Fed. 234].

⁷ *Clark v. Paddock*, 24 Ida. 142, 46 L. R. A. (N.S.) 475, 132 Pac. 795; *Bartels v. Davis*, 34 Mont. 285, 85 Pac. 1027; *Consterdine v. Moore*, 65 Neb. 291, 101 Am. St. Rep. 620, 96 N. W. 1021; *Kendall v. Selby*, 66 Neb. 60, 103 Am. St. Rep. 697, 92 N. W. 178.

⁸ *Bradtfeldt v. Cooke*, 27 Or. 194, 50 Am. St. Rep. 701, 40 Pac. 1.

⁹ *Interstate, etc., Association v. Knapp*, 20 Wash. 225, 55 Pac. 48 [rehearing denied, 20 Wash. 230, 55 Pac. 931].

¹⁰ *Stapleton v. Brannon*, 102 Wis. 26, 78 N. W. 181.

¹¹ *Edling v. Bradford*, 30 Neb. 593, 46 N. W. 836.

¹² *Security Trust & Life Ins. Co. v. Ellsworth*, 129 Wis. 349, 109 N. W. 125.

¹³ *Coughran v. Bigelow*, 9 Utah 260, 34 Pac. 51.

¹⁴ *St. Paul, etc., Ry. v. Depot Co.*, 44 Minn. 325, 46 N. W. 566.

¹⁵ *Clark v. Needham*, 125 Mich. 84, 84 Am. St. Rep. 559, 51 L. R. A. 785, 83 N. W. 1027. (To show that the lease

deed and contract;¹⁶ different written contracts and checks;¹⁷ and a deed and an acknowledgment of trust by the grantee,¹⁸ may in each case be construed together. If a note provides that on default the entire sum is to become due and the mortgage by which the note is secured provides that on default the mortgagee shall have the option to cause the entire sum to become due, such instruments are to be construed together,¹⁹ and they will be regarded as giving the option to the mortgagee to declare such sum due on default or not at his option.²⁰ A series of letters or letters and telegrams which make up a contract are to be construed together.²¹ A term inserted in one letter need not be repeated in subsequent letters on the same subject, not inconsistent with such term in order to preserve its force.²² A building contract and the drawings and specifications for the building are to be regarded as parts of the entire contract,²³ and the fact that a provision found in one is omitted from the other does not indicate any inconsistency, since omissions in any of such instruments may be supplemented by the remaining instruments.²⁴ While a note may be construed in connection with a contemporaneous contract, such construction can not be invoked to modify its legal effect if it is in the hands of a bona fide holder for value.²⁵ If the two contracts are not executed at the same time, but refer to the same subject-matter, and on their face show that they were executed each as a means of carrying out the same intent as the other, they may be construed together.²⁶ The rule

was intended to create a monopoly. See §§ 802 et seq.) *Floyd v. Arky*, 89 Miss. 162, 42 So. 569.

¹⁶ *Copeland v. Summers*, 138 Ind. 219, 35 N. E. 514 [rehearing denied, 138 Ind. 226, 37 N. E. 971].

¹⁷ *Getz v. Federal Salt Co.*, 147 Cal. 115, 109 Am. St. Rep. 114, 81 Pac. 416 (for the purpose of showing that the transaction was intended to create a monopoly).

¹⁸ *Chute v. Washburn*, 44 Minn. 312, 46 N. W. 555.

¹⁹ *Clark v. Paddock*, 24 Ida. 142, 46 L. R. A. (N.S.) 475, 132 Pac. 795.

²⁰ *Clark v. Paddock*, 24 Ida. 142, 46 L. R. A. (N.S.) 475, 132 Pac. 795.

²¹ *Porter v. Gossell*, 112 Ark. 380, 166 S. W. 533; *Gordon v. Churchill*, 34 S. D. 411, 148 N. W. 848.

²² *Georgia, etc., Co. v. Smith*, 83 Ga. 626, 10 S. E. 235.

²³ *Smith v. Board of Education*, 76 W. Va. 239, 85 S. E. 513.

²⁴ *Smith v. Board of Education*, 76 W. Va. 239, 85 S. E. 513.

²⁵ *Jennings v. Todd*, 118 Mo. 296, 40 Am. St. Rep. 373, 24 S. W. 148.

²⁶ *United States. Western Union Telegraph Co. v. Louisville & N. R. Co.*, 238 Fed. 26, 151 C. C. A. 102 [reversing decree, *Western Union Telegraph Co. v. Louisville & N. R. Co.*, 229 Fed. 234].

Alabama. *Drennen v. Satterfield*, 119 Ala. 84, 24 So. 723.

Arkansas. *Brady v. Wiemer*, 127 Ark. 535, 193 S. W. 273.

California. *Melone v. Ruffino*, 129 Cal. 514, 79 Am. St. Rep. 127, 62 Pac. 93.

that contracts which are entered into as a part of the same transaction are to be construed together is merely a rule of construction and it does not otherwise affect the character of either contract.²⁷ While a note and mortgage are to be construed together, a provision in the mortgage for the payment of attorneys' fees is not to be regarded as a part of the note for the purpose of destroying the negotiability of the note.²⁸ Thus a note and the contract, executed a few days before the note, in consideration of which it was executed;²⁹ a transfer of stock and the contract under which it was transferred;³⁰ and a trust deed and a deed thereunder;³¹ and the record of a public board and the contract which is authorized by such record,³² are to be construed together. If the original contract provides for a specified rate of interest and the note is so drawn as to bear a lower rate, the subsequent promise of the maker to pay the higher rate of interest is to be regarded as a part of the entire transaction.³³ Even if two writings are executed on different dates and between different parties, they may from their subject-matter be so connected that even without express reference the later contract is to be so construed as to be read in connection with the earlier.³⁴ Thus the contract of a sub-contractor with the chief contractor must be construed with that between the

Illinois. Chicago, etc., Bank v. Trust Co., 190 Ill. 404, 83 Am. St. Rep. 138, 60 N. E. 586 [affirming, 92 Ill. App. 366].

Louisiana. Delogny v. Mercer, 43 La. Ann. 205, 8 So. 903.

Montana. Talbott v. Heinze, 25 Mont. 4, 63 Pac. 624.

New York. Mt. Morris v. Thomas, 158 N. Y. 450, 53 N. E. 214.

²⁷ Farmers' National Bank v. McCall, 25 Okla. 600, 26 L. R. A. (N.S.) 217, 106 Pac. 866.

²⁸ Farmers' National Bank v. McCall, 25 Okla. 600, 26 L. R. A. (N.S.) 217, 106 Pac. 866.

²⁹ Brady v. Wiemer, 127 Ark. 535, 193 S. W. 273; Talbott v. Heinze, 25 Mont. 4, 63 Pac. 624.

³⁰ Mt. Morris, v. Thomas, 158 N. Y. 450, 53 N. E. 214.

³¹ Leach v. Rains, 149 Ind. 152, 48 N. E. 858.

³² Mobile County v. Lynch, — Ala. —, 73 So. 423.

³³ Brady v. Wiemer, 127 Ark. 535, 193 S. W. 273.

³⁴ Alabama. Drennen v. Satterfield, 119 Ala. 84, 24 So. 723.

California. Melone v. Ruffino, 129 Cal. 514, 79 Am. St. Rep. 127, 62 Pac. 93.

Illinois. Baltimore & O. S. W. R. Co. v. Brubaker, 217 Ill. 462, 75 N. E. 523.

Iowa. Kirkwood v. Perry Town Lot & Improvement Co., 178 Ia. 248, 159 N. W. 774.

Louisiana. Delogny v. Mercer, 43 La. Ann. 205, 8 So. 903.

Minnesota. Shaw v. Church, 44 Minn. 22, 46 N. W. 146.

Nebraska. Wilcox v. Badger Motor Car Co., 99 Neb. 189, 155 N. W. 891.

chief contractor and the owner if the contract between the subcontractor and the chief contractor shows such intention.³⁵ The terms of the contract between the principal contractor and the owner are not to be regarded as a part of the contract between the principal contractor and the subcontractor unless there is an express reference thereto.³⁶ If the subcontractor knows the time of performance which is fixed in the principal contract and no provision is made in the subcontract as to the time of performance, it will be assumed that the subcontractor is to perform in a reasonable time with reference to the performance of the principal contract.³⁷ A building contract is to be regarded as incorporated in the bond which is given to secure performance thereof,³⁸ and the surety has a right to insist upon a performance of such contract on the part of the property owner as a condition precedent to his liability.³⁹ On the other hand, the bond is not to be regarded as a part of the contract so as to limit the liability of the principal contractor to the property owner.⁴⁰ A provision in a building contract which in legal effect imposes absolute liability upon the contractor is not modified by a provision in the bond to the effect that neither the principal nor the surety is to be liable for damages resulting from an act of God.⁴¹ A contract of sale and an authority to sell must be construed together,⁴² and a prospectus and a land contract must be construed together.⁴³ A contract and

³⁵ *Noyes v. Noullet*, 118 La. 887, 43 So. 539; *Shaw v. Church*, 44 Minn. 22, 46 N. W. 146. See § 2045.

³⁶ *Mannix v. Tryon*, 152 Cal. 31, 91 Pac. 983.

A reference to the principal contract as to one matter does not incorporate as to another matter. *Guerini Stone Co. v. Carlin Construction Co.*, 240 U. S. 264, 240 L. ed. 636.

An illustration showing options reserved to the insured, and the insurance policy, must be construed together. *Forman v. Mutual Life Insurance Co.*, 173 Ky. 547, L. R. A. 1918F, 330, 191 S. W. 279.

³⁷ *Noyes v. Noullet*, 118 La. 888, 43 So. 539.

³⁸ *First National Bank v. Fidelity Co.*, 145 Ala. 335, 117 Am. St. Rep. 45, 5 L. R. A. (N.S.) 418, 40 So. 415.

³⁹ *First National Bank v. Fidelity Co.*, 145 Ala. 335, 117 Am. St. Rep. 45, 5 L. R. A. (N.S.) 418, 40 So. 415.

⁴⁰ *Milske v. Steiner Mantel Co.*, 103 Md. 235, 115 Am. St. Rep. 354, 5 L. R. A. (N.S.) 1105, 63 Atl. 471.

⁴¹ *Milske v. Steiner Mantel Co.*, 103 Md. 235, 115 Am. St. Rep. 354, 5 L. R. A. (N.S.) 1105, 63 Atl. 471.

⁴² *Melone v. Ruffino*, 129 Cal. 514, 79 Am. St. Rep. 127, 62 Pac. 93.

⁴³ *Delogny v. Mercer*, 43 La. Ann. 205, 8 So. 903.

The opposite result is reached if the agent has no power to bind the insurance company by such estimate. *Luellen v. New York Life Insurance Co.*, 201 Mich. 512, L. R. A. 1918F, 340, 167 N. W. 950.

a deed which is given in performance of such contract may be construed together, although they are executed several months apart.⁴⁴ Warrants which are issued by a public board in payment for work, labor and materials under a contract may be considered in connection with such contract in order to ascertain its meaning.⁴⁵ A contract between A and B, by which A agrees to purchase automobiles and B agrees to appoint A as B's sales agent, is to be construed in connection with a bill of sale given as a part of the same transaction.⁴⁶

It is said that the party who claims that two or more different instruments which do not purport to refer to one another or to be parts of the same transaction are in fact parts of the same transaction, has the burden of establishing such fact,⁴⁷ but that he need only establish it by a preponderance of evidence.⁴⁸

If two contracts between the same parties dealing with the same subject-matter are executed on different dates and can not be construed together, the latter, of course, abrogates the earlier.⁴⁹

On the other hand, if the two instruments are not connected in intention, especially where they are executed on different dates, as two deeds executed a week apart,⁵⁰ or if they deal with different subject-matters, even if executed on the same date, as independent contracts for the sale of different lots,⁵¹ they can not be construed together.

§ 2047. Extrinsic matters as terms of contract. When we pass from consideration of the words of the contract to the question of what else may be regarded as a term of such contract, we are met with a practical difficulty which admits of only a rather arbitrary solution. The parties who enter into a contract do so with full knowledge and in contemplation of a great many rules of law, customs and facts which they do not carry into their written contract in express terms. They have probably reached their written contract as the result of long negotiations. All these things have

⁴⁴ *Baltimore & O. S. W. R. Co. v. Brubaker*, 217 Ill. 462, 75 N. E. 523.

⁴⁵ *Mobile County v. Lynch*, — Ala. —, 73 So. 423.

⁴⁶ *Wilcox v. Badger Motor Car Co.*, 99 Neb. 189, 155 N. W. 891.

⁴⁷ *Kirkwood v. Perry Town Lot & Improvement Co.*, 178 Ia. 248, 159 N. W. 774.

⁴⁸ *Kirkwood v. Perry Town Lot & Improvement Co.*, 178 Ia. 248, 159 N. W. 774.

⁴⁹ *Heine Safety Boiler Co. v. Francis Brothers*, 105 Fed. 413.

⁵⁰ *Nye v. Lovitt*, 92 Va. 710, 24 S. E. 345.

⁵¹ *Clark v. Neumann*, 56 Neb. 374, 76 N. W. 892.

undoubtedly made some impression on their minds, and probably have influenced the wording of the contract. To what extent will the law recognize them as terms of the written contract? The principles of the law which afford a solution of this question for written contracts are grouped under the rather unfortunate name of the Parol Evidence rule. It may be said to be a general rule that these rules of law, custom and usages and surrounding facts and circumstances other than the prior and contemporaneous oral negotiations of the parties constitute a part of the contract as long as such contract is not inconsistent therewith.¹

§ 2048. Law as term of contract. It is impracticable and impossible to set forth in writing all the different stipulations and provisions which, by the operation of law, are terms of the contract. The difficulty exists, not because the contract is in writing, but because it is impossible to make an exhaustive enumeration in express words of everything which may in law be a part of the contract. Some things are a part of the contract which are in the minds of both parties, though not stated in express language. Other things are presumed to be in the minds of the parties; but in many cases this presumption is purely artificial—a mere fiction. What is really meant is that certain things affect the contract, even if the parties do not agree upon them or even think of them. Valid laws which are in force when the contract is made are a part thereof, even though not expressly referred to, as fully as if incorporated therein,¹ unless the contract shows an intention that such

¹ See §§ 2048 et seq.

¹ **United States.** *Bank v. Eaton*, 95 Fed. 355; *Armour Packing Co. v. United States*, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A. (N.S.) 400.

Alabama. *Board of Revenue v. Farson*, 197 Ala. 375, 72 So. 613.

California. *Ede v. Knight*, 93 Cal. 159, 28 Pac. 860; *Nielsen v. Assurance Society*, 139 Cal. 332, 96 Am. St. Rep. 146, 73 Pac. 168.

Florida. *State v. Tampa Waterworks Co.*, 56 Fla. 858, 47 So. 358.

Illinois. *Barrett v. Boddie*, 158 Ill. 479, 49 Am. St. Rep. 172, 42 N. E. 143, 43 N. E. 367; *Andrews, etc., Co. v. Atwood*, 167 Ill. 249, 47 N. E. 387 [affirming, 67 Ill. App. 303]; *Kendall v.*

Fader, 199 Ill. 294, 65 N. E. 318 [affirming, 99 Ill. App. 104].

Indiana. *Haskett v. Maxey*, 134 Ind. 182, 19 L. R. A. 379, 33 N. E. 358; *Hogston v. Bell*, 185 Ind. 536, 112 N. E. 883.

Kentucky. *Graves County Water Co. v. Ligon*, 112 Ky. 775, 66 S. W. 725; *Board of Education v. Littrell*, 173 Ky. 78, 190 S. W. 465.

Maine. *Phinney v. Phinney*, 81 Me. 450, 10 Am. St. Rep. 266, 4 L. R. A. 348, 17 Atl. 405.

Minnesota. *Haugen v. Sundseth*, 106 Minn. 129, 118 N. W. 666.

Ohio. *Cincinnati v. Public Utilities Commission*, 98 O. S. 320, 3 A. L. R. 705, 121 N. E. 688.

rules of law shall not apply.² A statute fixing eight hours as a day's work upon public contract,³ the Interstate Commerce Act,⁴ the statute under which a contract for a public improvement is made,⁵ or a statute which provides for the rendition of public services,⁶ and statutes with reference to the distribution of the estate of a decedent,⁷ are each to be regarded as a part of a contract which deals with the subject-matter for which such statute makes provision. A contract between heirs with reference to property descending to them is governed by the law of descent as then interpreted by the court, and a subsequent change of judicial decision will not change the legal effect of such contract.⁸ A contract for paying "all damages" due to a collision does not limit the parties to the amount which the admiralty would assess in the absence of contract.⁹ A provision for the inspection of weights and measures is to be regarded as a part of a contract for the sale of weights and measures.¹⁰ An ordinance requiring the walls of opera-houses to be of a specified thickness is a part of a contract of subscription for the erection of an opera-house within the city, although it is not referred to therein.¹¹ Municipal ordinances creating and establishing fire limits are part of a contract of insurance of property in such limits, and bind the insurer.¹² A provision for a farm-crossing across a railroad track in a contract for a right of way is to be construed as requiring such maintenance

Oklahoma. *Knight v. Clinkscales*, 51 Okla. 508, 152 Pac. 133; *Farley v. Board of Education*, — Okla. —, 162 Pac. 797.

Utah. *Weight v. Bailey*, 45 Utah 584, 147 Pac. 899.

Washington. *Wright v. Computing Scale Co.*, 47 Wash. 107, 91 Pac. 571.

Wisconsin. *Manistee Iron Works Co. v. Lumber Co.*, 92 Wis. 21, 65 N. W. 863.

See also, *Milwaukee v. Raulf*, 164 Wis. 172, 159 N. W. 819.

A statute granting to a city the power to make a binding contract for rates to be charged by a public utility for a certain period is part of such a contract. *Cincinnati v. Public Utilities Commission*, 98 O. S. 320, 3 A. L. R. 705, 121 N. E. 688.

² The extent to which the parties can prevent the operation of rules of law is

discussed elsewhere. See §§ 657 et seq.

³ *Milwaukee v. Raulf*, 164 Wis. 172, 159 N. W. 819 (obiter).

⁴ *Armour Packing Co. v. United States*, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A. (N.S.) 400.

⁵ *Board of Revenue v. Farson*, 197 Ala. 375, 72 So. 613.

⁶ *State v. Tampa Waterworks Co.*, 50 Fla. 858, 47 So. 358.

⁷ *Weight v. Bailey*, 45 Utah 584, 147 Pac. 899.

⁸ *Haskett v. Maxey*, 134 Ind. 182, 19 L. R. A. 379, 33 N. E. 358.

⁹ *Clarke v. Dunraven* [1897], A. C. 59.

¹⁰ *Wright v. Computing Scale Co.*, 47 Wash. 107, 91 Pac. 571.

¹¹ *Gerner v. Church*, 43 Neb. 690, 62 N. W. 51.

¹² *Larkin v. Ins. Co.*, 80 Minn. 527, 81 Am. St. Rep. 286, 83 N. W. 409.

as would be necessary if the right of way for the railway had been acquired by eminent domain.¹³

An unconstitutional statute is not, however, a term of a contract made between the time that it is passed and the time that it is declared unconstitutional,¹⁴ even, it has been held, if expressly made a part of the contract.¹⁵

It has been said that the remedy which is in force at the time and place that a contract is made, is a part thereof.¹⁶ Remedies are ordinarily governed by the law of the place where the action is brought,¹⁷ and they are subject to modification at any time by the legislature as long as an adequate remedy is left and as long as the substantive rights of the parties are not materially affected by the change of remedy.¹⁸

The law which is a part of the contract is undoubtedly the law which exists at the time that the contract is made and at the place where it is made and to be performed, if these two places are the same.¹⁹ If the contract is made in one place and to be performed in another, a question is raised as to the system of law which is applicable; and this question is discussed elsewhere.²⁰

An unconstitutional statute does not become a part of a contract made after such statute is passed and before it is declared unconstitutional, where the contract does not expressly incorporate the provisions of such statute.²¹ Even if the provisions of the unconstitutional statute are carried into the contract in compliance with the peremptory requirements of such statute, they do not thereby in legal effect become a part of such contract.²² "It is not in the power of the legislature to protect an invalid law from judicial scrutiny by providing that it must receive the assent of the parties to every contract to which it relates."²³

¹³ *Briscoe Home Trustees v. Ohio River R. Co.*, 78 W. Va. 502, L. R. A. 1916F, 1294, 89 S. E. 727.

¹⁴ *Palmer v. Tingle*, 55 O. S. 423, 45 N. E. 313.

¹⁵ *People v. Coler*, 166 N. Y. 1, 52 L. R. A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; (*City of*) *Cleveland v. Construction Co.*, 67 O. S. 197, 93 Am. St. Rep. 670, 59 L. R. A. 775, 65 N. E. 885. (Contracts of public corporations.)

¹⁶ *Muller v. McCann*, 50 Okla. 710, 151 Pac. 621.

¹⁷ See ch. XCIV.

¹⁸ See ch. XCV.

¹⁹ *Knight v. Clinkscales*, 51 Okla. 508, 152 Pac. 133. See ch. XCIV.

²⁰ See chs. XCTV et seq.

²¹ *Palmer v. Tingle*, 55 O. S. 423, 45 N. E. 313.

²² *People v. Coler*, 166 N. Y. 1, 82 Am. St. Rep. 605, 59 N. E. 716; *Cleveland v. Construction Co.*, 67 O. S. 197, 93 Am. St. Rep. 670, 59 L. R. A. 775, 65 N. E. 885.

²³ *People v. Coler*, 166 N. Y. 1, 9, 82 Am. St. Rep. 605, 59 N. E. 716 [quoted in *Cleveland v. Construction Co.*, 67 O. S. 197, 93 Am. St. Rep. 670, 59 L. R. A. 775, 65 N. E. 885].

§ 2049. Nature of law as affecting contract. Certain provisions of law are of such a character that the parties can not prevent the application of such legal principles by any contractual provisions.¹ Other provisions of law are binding upon the parties in the absence of inconsistent provisions in the contract, but if the parties indicate clearly that they intend to fix their rights by their agreement rather than by the rules of law which apply in the absence of an agreement, full effect will be given to their intention.² The rule that the law is to be regarded as a part of a contract is much more imperative in the case of a rule of law which the parties can not set aside by the terms of their contract, than it is in the case of a rule of law which applies in the absence of contract, but which the parties may avoid if they so wish. In the former case the contract must be treated as invalid if it is inconsistent with the law,³ and accordingly the rule that a contract must be upheld by construction, if possible,⁴ requires the court to construe the contract so as to render it consistent with such rules of law. In such cases provisions which are apparently contrary to the law which is in force will be construed, if possible, so as to be consistent with the law.⁵

If the intention of the parties to violate the law is so plain that the court can not extract a legal intention from the language which is used, the result will be that the contract is in part or in whole invalid.⁶

If the rule of law is one which the parties may avoid by the terms of their contract, the court is not given the choice between construing the contract in accordance with the rule of law or of declaring the contract to be invalid; and accordingly the courts do not feel bound to exercise as much ingenuity in reconciling the contract with the provisions of the law as they do in cases in which a failure to reconcile the contract with the provisions of the law will result in declaring the contract invalid.

§ 2050. Contract to be upheld by construction if possible. As between two constructions, each reasonable, one of which will make the contract enforceable, and the other of which will make

¹ See §§ 657 et seq.

² *Clarke v. Dunraven* [1897], A. C. 59; *First National Bank v. McIntosh & Peters' Live Stock & Commission Co.*, 72 Kan. 603, 84 Pac. 535; *Smyser v. Fair*, 73 Kan. 773, 85 Pac. 408.

³ See §§ 657 et seq.

⁴ See § 2050.

⁵ *Farley v. Board of Education*, — Okla. —, 162 Pac. 797.

⁶ See §§ 657 et seq.

it unenforceable, that construction which makes the contract enforceable will be preferred.¹ Thus if a contract is fairly open to two constructions, one of which will accomplish the intention of the parties and the other of which will defeat such intention,² or will make the contract meaningless,³ or uncertain,⁴ the former construction is to be preferred. As between two possible constructions, one of which makes the instrument an executory contract and the other of which makes it an option, the court will prefer the construction which will make it an executory contract, since by such construction mutual rights are conferred upon both of the parties thereto.⁵

¹England. *North-Western Salt Co. v. Electrolytic Alkali Co.* [1914], A. C. 461.

United States. *Cooper v. Northern Pacific Ry. Co.*, 212 Fed. 533.

California. *Mebius v. Mills*, 150 Cal. 229, 88 Pac. 917.

Illinois. *Shreffler v. Nadelhoffer*, 133 Ill. 536, 23 Am. St. Rep. 626, 25 N. E. 630.

Iowa. *Sinclair v. National Surety Co.*, 132 Ia. 549, 107 N. W. 184; *Cole v. Brown-Hurley Hardware Co.*, 139 Ia. 487, 18 L. R. A. (N.S.) 1161, 117 N. W. 746.

Kentucky. *Berry v. Frisbie (Ky.)*, 86 S. W. 558, 27 Ky. Law Rep. 724.

Michigan. *Millen v. Potter*, 190 Mich. 262, 157 N. W. 101.

Missouri. *National Bank v. Flanagan Mills & Elevator Co.*, 268 Mo. 547, 188 S. W. 117.

Montana. *Finley v. School District*, 51 Mont. 411, 153 Pac. 1010; *Haley v. Hollenback*, 53 Mont. 494, 165 Pac. 459.

New Jersey. *Empire Rubber Mfg. Co. v. Morris*, 73 N. J. L. 602, 65 Atl. 450.

New York. *De Cicco v. Schweizer*, 221 N. Y. 431, 117 N. E. 807.

North Carolina. *Beasley v. Aberdeen & Rockfish R. Co.*, 145 N. Car. 272, 59 S. E. 60; *Torrey v. Cannon*, 171 N. Car. 519, 88 S. E. 768; *Edwards v. Jefferson*

Standard Life Ins. Co., 173 N. Car. 614, 92 S. E. 695.

Oregon. *North Pacific Lumber Co. v. Spore*, 44 Or. 462, 75 Pac. 890.

South Dakota. *Trumbauer v. Rust*, 36 S. D. 301, 154 N. W. 801.

Washington. *Ayars v. O'Connor*, 45 Wash. 132, 88 Pac. 119; *Crawford v. Seattle, R. & S. Ry. Co.*, 86 Wash. 628, 150 Pac. 1155.

Tennessee. *Morley v. Power*, 78 Tenn. (10 Lea) 219; *New Memphis Gaslight Co. Cases*, 105 Tenn. 268, 80 Am. St. Rep. 880, 60 S. W. 206.

²*Cravens v. Cotton Mills*, 120 Ind. 6, 16 Am. St. Rep. 298, 21 N. E. 981; *Powers v. Clarke*, 127 N. Y. 417, 28 N. E. 402; *De Cicco v. Schweizer*, 221 N. Y. 431, 117 N. E. 807; *Frierson v. Blanton*, 60 Tenn. (1 Baxt.) 272; *Atlanta Guano Co. v. Phipps* (Tenn. Ch. App.), 41 S. W. 1087; *New Memphis Gaslight Co. Cases*, 105 Tenn. 268, 80 Am. St. Rep. 880, 60 S. W. 206.

³*Irwin v. Nichols*, 87 Ark. 97, 112 S. W. 209; *Savage v. Smith*, 170 Cal. 472, 150 Pac. 353; *Shreffler v. Nadelhoffer*, 133 Ill. 536, 23 Am. St. Rep. 626, 25 N. E. 630; *Sinclair v. National Surety Co.*, 132 Ia. 549, 107 N. W. 184.

⁴*Empire Rubber Mfg. Co. v. Morris*, 73 N. J. L. 602, 65 Atl. 450.

⁵*Abel v. Gill*, 95 Neb. 279, 145 N. W. 637; *Dillinger v. Ogden*, 244 Pa. St. 20, 90 Atl. 446.

§ 2051. Legal construction preferred to illegal construction.

If one of two possible constructions will make a contract legal and another will make it illegal, the former is to be preferred.¹ So a construction which will accord with public policy is to be preferred to one contrary thereto.² As between two possible constructions one of which will make the contract usurious and the other of which will make it free from usury, the courts will prefer that construction which makes it free from usury.³ If from the wording of the contract any reasonable doubt as to its legality will arise, it will be presumed that the contract does not require improper personal influence to be exerted upon public officials,⁴ that the contract is not a gambling transaction,⁵ that the area of restraint from competition is so limited as to render the contract valid,⁶ and that the parties intend compliance with building requirements.⁷

§ 2052. Construction to protect public interest. If the interest of the public is affected by a contract, it should be construed so

¹ **England.** *North-Western Salt Co. v. Electrolytic Alkali Co.* [1914], A. C. 461.

Colorado. *Wyatt v. Irrigation Co.*, 18 Colo. 298, 36 Am. St. Rep. 280, 33 Pac. 144.

Iowa. *Alfree v. Gates*, 82 Ia. 19, 47 N. W. 993; *Cole v. Brown-Hurley Hardware Co.*, 139 Ia. 487, 18 L. R. A. (N.S.) 1161, 117 N. W. 746.

Massachusetts. *Foss v. Roby*, 195 Mass. 292, 10 L. R. A. (N.S.) 1200, 81 N. E. 199.

Missouri. *National Bank v. Flanagan Mills & Elevator Co.*, 268 Mo. 547, 188 S. W. 117.

Montana. *Dallas v. Douglas*, 45 Mont. 114, 122 Pac. 275; *Haley v. Hollenback*, 53 Mont. 494, 165 Pac. 459.

New Jersey. *Pitney v. Bolton*, 45 N. J. Eq. 639, 18 Atl. 211.

North Carolina. *Beasley v. Aberdeen & Rockfish R. Co.*, 145 N. Car. 272, 59 S. E. 60; *Johnson v. Rhode Island Insurance Co.*, 172 N. Car. 142, 90 S. E. 124.

Oregon. *Overbeck v. Roberts*, 49 Or. 37, 87 Pac. 158.

South Carolina. *South Carolina, etc., Ry. v. Ry.*, 93 Fed. 543, 35 C. C. A. 423.

Texas. *Norris v. W. C. Belcher Land Mortg. Co.*, 98 Tex. 176, 83 S. W. 799.

Washington. *Ayars v. O'Connor*, 45 Wash. 132, 88 Pac. 119; *Crawford v. Seattle, R. & S. Ry. Co.*, 86 Wash. 628, 150 Pac. 1155.

² *Rackemann v. Improvement Co.*, 167 Mass. 1, 57 Am. St. Rep. 427, 44 N. E. 990.

³ *Clemens v. Crane*, 234 Ill. 215, 84 N. E. 884; *Norris v. W. C. Belcher Land Mortg. Co.*, 98 Tex. 176, 83 S. W. 799; *Cobb v. Hartenstein*, 47 Utah 174, 152 Pac. 424; *Ayars v. O'Connor*, 45 Wash. 132, 88 Pac. 119.

⁴ *Knut v. Nutt*, 83 Miss. 365, 35 So. 686.

⁵ *King v. Zell & Merceret*, 103 Md. 435, 66 Atl. 279; *Overbeck v. Roberts*, 49 Or. 37, 87 Pac. 158.

⁶ *Foss v. Roby*, 195 Mass. 292, 10 L. R. A. (N.S.) 1200, 81 N. E. 199.

⁷ *Eastern Expanded Metal Co. v. Webb Granite & Construction Co.*, 195 Mass. 356, 81 N. E. 251.

as to protect such interest.¹ A contract for exemption from taxation is to be construed strictly.² Such a contract for exempting from taxation realty which belongs to an educational institution, does not prevent the levying of a tax upon a lessee from such educational institution who has erected a building upon the land thus leased.³ If a grant of a public franchise contains an ambiguous provision, such provision will be construed in favor of the right of the public.⁴

§ 2053. Contract construed to be fair and reasonable. As between two constructions, each probable, one of which makes the contract fair and reasonable and the other of which makes it unfair and unreasonable, the former should always be preferred.¹

¹ *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 843; *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 50 L. ed. 353; *Jetton v. University of the South*, 208 U. S. 489, 52 L. ed. 584 [reversing, *Jetton v. University of the South*, 155 Fed. 182]; *Darling v. Newport News*, 123 Va. 14, 3 A. L. R. 748, 96 S. E. 307.

² *Rochester Railway Co. v. Rochester*, 205 U. S. 236, 51 L. ed. 784; *Jetton v. University of the South*, 208 U. S. 489, 52 L. ed. 584 [reversing, *Jetton v. University of the South*, 155 Fed. 182]; *State, ex rel., v. Water Supply Co.*, 19 N. M. 36, L. R. A. 1915A, 246, 140 Pac. 1059.

³ *Jetton v. University of the South*, 208 U. S. 489, 52 L. ed. 584 [reversing, *Jetton v. University of the South*, 155 Fed. 182].

⁴ *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 50 L. ed. 353; *State, ex rel., v. Water Supply Co.*, 19 N. M. 36, L. R. A. 1915A, 246, 140 Pac. 1059.

See also, *Darling v. Newport News*, 123 Va. 14, 3 A. L. R. 748, 96 S. E. 307.

¹ *United States. Calvo v. De Gutierrez*, 208 U. S. 443, 52 L. ed. 564; *McElroy v. Swope*, 47 Fed. 380; *Ingersoll v. Coran*, 127 Fed. 418; *Manson v. Dayton*, 153 Fed. 258, 82 C. C. A. 588; *Christian v. First National Bank*, 155

Fed. 705, 84 C. C. A. 53; *Leschen & Sons Rope Co. v. Mayflower Gold Min. & R. Co.*, 173 Fed. 855, 97 C. C. A. 465, 35 L. R. A. (N.S.) 1; *Cole Motor Car Co. v. Hurst*, 228 Fed. 280, 142 C. C. A. 572.

Alabama. *Little Cahaba Coal Co. v. Aetna Life Insurance Co.*, 192 Ala. 42, 68 So. 317.

Arkansas. *Mississippi Home Insurance Co. v. Adams*, 84 Ark. 431, 106 S. W. 209.

California. *Stein v. Archibald*, 151 Cal. 220, 90 Pac. 536; *Stoddart v. Golden*, — Cal. —, 3 A. L. R. 1060, 178 Pac. 707.

Colorado. *Wyatt v. Irrigation Co.*, 18 Colo. 298, 36 Am. St. Rep. 280, 33 Pac. 144; *Chicago, B. & Q. R. Co. v. Provolt*, 42 Colo. 103, 93 Pac. 1126.

Connecticut. *MacDonald v. Aetna Indemnity Co.*, 90 Conn. 226, 96 Atl. 926.

Florida. *Jacobs v. Parodi*, 50 Fla. 541, 39 So. 833.

Illinois. *Bartlett v. Wheeler*, 195 Ill. 445, 63 N. E. 169 [affirming, 96 Ill. App. 342]; *R. F. Conway Co. v. Chicago*, 274 Ill. 369, 113 N. E. 703.

Kentucky. *General Accident, Fire & Life Assurance Corp. v. Louisville Home Telephone Co.*, 175 Ky. 96, L. R. A. 1917D, 952, 193 S. W. 1031.

The acceptance of a note will not be regarded as payment of the debt for which it was given if the effect of such construction will be to destroy the security which the creditor had attempted to reserve for the payment of such debt.² A provision in a water franchise to the effect that water must be furnished to the public corporation without charge for certain purposes, does not require the water company to furnish water for other purposes without charge.³ A contract for the sale of property in which certain undivided interests and a dower interest existed and for the payment of certain claims out of such fund and for the payment of a "remainder" of such fund to the widow, is to be construed as

Mississippi. *Dederick v. Wolfe*, 68 Miss. 500, 24 Am. St. Rep. 283, 9 So. 350.

Missouri. *Lovelace v. Travelers', etc., Association*, 126 Mo. 104, 47 Am. St. Rep. 638, 30 L. R. A. 209, 28 S. W. 877.

Nebraska. *Midland Glass & Paint Co. v. Ocean Accident & Guarantee Corporation*, 102 Neb. 349, L. R. A. 1918D, 442, 167 N. W. 211.

Nevada. *Ely Water Co. v. White Pine Co.*, 38 Nev. 472, L. R. A. 1916D, 431, 151 Pac. 335.

New York. *Wright v. Reusens*, 133 N. Y. 298, 305, 31 N. E. 215; *Gillett v. Bank*, 160 N. Y. 549, 55 N. E. 292.

North Carolina. *Fairbanks-Morse & Co. v. Twin City Supply Co.*, 170 N. Car. 315, 86 S. E. 1051.

Ohio. *Travelers' Ins. Co. v. Myers*, 62 O. S. 529, 49 L. R. A. 760, 57 N. E. 458.

Oklahoma. *Union Trust Co. v. Shelby Downard Asphalt Co.*, 55 Okla. 251, 156 Pac. 903.

Virginia. *Hairston v. Hill*, 118 Va. 339, 87 S. E. 573.

Vermont. *Thompson-Starrett Co. v. Plunkett*, 89 Vt. 177, 94 Atl. 845.

Wisconsin. *Kentzler v. Accident Association*, 88 Wis. 589, 43 Am. St. Rep. 934, 60 N. W. 1002.

A general guaranty which does not specify the amount for which it is

given, will be construed for a reasonable amount only; and accordingly it will not be construed as imposing an obligation upon the guarantor for an amount in excess of that which the bank to which the guaranty was given was permitted by law to lend to any one debtor. *Farmers' Savings Bank v. Jameson*, 175 Ia. 676, 157 N. W. 460.

A provision for giving notice of loss "immediately" must be construed reasonably in connection with the circumstances which surround the loss. *Midland Glass & Paint Co. v. Ocean Accident & Guarantee Corporation*, 102 Neb. 349, L. R. A. 1918D, 442, 167 N. W. 211.

A covenant "to perform * * * additional service that may be ordered * * * by the establishment of new * * * post-offices," is held not to apply to a great amount of additional work and expense made necessary by the creation of a post-office station three miles from the original station. *United States v. Utah, Nevada and California Stage Co.*, 199 U. S. 414, 50 L. ed. 251.

² *Leschen & Sons Rope Co. v. Mayflower Gold Min. & R. Co.*, 173 Fed. 855, 35 L. R. A. (N.S.) 1, 97 C. C. A. 465.

³ *Ely Water Co. v. White Pine Co.*, 38 Nev. 472, L. R. A. 1916D, 431, 151 Pac. 335.

requiring the payment to her only of the remainder of the share of her deceased husband.⁴ If a provision might be a condition or a covenant and either construction will protect one party equally, while one construction will make the contract much more burdensome to the other, that provision will be taken which renders it least burdensome.⁵ A contract for the purchase of a water-works system by a public corporation is to be construed as a purchase of the entire system, including certain distributing systems in suburban towns outside of the territorial limits of such public corporation.⁶ Thus a contract by a principal to furnish his agent samples and advertising matter means a reasonable amount, and not whatever the agent may demand.⁷ So a contract to furnish machinery to be set up in "good working order" means not at the very moment of completing the work, but after giving the vendee a reasonable opportunity for testing it.⁸ A contract by A to construct a heater to B's satisfaction means, if B dies before the heater is finished, to the satisfaction of B's executor and devisee, and not to B's satisfaction.⁹ Where A agreed to pay B for certain advertising by deducting the amount of such bill from the price of any launch that B might buy of A, it was held that such launch was to be sold on "exactly the same terms as it offered other customers."¹⁰ So under a contract for the sale of sugar "for shipment within thirty days by sail or steam at seller's option," "shipment" means placing the sugar within such time on board of a vessel which is honestly endeavoring to secure a full cargo, and which is bound for the proper port, and does not mean that such vessel must clear within such time.¹¹ A provision for making the architect's certificate conclusive is to be construed as making it conclusive upon both the contractor and the owner.¹² Such a provision is not to be regarded as applicable to a dispute to which the architect himself is a party.¹³ A provision for replacing parts

⁴ *Calvo v. De Gutierrez*, 208 U. S. 443, 52 L. ed. 564.

⁵ *Carper v. United Fuel Gas Co.*, 78 W. Va. 433, L. R. A. 1917A, 171, 89 S. E. 12.

⁶ *Omaha v. Omaha Water Co.*, 218 U. S. 180, 54 L. ed. 991, 48 L. R. A. (N.S.) 1084.

⁷ *Jensen v. Perry*, 126 Pa. St. 495, 12 Am. St. Rep. 888, 17 Atl. 665.

⁸ *Edison, etc., Co. v. Navigation Co.*, 8 Wash. 370, 40 Am. St. Rep. 910, 24 L. R. A. 315, 36 Pac. 260.

⁹ *Adams Radiator Co. v. Schnader*, 155 Pa. St. 394, 35 Am. St. Rep. 893, 26 Atl. 745.

¹⁰ *Hand v. Power Co.*, 167 N. Y. 142, 60 N. E. 425.

¹¹ *Ledon v. Havermeier*, 121 N. Y. 179, 8 L. R. A. 245, 24 N. E. 297.

¹² *Young v. Stein*, 152 Mich. 310, 125 Am. St. Rep. 412, 116 N. W. 195.

¹³ *Payne v. Roberts*, 214 Pa. St. 568, 64 Atl. 86.

which break under normal service in a specified time because of defective material or workmanship, applies to an injury of a part which itself is perfect, but which is injured because of a defect in another part.¹⁴ Such a provision applies to bearings which are burnt out by reason of a defective crank case, although the bearings themselves are perfect.¹⁵

Contracts in restraint of trade will be construed to impose reasonable limitations as to time¹⁶ or place,¹⁷ if it does not appear to be the intention of the parties to impose an unreasonable limitation. So a contract not to sell certain realty for less than a certain price will be construed to restrict it for a reasonable time only.¹⁸ A covenant not to compete in business in a certain city has been construed so as to prevent competition from a place of business just outside of the limits of such city.¹⁹

If the language which the parties have used is free from ambiguity, the courts can not give relief by construction against harsh or oppressive consequences.²⁰ The contract may be so unconscionable that it may be set aside altogether,²¹ but the court can not vary the plain language of the contract under guise of construction. At the same time the fact that the result of a literal application of the language of the contract will be oppression or illegality may induce the court to regard a contract as ambiguous, although similar language would not be regarded as ambiguous if it would lead to a just and lawful result.²²

A clause which is introduced by a proviso is prima facie a condition.²³ If it is doubtful whether a clause is intended as a condition

¹⁴ *American Locomotive Company v. National Wholesale Grocery Company*, 226 Mass. 314, L. R. A. 1917D, 1125, 115 N. E. 404.

¹⁵ *American Locomotive Company v. National Wholesale Grocery Company*, 226 Mass. 314, L. R. A. 1917D, 1125, 115 N. E. 404.

¹⁶ *Saddlery Hardware Mfg. Co. v. Hillsborough Mills*, 68 N. H. 216, 73 Am. St. Rep. 569, 44 Atl. 300. (Here a contract by a vendor of goods not to sell like goods to anyone else in that locality was construed to mean until vendee had a reasonable opportunity to resell such goods.)

¹⁷ *Dethlefs v. Tamsen*, 7 Daly (N. Y.) 354.

¹⁸ *Rackemann v. Improvement Co.*, 167 Mass. 1, 57 Am. St. Rep. 427, 44 N. E. 990.

¹⁹ *Skaggs v. Simpson* (Ky.), 110 S. W. 251, 33 Ky. Law Rep. 410.

²⁰ *Lee v. Cochran*, 157 Ala. 311, 47 So. 581.

²¹ See §§ 641 et seq.

²² *Clappenback v. New York Life Insurance Co.*, 136 Wis. 626, 118 N. W. 245.

²³ *Southern Colonization Co. v. Derfler*, — Fla. —, 75 So. 790.

or as a covenant, its operation and effect will be considered;²⁴ and if it will be equally beneficial to one party if treated as a condition, and not as burdensome to the adversary party, it will be regarded as a condition.²⁵

§ 2054. The rule contra proferentem. If terms of a contract appear on their face to be inserted for the benefit of one of the parties, he will be considered as having inserted such terms and as having chosen the language thereof. Any ambiguity in such language is therefore to be construed more strongly against the party making use of such language.¹ If one party draws the contract and the adversary party has no choice in the selection of the words used or in the arrangements of the sentences or in the punctuation, any ambiguity is to be resolved in favor of the party

²⁴ Carper v. United Fuel Gas Co., 78 W. Va. 433, L. R. A. 1917A, 171, 89 S. E. 12.

²⁵ Carper v. United Fuel Gas Co., 78 W. Va. 433, L. R. A. 1917A, 171, 89 S. E. 12.

¹ United States. Chambers v. United States, 24 Ct. Cl. 387; Simpson v. United States, 31 Ct. Cl. 217; Supreme Council, etc., v. Casualty Co., 63 Fed. 48, 11 C. C. A. 96; Davis, etc., Co. v. Jones, 66 Fed. 124; Christian v. First National Bank, 155 Fed. 705, 84 C. C. A. 53; Bijur Motor Lighting Co. v. Eclipse Machine Co., 237 Fed. 89; Hongkong & Whampoa Dock Co., Ltd. v. United States, 50 Ct. Cl. 213.

Arkansas. Leslie v. Bell, 73 Ark. 338, 84 S. W. 491; Allen-West Commission Co. v. People's Bank, 74 Ark. 41, 84 S. W. 1041.

Colorado. Wyatt v. Irrigation Co., 18 Colo. 298, 36 Am. St. Rep. 280, 33 Pac. 144.

Georgia. Hill v. Mfg. Co., 79 Ga. 105, 3 S. E. 445; Young v. Central of Georgia Ry. Co., 120 Ga. 25, 102 Am. St. Rep. 68, 65 L. R. A. 436, 47 S. E. 556.

Illinois. Mueller v. University, 195 Ill. 236, 88 Am. St. Rep. 194, 63 N. E. 110 [affirming, 95 Ill. App. 258].

Indiana. Rogers v. Ins. Co., 121 Ind. 570, 23 N. E. 498.

Iowa. Sinclair v. National Surety Co., 132 Ia. 549, 107 N. W. 184.

Kentucky. Bowser v. Patrick (Ky.), 65 S. W. 824; General Accident, Fire & Life Assur. Corp. v. Louisville Home Telephone Co., 175 Ky. 96, L. R. A. 1917D, 952, 193 S. W. 1031.

Louisiana. St. Landry State Bank v. Meyers, 52 La. Ann. 1769, 28 So. 136.

Maryland. McEvoy v. Security F. Ins. Co., 110 Md. 275, 22 L. R. A. (N.S.) 964, 73 Atl. 157.

Mississippi. Home Mutual Fire Insurance Co. v. Pittman, 111 Miss. 420, 71 So. 739.

Montana. Blankenship v. Decker, 34 Mont. 292, 85 Pac. 1035.

Nebraska. Jensen v. Palatine Insurance Co., 81 Neb. 523, 116 N. W. 286; Falloon v. Miles, 102 Neb. 843, 2 A. L. R. 840, 170 N. W. 191.

New York. Paul v. Ins. Co., 112 N. Y. 472, 8 Am. St. Rep. 758, 3 L. R. A. 443, 20 N. E. 347; Rickerson v. Ins. Co., 149 N. Y. 307, 313, 43 N. E. 856; Gillett v. Bank, 160 N. Y. 549, 55 N. E. 292.

North Carolina. Kendrick v. Ins. Co., 124 N. Car. 315, 70 Am. St. Rep.

who did not prepare the contract.² The rule is sometimes stated in such a form as to imply that the promisee is the party for whose benefit ambiguous provisions are to be construed.³ Occasionally the party under whose supervision a contract is drawn rather than the party for whose benefit the provision was inserted, is regarded as the party against whom the contract is to be construed most strictly.⁴ From the nature of the case, however, the party for whose benefit ambiguous provisions are inserted is usually the party under whose supervision the contract or at least that part of the contract was drawn. As a rule no practical difference in result follows from these different methods of stating the general rule. This rule is summarized in the maxim: "Fortius contra proferentem."

Thus a contract of sale has been construed more strictly against the vendor;⁵ a contract to repair more strictly against the builder who drew it;⁶ restrictions on a carrier's common-law liability more strictly against the carrier;⁷ exceptions⁸ and conditions in an insurance policy more strictly against the insurer.⁹ A qualifica-

592, 32 S. E. 728; *Torrey v. Cannon*, 171 N. Car. 519, 88 S. E. 768; *Bank v. Redwine*, 171 N. Car. 559, 88 S. E. 878; *Edwards v. Jefferson Standard Life Ins. Co.*, 173 N. Car. 614, 92 S. E. 695.

Ohio. *Webster v. Ins. Co.*, 53 O. S. 558, 53 Am. St. Rep. 658, 30 L. R. A. 719, 42 N. E. 546.

Oklahoma. *Reeves v. Martin*, 20 Okla. 558, 94 Pac. 1058; *Warner v. Page*, — Okla. —, 159 Pac. 264.

Oregon. *Loomis v. MacFarlane*, 50 Or. 129, 91 Pac. 466.

South Dakota. *M. Osborne & Co. v. Springham*, 4 S. D. 593, 57 N. W. 776.

A contract for professional compensation which is drawn by the attorney by whom such compensation is to be paid, will be construed against such attorney if ambiguous. *Falloon v. Miles*, 102 Neb. 843, 2 A. L. R. 840, 170 N. W. 191.

This rule has been adopted by statute in some jurisdictions. *Blankenship v. Decker*, 34 Mont. 292, 85 Pac. 1035.

² *Allen-West Commission Co. v. People's Bank*, 74 Ark. 41, 84 S. W. 1041; *General Accident, Fire & Life Assur. Corp. v. Louisville Home Telephone Co.*, 175 Ky. 96, L. R. A. 1917D, 952, 193 S. W. 1031.

³ *Torrey v. Cannon*, 171 N. Car. 519, 88 S. E. 768.

⁴ *Bijur Motor Lighting Co. v. Eclipse Machine Co.*, 237 Fed. 89.

⁵ *Delogny v. Mercer*, 43 La. Ann. 205, 8 So. 903.

⁶ *Laidlaw v. Marye*, 133 Cal. 170, 65 Pac. 391.

⁷ *Texas, etc., Ry. v. Reiss*, 183 U. S. 621, 46 L. ed. 358; *Hinkle v. Ry.*, 126 N. Car. 932, 78 Am. St. Rep. 685, 36 S. E. 348; *Amory Mfg. Co. v. Ry.*, 89 Tex. 419, 59 Am. St. Rep. 65, 37 S. W. 856.

⁸ *Starr v. Aetna Ins. Co.*, 41 Wash. 199, 4 L. R. A. (N.S.) 636, 83 Pac. 113.

⁹ **United States.** *First National Bank v. Ins. Co.*, 95 U. S. 673, 24 L. ed. 563; *London Assurance Co. v. Compania de Moagens*, 167 U. S. 149, 42 L. ed. 113.

tion in favor of the insured which follows a list of exceptions in a policy of insurance in favor of the insurer, will be construed as applying to all of such exceptions.¹⁰

If performance is optional as to one party, the contract is construed strictly against the party at whose option performance may be required and in favor of the party from whom performance may be required at the option of the adversary party.¹¹ The rule of a construction strictly against one party and in favor of the other, has been applied to contracts between public corporations and private individuals so as to require a construction in favor of the public corporation;¹² although in many cases such a contract is drawn by the public corporation and the language therein is inserted by such public corporation for its own benefit.

A contract of suretyship is construed strictly in favor of the surety, if he does not receive value for becoming surety.¹³ This rule, however, does not require the contract to be construed unfairly as against the creditor,¹⁴ and if by strict construction the liability of the surety is found to exist, his liability in other respects is controlled by the ordinary rules of construction.¹⁵ A different principle applies to cases in which a surety becomes such for a valuable consideration which moves to the surety. In such cases the contract is not to be construed strictly in favor of the surety,¹⁶ and it has been said that it should be construed strictly

Illinois. *Forest City Ins. Co. v. Hardesty*, 182 Ill. 39, 74 Am. St. Rep. 161, 55 N. E. 139.

Mississippi. *Home Mutual Fire Insurance Co. v. Pittman*, 111 Miss. 420, 71 So. 739.

New York. *Paul v. Ins. Co.*, 112 N. Y. 472, 8 Am. St. Rep. 758, 3 L. R. A. 443, 20 N. E. 347.

North Carolina. *Edwards v. Jefferson Standard Life Ins. Co.*, 173 N. Car. 614, 92 S. E. 695.

Ohio. *Webster v. Ins. Co.*, 53 O. S. 558, 53 Am. St. Rep. 658, 30 L. R. A. 719, 42 N. E. 546.

¹⁰ *McEvoy v. Security F. Ins. Co.*, 110 Md. 275, 22 L. R. A. (N.S.) 964, 73 Atl. 157.

¹¹ *Warner v. Page*, — Okla. —, 159 Pac. 264.

¹² *State v. Sapulpa*, — Okla. —, 160 Pac. 489.

¹³ *England. Napier v. Bruce*, 8 Cl. & F. 470.

United States. *Leggett v. Humphreys*, 62 U. S. (21 How.) 66, 16 L. ed. 50.

California. *Felonicher v. Stingley*, 142 Cal. 630, 76 Pac. 504.

North Carolina. *Blades v. Dewey*, 136 N. Car. 176, 103 Am. St. Rep. 924, 48 S. E. 627.

Oregon. *Woodle v. Settlemyer*, 71 Or. 25, L. R. A. 1915A, 839, 141 Pac. 205.

¹⁴ *Mann v. Mann*, 119 Va. 630, 89 S. E. 897.

¹⁵ *Blades v. Dewey*, 136 N. Car. 176, 103 Am. St. Rep. 924, 48 S. E. 627.

¹⁶ *Federal Union Surety Co. v. McGuire*, 111 Ark. 373, 163 S. W. 1171;

in favor of the creditor.¹⁷ The reason for this difference in theories of construction is undoubtedly that in the latter case the surety enters into the contract as a matter of business and that he is entitled to no more favorable consideration than any other party who enters into a contract by which he expects to profit. In some states the reason for this difference has been said to be that in the latter group of cases the surety becomes surety for a valuable consideration which moves to himself.¹⁸ In some cases, however, it has been intimated that the reason for the difference in cases is that in the latter group of cases the surety is a corporation, while in the former group of cases the surety was an individual.¹⁹ It has also been suggested that the reason for the difference in construction is that the surety company selects the language of the instrument by which it becomes a surety.²⁰ For any or all of these reasons such contracts of suretyship are treated in many jurisdictions just as insurance contracts are treated and they are construed in favor of the insured.²¹

This rule, if rightly applied, has especial force with reference to such contracts as are not favored by the law.²² Thus covenants for forfeitures,²³ such as covenants inserted in insurance policies,²⁴

United States Fidelity and Guaranty Co. v. Poetker, 180 Ind. 255, 102 N. E. 372; American Surety Co. v. Pangburn, 182 Ind. 116, 105 N. E. 769; Hileman v. Faus, 178 Ia. 644, 158 N. W. 597.

¹⁷ American Bonding Co. v. Morrow, 80 Ark. 49, 117 Am. St. Rep. 72, 96 S. W. 613.

¹⁸ United States Fidelity and Guaranty Co. v. Poetker, 180 Ind. 255, 102 N. E. 372; Hileman v. Faus, 178 Ia. 644, 158 N. W. 597.

¹⁹ Southern Real Estate & Financial Co. v. Bankers' Surety Co. (Mo.), 184 S. W. 1030.

²⁰ Federal Union Surety Co. v. Maguire, 111 Ark. 373, 163 S. W. 1171.

²¹ American Bonding Co. v. Morrow, 80 Ark. 49, 117 Am. St. Rep. 72, 96 S. W. 613; American Surety Co. v. Pangburn, 182 Ind. 116, 105 N. E. 769; Hormel v. American Bonding Co., 112 Minn. 288, 33 L. R. A. (N.S.) 513, 128

N. W. 12; Philadelphia v. Fidelity & Deposit Co., 231 Pa. St. 208, Ann. Cas. 1912B, 1085, 80 Atl. 62; Brown v. Title Guaranty & Surety Co., 232 Pa. St. 337, 38 L. R. A. (N.S.) 698, 81 Atl. 410.

²² Letchworth v. Vaughan, 77 Ark. 305, 90 S. W. 1001; Hunn v. Pennsylvania Institution for Instruction of the Blind, 221 Pa. St. 403, 18 L. R. A. (N.S.) 1248, 70 Atl. 812.

²³ Letchworth v. Vaughan, 77 Ark. 305, 90 S. W. 1001; Jensen v. Palatine Insurance Co., 81 Neb. 523, 116 N. W. 286; Hamann v. Nebraska Underwriters' Insurance Co., 82 Neb. 429, 118 N. W. 65; Reeves v. Martin, 20 Okla. 558, 94 Pac. 1058; Jacobs v. Spalding, 71 Wis. 177, 36 N. W. 608.

²⁴ Arkansas. American Bonding Co. v. Morrow, 80 Ark. 49, 117 Am. St. Rep. 72, 96 S. W. 613.

Georgia. Thornton v. Ins. Co., 116 Ga. 121, 94 Am. St. Rep. 99, 42 S. E. 287.

are construed strictly against the party for whose benefit they are exacted. Thus under an insurance policy containing a provision that the policy should be incontestable after three years, and another provision avoiding the policy "if the insured die in consequence of his own criminal action," the latter clause was held not to apply after the expiration of three years.²⁵ A condition in an insurance policy which makes the policy void if gasoline is kept, used or allowed on the premises, applies to such keeping or using as a matter of practice, and it does not apply to the temporary possession of a small quantity of gasoline for the purpose of cleaning an automobile and vulcanizing tires.²⁶ A provision to the effect that a railway ticket is not good if mutilated is to be construed strictly against the railway company.²⁷ A contract by which an employe releases his legal rights,²⁸ and a covenant for arbitration,²⁹ are to be construed strictly. In many cases language is used which seems to indicate that the question to be considered is which party in fact prepared the contract or the term in question, and that the term is to be construed as against the party who prepared it in fact.³⁰ It has, however, been said that to have this rule apply, the contract must, on its face, show which party makes use of the language; and that oral evidence is inadmissible to show which party stipulated for certain terms since it is im-

Kentucky. *Home Ins. Co. v. Bridges*, 172 Ky. 161, L. R. A. 1917C, 276, 189 S. W. 6.

Illinois. *Forest City Ins. Co. v. Hardesty*, 182 Ill. 39, 74 Am. St. Rep. 161, 55 N. E. 139.

Indiana. *Aetna Ins. Co. v. Deming*, 123 Ind. 384, 24 N. E. 86, 375.

Nebraska. *Connecticut Fire Ins. Co. v. Jeary*, 60 Neb. 338, 51 L. R. A. 698, 83 N. W. 78; *Hamann v. Nebraska Underwriters' Insurance Co.*, 82 Neb. 429, 118 N. W. 65.

Ohio. *Webster v. Ins. Co.*, 53 O. S. 558, 53 Am. St. Rep. 658, 30 L. R. A. 719, 42 N. E. 546.

South Dakota. *McNamara v. Ins. Co.*, 1 S. D. 342, 47 N. W. 288.

Washington. *Starr v. Aetna Ins. Co.*, 41 Wash. 199, 4 L. R. A. (N.S.) 636, 83 Pac. 113.

²⁵*Sun Life Ins. Co. v. Taylor*, 106

Ky. 408, 94 Am. St. Rep. 383, 56 S. W. 668.

²⁶*Home Ins. Co. v. Bridges*, 172 Ky. 161, L. R. A. 1917C, 276, 189 S. W. 6.

²⁷*Young v. Central of Georgia Ry. Co.*, 120 Ga. 25, 102 Am. St. Rep. 68, 65 L. R. A. 436, 47 S. E. 556.

²⁸*Maucher v. Chicago, R. I. & P. Ry. Co.*, 100 Neb. 237, 159 N. W. 422.

²⁹*Hunn v. Pennsylvania Institution for Instruction of the Blind*, 221 Pa. St. 403, 18 L. R. A. (N.S.) 1248, 70 Atl. 812.

³⁰*Allen-West Commission Co. v. People's Bank*, 74 Ark. 41, 84 S. W. 1041; *General Accident, Fire & Life Assurance Corp. v. Louisville Home Telephone Co.*, 175 Ky. 96, L. R. A. 1917D, 952, 193 S. W. 1031; *Bickford v. Kirwin*, 30 Mont. 1, 75 Pac. 518.

Contra. Blankenship v. Decker, 34 Mont. 292, 85 Pac. 1035; *Gillet v. Bank*, 160 N. Y. 549, 55 N. E. 292.

material.³¹ In most cases the contract shows on its face that the provisions in question were inserted for the benefit of the party by whom they were in fact drawn; and the question of the right to show, as a fact, which party prepared such provision does not arise.

The rule *contra proferentem* is not one of the favored rules of construction. Indeed, it is said that it is to be resorted to only when the other rules fail.³²

It has no application where the contract is not ambiguous and where the intention of the parties is clear.³³

§ 2055. Rules and by-laws. Rules of a voluntary association are a part of a contract for membership in such association entered into between the association and a member thereof.¹ A pastor of a church whose rule provides the pastor's salary to be fixed upon the basis of the estimated amount of voluntary subscriptions, which can be collected, and which provides that neither the church nor the conference shall be liable for the deficiency, can not recover from the church for the amount of subscriptions which have not been collected.² The constitution and by-laws of a beneficial association form a part of a contract of insurance entered into between such association and a member thereof,³ whether such by-laws are referred to in the contract of insurance or not.⁴ The construction placed upon such by-laws by its highest tribunal be-

³¹ *Hull, etc., Co. v. Coke Co.*, 113 Fed. 256, 51 C. C. A. 213.

³² *Patterson v. Gage*, 11 Colo. 50, 16 Pac. 560; *Sinclair v. National Surety Co.*, 132 Ia. 549, 107 N. W. 184; *Aldrich v. Bay State Construction Co.*, 186 Mass. 489, 72 N. E. 53; *Empire Rubber Mfg. Co. v. Morris*, 73 N. J. L. 602, 65 Atl. 450.

³³ *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 38 L. ed. 231; *Wilkie v. New York Life Insurance Co.*, 146 N. Car. 513, 60 S. E. 427.

¹ *Lawson v. Hewell*, 118 Cal. 613, 49 L. R. A. 400, 50 Pac. 763; *Green v. Board of Trade*, 174 Ill. 585, 49 L. R. A. 365, 51 N. E. 599.

² *Baldwin v. First Methodist Episcopal Church*, 79 Wash. 578, 52 L. R. A. (N.S.) 171, 140 Pac. 673.

³ *Illinois. Protection Life Ins. Co. v. Foote*, 79 Ill. 361; *Illinois, etc., Association v. Wahl*, 68 Ill. App. 411.

Indiana. Supreme Lodge Knights of Pythias v. Knight, 117 Ind. 489, 3 L. R. A. 409, 20 N. E. 479.

Louisiana. Daugherty v. Knights of Pythias, 48 La. Ann. 1203, 55 Am. St. Rep. 310, 20 So. 712.

Oklahoma. Home Forum Benefit Order v. Jones, 5 Okla. 598, 50 Pac. 165.

Tennessee. McLendon v. Woodmen of the World, 106 Tenn. 695, 52 L. R. A. 444, 64 S. W. 36.

⁴ *Hass v. Relief Association*, 118 Cal. 6, 49 Pac. 1056; *Condon v. Reserve Association*, 89 Md. 99, 73 Am. St. Rep. 169, 44 L. R. A. 149, 42 Atl. 944.

comes as much a part of the contract as the by-laws themselves.⁵ If power to change the by-laws is reserved, subsequent amendments become terms of the contract and are binding on the members.⁶ However, general power to change by-laws has been held not to confer power to change the contractual rights of a member.⁷

§ 2056. Usages and customs as terms of contract. In many kinds of business, however, a great number of usages and customs have gradually been built up. These customs are rarely carried in express terms into contracts made with reference to such kinds of business, yet they are ordinarily intended by the parties as terms of such contracts. Accordingly, even though the contract is in writing, extrinsic evidence may be resorted to to show usages and customs of such business consistent with the contract, and either known to the parties to the contract,¹ or so notorious that

⁵ *Supreme Lodge Knights of Pythias v. Kalinski*, 163 U. S. 289, 41 L. ed. 163.

⁶ *Robinson v. Templar Lodge*, 117 Cal. 370, 59 Am. St. Rep. 193, 49 Pac. 170; *Hass v. Relief Association*, 118 Cal. 6, 49 Pac. 1056; *Lawson v. Hewell*, 118 Cal. 613, 49 L. R. A. 400, 50 Pac. 763; *Daughtry v. Knights of Pythias*, 48 La. Ann. 1203, 55 Am. St. Rep. 310, 20 So. 712.

⁷ *Sieverts v. Benevolent Association*, 95 Ia. 710, 64 N. W. 671; *Cohen v. Supreme Sitting*, 105 Mich. 283, 63 N. W. 304; *Strause v. Life Association*, 126 N. Car. 971, 54 L. R. A. 60, 36 S. E. 352 [rehearing denied, 128 N. Car. 465, 54 L. R. A. 605, 39 S. E. 55]; *Hale v. Aid Union*, 168 Pa. St. 377, 31 Atl. 1066.

¹ *United States. National Bank v. Burkhardt*, 100 U. S. 686, 25 L. ed. 766; *Hostetter v. Park*, 137 U. S. 30, 34 L. ed. 568; *Moore v. United States*, 196 U. S. 157, 166, 49 L. ed. 428; *Kauffman v. Raeder*, 108 Fed. 171, 54 L. R. A. 247, 47 C. C. A. 278; *The Indrapura*, 238 Fed. 853; *Kawin v. American Colortype Co.*, 243 Fed. 317, 156 C. C. A. 97; *Central Commercial*

Co. v. Jones-Dusenbury Co., 231 Fed. 13; *Neer v. Lang*, 252 Fed. 575.

Alabama. *Middleton v. Western Union Telegraph Co.*, 197 Ala. 243, 72 So. 548; *Lutz v. Van Heynigen Brokerage Co.*, — Ala. —, 75 So. 284; *Smith v. Waldrop*, — Ala. —, 77 So. 331.

Arkansas. *Bush v. Southern Grocery Co.*, — Ark. —, 208 S. W. 299.

Connecticut. *Kinney v. Horwitz*, — Conn. —, 105 Atl. 438.

Georgia. *Farmers' Ginnery & Mfg. Co. v. Thrasher*, 144 Ga. 598, 87 S. E. 804.

Iowa. *Nagel v. Meier (Ia.)*, 155 N. W. 813.

Kansas. *Strong v. Ringle*, 96 Kan. 573, 152 Pac. 631; *Rains v. Weiler*, 101 Kan. 204, L. R. A. 1917F. 571, 166 Pac. 235.

Maryland. *Himmel v. Levinstein*, — Md. —, 103 Atl. 848.

Massachusetts. *South Deerfield Union Storage Co. v. New York, N. H. & H. R. Co.*, 222 Mass. 535, 111 N. E. 367; *Roach v. Lane*, 226 Mass. 598, 116 N. E. 470.

New York. *Rinaldi v. Mohican Co.*, 225 N. Y. 70, 121 N. E. 471; *Bolles v. Scheer*, 225 N. Y. 118, 121 N. E. 771.

one dealing in such business must be presumed to know it.² Under a contract of sale, a trade usage may be shown to establish the existence of an implied warranty.³ Under a contract for dividing net profits, a trade custom of making an annual inventory may be shown.⁴ A principal who employs a broker is bound by the customs of the market at which such broker acts,⁵ and the actual knowledge of such principal is immaterial.⁶ In an oral contract of insurance not specifying when it is to take effect extrinsic evidence of a custom as to when the risk attaches is admissible.⁷ So under a contract to pay twelve dollars an acre for clearing a right of way at points to be designated, it has been held proper to show a custom to pay for clearing in open fields only such proportion of the contract price as such work bears to the work of clearing in the forest.⁸ So under a binding slip issued by an insurance company which recites that it is issued to the insured to protect him against loss for a certain time and amount, but which is incomplete as not showing the consideration, it may be shown that the custom of the insurance business is to issue such slips pending the acceptance or rejection of the policy and that in case of rejection, liability under the binding slip ceases at once.⁹ If a general custom in a certain business requires payment for each separate carload, such custom renders the contract severable so that a shortage as to one car does not discharge the contract as to other carloads.¹⁰ A general custom may make the employer liable to his employees for time lost when the business is shut

South Carolina. *Friedheim v. Hildie Co.*, 104 S. Car. 378, 89 S. E. 358; *Burden v. Woodside Cotton Mills*, 104 S. Car. 435, 89 S. E. 474.

Vermont. *G. R. Bianchi Granite Co. v. Terre Haute Monument Co.*, 91 Vt. 177, 99 Atl. 875.

Washington. *Cormier v. Martin Lumber Co.*, 98 Wash. 463, 167 Pac. 1105.

² *Silverstein v. Michau*, 221 Fed. 55, 137 C. C. A. 79; *Farley Nat. Bank v. Pollock*, 145 Ala. 321, 117 Am. St. Rep. 44, 2 L. R. A. (N.S.) 194, 8 Ann. Cas. 370, 39 So. 612; *People v. Traves*, 188 Mich. 415, 154 N. W. 120; *Van Dusen-Harrington Co. v. Jungeblut*, 75 Minn. 298, 74 Am. St. Rep. 463, 77 N. W. 970.

³ *Rinaldi v. Mohican Co.*, 225 N. Y. 70, 121 N. E. 471.

⁴ *Bolles v. Scheer*, 225 N. Y. 118, 121 N. E. 771.

⁵ *Van Dusen-Harrington Co. v. Jungeblut*, 75 Minn. 298, 74 Am. St. Rep. 463, 77 N. W. 970; *Miller v. Great Western Commission Co.*, 98 Neb. 392, 152 N. W. 787.

⁶ *Miller v. Great Western Commission Co.*, 98 Neb. 392, 152 N. W. 787.

⁷ *Cleveland Oil Co. v. Ins. Society*, 34 Or. 228, 55 Pac. 435.

⁸ *McCarthy v. McArthur*, 69 Ark. 313, 63 S. W. 56.

⁹ *Underwood v. Ins. Co.*, 161 N. Y. 413, 55 N. E. 936.

¹⁰ *Roach v. Lane*, 226 Mass. 598, 116 N. E. 470.

down.¹¹ A local custom may require a common carrier to give notice to the shipper of failure to deliver goods within a specified time.¹² A custom to the effect that the buyer of a vessel acquires all the credits which have been earned by it and which are unpaid, and that he becomes liable for all debts thereon, is a part of such a contract of sale.¹³ In the absence of a specific provision as to the rate of compensation, the usual and customary rate will be implied.¹⁴ A local custom as to the division of attorney's fees may be considered.¹⁵

In the absence of specific provision in the contract, custom or usage may be considered in determining what constitutes performance of such contract.¹⁶ Under a contract for the delivery of goods, evidence of a trade usage as to variation is admissible if such variation is slight.¹⁷ Under a contract for the sale of goods a custom as to the method for settling for defects is to be regarded as fixing the rights of the parties in the absence of specific provision in such contract.¹⁸ Under a contract of sale, a trade custom as to inspection and method of payment may be shown.¹⁹ In an action against a common carrier to recover for the value of goods which have been destroyed, a custom that the bill of lading was to be surrendered may be shown to determine when delivery was made.²⁰

While usages and customs may be regarded as a part of a contract, they can not be a substitute for a contract; and the parties

¹¹ *Cormier v. Martin Lumber Co.*, 98 Wash. 463, 167 Pac. 1105.

¹² *South Deerfield Onion Storage Co. v. New York, N. H. & H. R. Co.*, 222 Mass. 535, 111 N. E. 367.

¹³ *Donnell v. G. G. Deering Co.*, 115 Me. 32, 97 Atl. 130.

¹⁴ *Seward v. M. Seward & Son Co.*, 91 Conn. 190, 99 Atl. 887; *Godefroy v. Hupp*, 93 Wash. 371, Ann. Cas. 1918E, 494, 160 Pac. 1056.

¹⁵ *Smith v. Waldrop*, — Ala. —, 77 So. 331.

¹⁶ *Fleisher v. Abbott*, 222 Fed. 211, 137 C. C. A. 525 [reversing, *Abbott v. Fleisher*, 217 Fed. 828]; *Kawin v. American Colortype Co.*, 243 Fed. 317, 156 C. C. A. 97; *Central Commercial Co. v. Jones-Dusenbury Co.*, 251 Fed. 13; *Roach v. Lane*, 226 Mass. 598, 116

N. E. 470; *Oswego Falls Pulp & Paper Co. v. Stecker Lithographic Co.*, 215 N. Y. 98, L. R. A. 1916B, 1257, 109 N. E. 92; *G. R. Bianchi Granite Co. v. Terre Haute Monument Co.*, 91 Vt. 177, 99 Atl. 875.

¹⁷ *Oswego Falls Pulp & Paper Co. v. Stecker Lithographic Co.*, 215 N. Y. 98, L. R. A. 1916B, 1257, 109 N. E. 92; *G. R. Bianchi Granite Co. v. Terre Haute Monument Co.*, 91 Vt. 177, 99 Atl. 875.

¹⁸ *Folley v. Smith*, 103 S. Car. 445, 88 S. E. 24.

¹⁹ *Kinney v. Horwitz*, — Conn. —, 105 Atl. 438; *Roach v. Lane*, 226 Mass. 598, 116 N. E. 470.

²⁰ *Bush v. Southern Grocery Co.*, — Ark. —, 208 S. W. 299.

to a transaction can not be held to be bound by a contract by reason of a custom or usage unless they actually intended to enter into a contract.²¹

§ 2057. Elements of usage or custom. The terms "usage" and "custom" with reference to trade are practically synonymous. It has been suggested that a usage is a method of doing business which the parties may be presumed to intend as part of their contract,¹ while custom originates in usage and persists so long as to become law.² The idea of "custom" as law is a survival of the English theory of the so-called local custom which was the name given by the king's courts to the law of the local courts; that is, to rules which were law in the local courts, but which were treated as facts in the king's courts.

To be regarded as a part of a transaction a custom must be shown to exist,³ as a certain and uniform custom, and as one which has been established for so long a time as to have been generally known and to be recognized as the established rule in such cases,⁴

²¹ *Great Lakes Coal & Dock Co. v. Seither Transit Co.*, 220 Fed. 28; *Thomas v. Guarantee Title & T. Co.*, 81 O. S. 432, 26 L. R. A. (N.S.) 1210, 91 N. E. 183.

¹ *Eames v. H. B. Claffin Co.*, 239 Fed. 631, 152 C. C. A. 465.

² *Eames v. H. B. Claffin Co.*, 239 Fed. 631, 152 C. C. A. 465.

³ *Alabama*. *Cole Motor Car Co. v. Tebault*. 196 Ala. 382, 72 So. 21.

Florida. *Gulf Coast Transportation Co. v. Howell*, 70 Fla. 544, L. R. A. 1916D, 974, 70 So. 567.

Kansas. *Atkinson v. Kirkpatrick*, 90 Kan. 515, 135 Pac. 579.

Kentucky. *Mowbray & Robinson Co. v. Kelley*, 170 Ky. 271, 185 S. W. 1130.

Michigan. *Saginaw Milling Co. v. Schram*, 186 Mich. 52, 152 N. W. 945.

Oklahoma. *Gilbert v. Citizens' Nat. Bank*. — Okla. —, L. R. A. 1917A, 740, 160 Pac. 635.

Pennsylvania. *Bubb v. Parker & Edwards Oil Co.*, 252 Pa. St. 26, 97 Atl. 114.

Washington. *Wilkins v. Kessinger*, 90 Wash. 447, 156 Pac. 389.

United States. *Oelricks v. Ford*, 64 U. S. (23 How.) 49, 16 L. ed. 534.

Arkansas. *Taylor v. Union Sawmill Co.*, 105 Ark. 518, 152 S. W. 150.

District of Columbia. *Shortsleeves v. Capital Traction Co.*, 28 D. C. App. 365, 8 L. R. A. (N.S.) 287.

Iowa. *Nelson v. C. F. Adams Co.*, 179 Ia. 586, 161 N. W. 645.

Maryland. *Himmel v. Levinstein*, — Md. —, 103 Atl. 848.

Minnesota. *Stevens v. Wisconsin Farm Land Co.*, 124 Minn. 421, 145 N. W. 173.

Washington. *Johns v. Jaycox*, 67 Wash. 403, 39 L. R. A. (N.S.) 1151, Ann. Cas. 1913D, 471, 121 Pac. 854.

Wisconsin. *Hinton v. Coleman*, 45 Wis. 165.

⁴ *United States*. *Oelricks v. Ford*, 64 U. S. (23 How.) 49, 16 L. ed. 534.

Arkansas. *Taylor v. Union Sawmill Co.*, 105 Ark. 518, 152 S. W. 150.

Indiana. *Rastetter v. Reynolds*, 160 Ind. 133, 66 N. E. 612.

or as one which is actually known to the party against whom it is invoked.⁵ It need not be immemorial.⁶ While language is occasionally used which seems to assume that a custom must be immemorial, this is an adaptation of the requirement laid down by the king's courts in England for proof of so-called local customs which were really the laws of the local courts. A prior custom which has been superseded by reason of the development of the business in question can not be regarded as a part of the transaction.⁷ If a custom is not established in the particular trade or business, it is not regarded as part of the contract unless the parties actually contracted with reference thereto.⁸ If the custom is a general one, all are presumed to know of it and to contract with reference to it.⁹ To be regarded as part of a contract, the usage or custom must not only be shown to exist, but it must have both of the following elements: (1) it must be actually or constructively known; and (2) it must be consistent with the contract. If either of these elements is lacking the usage or custom can not be regarded as part of the contract. If the usage is neither actually nor constructively known to one of the parties to the contract, it is not binding upon him.¹⁰ A custom of certain employers to permit certain agents to incur expenses in livery hire does not

Kentucky. *Shaw v. Ingram-Day Lumber Co.*, 152 Ky. 329, L. R. A. 1915D, 145, 153 S. W. 431.

Michigan. *Pennell v. Delta Transportation Co.*, 94 Mich. 247, 53 N. W. 1049.

Wisconsin. *Zartner v. George*, 156 Wis. 131, 52 L. R. A. (N.S.) 129, 145 N. W. 971.

⁵ *Eames v. H. B. Clafin Co.*, 239 Fed. 631, 152 C. C. A. 465.

⁶ *Banks v. Simpkins*, 88 N. J. Eq. 1, 102 Atl. 680.

⁷ *Bubb v. Parker & Edwards Oil Co.*, 252 Pa. St. 26, 97 Atl. 114.

⁸ *Mullins Lumber Co. v. Williamson & Brown Land & Lumber Co.*, 246 Fed. 232, 158 C. C. A. 392; *Puffer Mfg. Co. v. Yeager*, 230 Mass. 557, 120 N. E. 97; *Universal Oil & Fertilizer Co. v. Burney*, 174 N. Car. 382, 93 S. E. 912; *Donaldson v. Brewster*, 103 Wash. 65, 173 Pac. 1018.

⁹ *Cormier v. H. H. Martin Lumber Co.*, 98 Wash. 463, 167 Pac. 1105.

¹⁰ *England.* *Daun v. Brewery Co.*, L. R. 8 Eq. 155.

United States. *Barnard v. Kellogg*, 77 U. S. (10 Wall.) 383, 19 L. ed. 987; *McDonough v. Marble Co.*, 112 Fed. 634.

Alabama. *Edwards v. Kilgore*, 192 Ala. 343, 68 So. 888; *Cole Motor Car Co. v. Tebault*, 196 Ala. 382, 72 So. 21.

Connecticut. *Estes v. United Brotherhood of Carpenters, etc.*, 90 Conn. 426, 97 Atl. 326.

Maryland. *Himmel v. Levinstein*, — Md. —, 103 Atl. 848.

Massachusetts. *Nonotuck Silk Co. v. Fair*, 112 Mass. 354; *Hall v. Paine*, 224 Mass. 62, L. R. A. 1917C, 737, 112 N. E. 153; *Aradalou v. New York, New Haven & Hartford R. Co.*, 225 Mass. 235, 114 N. E. 297; *Puffer Mfg. Co. v. Yeager*, 230 Mass. 557, 120 N. E. 97.

impose such liability upon other employees.¹¹ A custom of certain employers to pay the expense of the attendance of a physician upon their employes can not impose a liability upon other employers.¹² The custom of a bank is not binding upon a party who deals with such bank in ignorance of such custom.¹³ A custom of a bank with reference to the ownership of checks deposited for collection is not binding upon one who deals with such bank in ignorance of such custom.¹⁴ The usage of banks to hold checks deposited as a deposit until the end of banking hours to see if the account is good is not binding on a depositor if not known to him.¹⁵ A custom on the part of one who sells on credit to take a certain time to investigate the credit of those who buy from him, is not binding upon purchasers who do not know of such custom.¹⁶ A usage that government contracts contain a provision requiring the approval of material by the supervising architect before it is used is not a general custom, and one who makes a bid for supplying material for the performance of such a contract is not to be regarded as having contracted with reference to such usage.¹⁷ A custom to deliver goods upon the bank of the river and not upon a boat for transportation is held not to be binding upon a purchaser who does not know of such custom.¹⁸

A usage or custom which applies only to certain classes of transactions can not be regarded as controlling other classes of transactions, even if analogous to those of the former classes.¹⁹ A custom that no compensation shall be paid to an architect for plans which are submitted in a competition and which are not used can have no application to his right to recover for plans which he submits at request and not in a competition.²⁰

Michigan. Schook v. Zimmerman, 316, L. R. A. 1915E, 395, 176 S. W. 188 Mich. 617, 155 N. W. 526; Tuttle v. Embury-Martin Lumber Co., 192 Mich. 385, Ann. Cas. 1918C, 664, 158 N. W. 875.

Ohio. Metropolitan Bank & Trust Co. v. Newcomb, 2 Ohio App. 56, 25 O. C. D. 327.

Virginia. Scott's Ex'r v. Chesterman, 117 Va. 584, 85 S. E. 502.

¹¹ Nelson v. C. F. Adams Co., 179 Ia. 586, 161 N. W. 645.

¹² Indiana Die Casting Development Co. v. Newcomb, 184 Ind. 250, 111 N. E. 16.

¹³ Calhoun v. Ainsworth, 118 Ark. 316, L. R. A. 1915E, 395, 176 S. W. 316.

¹⁴ American Savings Bank & Trust Co. v. Dennis, 90 Wash. 547, 156 Pac. 559.

¹⁵ National Bank v. Burkhardt, 100 U. S. 686, 25 L. ed. 766.

¹⁶ Bowser v. Fountain, 128 Minn. 198, L. R. A. 1916B, 1036, 150 N. W. 795.

¹⁷ Puffer Mfg. Co. v. Yeager, 230 Mass. 557, 120 N. E. 97.

¹⁸ Universal Oil & Fertilizer Co. v. Burney, 174 N. Car. 382, 93 S. E. 912.

¹⁹ Rice v. Sheldon, 38 R. I. 161, 94 Atl. 711.

²⁰ Rice v. Sheldon, 38 R. I. 161, 94 Atl. 711.

A custom must be reasonable.²¹ A custom that the actual rating of a vessel shall be determined by the entry upon the register of the insurance company is invalid.²² A custom which makes the statement of the consignee and of the person for whom he ordered the goods, conclusive as against the shipper is unreasonable.²³

A custom in violation of the law can not have any legal effect, and it can not be regarded as a part of the contract between the parties.²⁴

§ 2058. Usage or custom contrary to express terms of contract. It is perfectly possible for parties to make contracts which are not controlled by given usages. This may be done by expressly providing against them; but it is done more frequently by making express provisions, covering the same ground as the usage, but inconsistent therewith. Accordingly the usage invoked must furthermore be consistent with the contract in question in order to be regarded as part of it. If inconsistent with the express provisions of the contract, it can not be used to contradict them and to show an intent different from that expressed.¹ A custom to use a freight elevator for general purposes can not control an express provision of a lease to the effect that such elevator shall not be used except

²¹ England. *Produce Brokers Co. v. Olympia Oil & Coke Co.* [1916], 2 K. B. 296.

United States. *Insurance Companies v. Wright*, 68 U. S. (1 Wall.) 456, 17 L. ed. 505.

Kentucky. *Shaw v. Ingram-Day Lumber Co.*, 152 Ky. 320, L. R. A. 1915D, 145, 153 S. W. 431.

New York. *Fuller v. Robinson*, 86 N. Y. 306, 40 Am. Rep. 540.

Tennessee. *Pennsylvania Ry. v. Naive*, 112 Tenn. 239, 64 L. R. A. 443, 79 S. W. 124.

²² *Insurance Companies v. Wright*, 68 U. S. (1 Wall.) 456, 17 L. ed. 505.

²³ *Byrd v. Beal*, 150 Ala. 122, 124 Am. St. Rep. 60, 43 So. 749.

²⁴ United States. *Cook v. Flagg*, 251 Fed. 5.

Arkansas. *Burton v. Wilson*, — Ark. —, 205 S. W. 655.

California. *Crocker National Bank v. Byrne*, — Cal. —, 173 Pac. 752.

Georgia. *Deadwyler v. Karow*, 131 Ga. 227, 19 L. R. A. (N.S.) 197, 62 S. E. 172.

Washington. *Myers v. Exchange National Bank* (Wash.), 164 Pac. 951.

This rule applies to customs in violation of the positive provisions of a statute. *Crocker National Bank v. Byrne*, — Cal. —, 173 Pac. 752; *Deadwyler v. Karow*, 131 Ga. 227, 19 L. R. A. (N.S.) 197, 62 S. E. 172.

¹ United States. *Oelricks v. Ford*, 64 U. S. (23 How.) 49, 16 L. ed. 534; *Insurance Companies v. Wright*, 68 U. S. (1 Wall.) 456, 17 L. ed. 505; *Barnard v. Kellogg*, 77 U. S. (10 Wall.) 383, 19 L. ed. 987; *Hearne v. Marine Ins. Co.*, 87 U. S. (20 Wall.) 488, 22 L. ed. 395; *National Bank v. Burkhardt*, 100 U. S. 686, 25 L. ed. 766; *Hostetter v. Park*, 137 U. S. 30, 34 L. ed. 568; *Moore v. United States*, 196 U. S. 157, 166, 49 L. ed. 428; *Great Lakes Coal & Dock Co. v. Seither Transit Co.*, 220

for freight.² A custom to accept payment in checks can not control an express provision in a contract for payment in money.³ The specific provisions of a contract to ship goods can not be contradicted by a local custom.⁴ A contract by which the seller agrees to deliver "f. o. b." is so plain in view of the meaning which attaches to it in business that such meaning can not be varied by custom.⁵ A contract to saw logs as fast as the operator could can

Fed. 28; *Pabst Brewing Co. v. E. Clemens Horst Co.*, 229 Fed. 913, 144 C. C. A. 195; *The Rebecca R. Douglass*, 248 Fed. 366.

Alabama. *Middleton v. Western Union Telegraph Co.*, 197 Ala. 243, 72 So. 548; *People's Bank & Trust Co. v. Walthall*, — Ala. —, 75 So. 570.

Arkansas. *Burton v. Wilson*, — Ark. — 205 S. W. 655.

Iowa. *McDowell v. Bowles, Billings & Kessler Grain Co.*, 177 Ia. 744, 157 N. W. 173.

Kansas. *Fidelity & Deposit Co. of Maryland v. Callahan*, 98 Kan. 547, 158 Pac. 658; *Cargill Commission Co. v. Mowery*, 99 Kan. 389, 161 Pac. 634 [modified on rehearing, *Cargill Commission Co. v. Mowery*, 162 Pac. 313].

Kentucky. *City of Covington v. Kanawha Coal & Coke Co.*, 121 Ky. 681, 123 Am. St. Rep. 219, 3 L. R. A. (N.S.) 248, 12 Ann. Cas. 311, 89 S. W. 1126.

Massachusetts. *Menage v. Rosenthal*, 175 Mass. 358, 56 N. E. 579; *Follins v. Dill*, 229 Mass. 321, 118 N. E. 644.

Missouri. *State, ex rel., v. Public Service Commission* 269 Mo. 63, 189 S. W. 377.

New Mexico. *Gooch v. Coleman*, 22 N. M. 45, 159 Pac. 945.

Oregon. *Interior Warehouse Co. v. Dunn*, 80 Or. 528, 157 Pac. 806.

Rhode Island. *Watkins v. Greene*, 22 R. I. 34, 46 Atl. 38.

Virginia. *Scott's Ex'r v. Chesterman*, 117 Va. 584, 85 S. E. 502; *Straus v. Fahed*, 117 Va. 633, 85 S. E. 969;

Sutherland & Co. v. Gibson, 117 Va. 840, 86 S. E. 108.

Washington. *Wilkins v. Kessinger*, 90 Wash. 447, 156 Pac. 389.

Wisconsin. *Vogt v. Schienebeck*, 122 Wis. 491, 106 Am. St. Rep. 989, 67 L. R. A. 756, 2 Am. & Eng. Ann. Cas. 814, 100 N. W. 820; *State v. Park*, 166 Wis. 386, 165 N. W. 289.

Wyoming. *Leitner v. Thayer*, 24 Wyom. 378, 159 Pac. 1084.

Usage "may be resorted to in order to make definite what is uncertain, clear up what is doubtful or annex incidents but not to vary or contradict the terms of a contract." *Moore v. United States*, 196 U. S. 157, 166, 49 L. ed. 428 [citing, *Oelricks v. Ford*, 64 U. S. (23 How.) 49, 16 L. ed. 534; *Insurance Companies v. Wright*, 68 U. S. (1 Wall.) 456, 17 L. ed. 505; *Barnard v. Kellogg*, 77 U. S. (10 Wall.) 383, 19 L. ed. 987; *Hearne v. Marine Ins. Co.*, 87 U. S. (20 Wall.) 488, 22 L. ed. 395; *National Bank v. Burkhardt*, 100 U. S. 686, 25 L. ed. 766; *Hostetter v. Park*, 137 U. S. 30, 34 L. ed. 568].

² *Follins v. Dill*, 229 Mass. 321, 118 N. E. 644.

³ *State v. Park*, 166 Wis. 386, 165 N. W. 289.

⁴ *Boon v. The Belfast*, 40 Ala. 184, 88 Am. Dec. 761; *Louisville, etc., Co. v. Rogers*, 20 Ind. App. 594, 49 N. E. 970; *Benson v. Gray*, 154 Mass. 391, 13 L. R. A. 262, 28 N. E. 275; *Meloche v. Ry.*, 116 Mich. 69, 74 N. W. 301.

⁵ *Vogt v. Schienebeck*, 122 Wis. 491, 106 Am. St. Rep. 989, 67 L. R. A. 756, 2 Am. & Eng. Ann. Cas. 814, 100 N. W. 820.

not be contradicted by a custom to saw logs of different owners in the order in which they were delivered.⁶ A contract which provides who shall pay the duty can not be contradicted by a custom as to who receives the benefit of subsequent reductions.⁷ A contract by which A sells to X property which A has acquired from B, imposes upon X the duty of making payments to A and it can not be varied by evidence of a custom that under such circumstances X should pay B.⁸ A written oil lease can not be contradicted by evidence of a custom that the prospector should burn oil produced on a claim.⁹ A contract requiring a specific number of wells to be bored can not be contradicted by a custom to bore a certain number in a given time.¹⁰ If a contract requires "walls to be washed or sized with good, strong glue," preliminary to papering, evidence of a custom as to the method of papering is no part of the contract.¹¹ Under a contract to print a catalogue cover in accordance with approved proof, it can not be shown to be the custom for the printers to add their name to the bottom of the last page of the catalogue, proof having been approved without such addition.¹² An express provision as to time can not be controlled by custom.¹³ A contract containing an express provision as to the time of settlement can not be varied by evidence of a general custom.¹⁴ An express provision as to time of delivery can not be controlled by evidence of a custom as to delivery.¹⁵ An express provision as to the time of employment can not be contradicted by a custom to employ for the season.¹⁶ If a contract provides for performance during a certain time, it can not be varied by evidence of a custom to terminate such contracts at will.¹⁷ A custom that a certain kind of employment should last for a certain

⁶ *Mowatt v. Wilkinson*, 110 Wis. 176, 85 N. W. 661.

⁷ *Withers v. Moore*, 140 Cal. 591, 74 Pac. 159 [reversing in banc, 71 Pac. 697].

⁸ *McDowell v. Bowles, Billings & Kessler Grain Co.*, 177 Ia. 744, 157 N. W. 173.

⁹ *Swift v. Petroleum Co.*, 141 Cal. 161, 74 Pac. 700 [reversing in banc, 70 Pac. 470].

¹⁰ *Stoddard v. Emery*, 128 Pa. St. 436, 18 Atl. 339.

¹¹ *Independent School District v. Swearingen*, 119 Ia. 702, 94 N. W. 206.

¹² *Harris v. Sharples*, 202 Pa. St. 243, 58 L. R. A. 214, 51 Atl. 965.

¹³ *Levy v. Hoffman*, 235 Fed. 46, 148 C. C. A. 540; *Ady v. Jenkins*, — Md. —, 104 Atl. 178.

¹⁴ *Comstock Amusement Co. v. Opera Ball Co.*, 93 O. S. 46, 112 N. E. 150.

¹⁵ *Ady v. Jenkins*, — Md. —, 104 Atl. 178.

¹⁶ *Dunning v. Lederer, Strauss & Co.*, 164 Wis. 399, 160 N. W. 159.

¹⁷ *Pratt Consol. Coal Co. v. Short*, 191 Ala. 378, 68 So. 63.

and also of the nature of the subject-matter of the con-

C. C. A. 237; *Leschen & Sons Rope Co. v. Mayflower Gold Min. & R. Co.*, 173 Fed. 855, 97 C. C. A. 465, 35 L. R. A. (N.S.) 1; *Ferguson v. Omaha & S. W. R. Co.*, 227 Fed. 513; *Roller v. Leonard*, 229 Fed. 607, 143 C. C. A. 629; *Vinton Petroleum Co. v. Sun Co.*, 230 Fed. 105, 144 C. C. A. 403; *Pitt Construction Co. v. City of Dayton*, 237 Fed. 305; *Eustis Mining Co. v. Beer, Sondheimer Co., Inc.*, 239 Fed. 976; *Brown v. Fletcher*, 244 Fed. 854; *Merrill-Ruckgaber Co. v. United States*, 49 Ct. Cl. 553; *Harten v. Loffler*, 29 D. C. App. 490.

Alabama. *Crass v. Scruggs*, 115 Ala. 258, 22 So. 81; *Lutz v. Van Heynigen Brokerage Co.*, — Ala. —, 75 So. 284.

Alaska. *Daigle v. Maddocks*, 2 Alaska 387.

Arkansas. *Goodwin v. Baker*, 129 Ark. 513, 197 S. W. 10.

California. *Remy v. Olds (Cal.)*, 21 L. R. A. 645, 34 Pac. 216; *Stein v. Archibald*, 151 Cal. 220, 90 Pac. 536.

Colorado. *Union Pacific Ry. v. Anderson*, 11 Colo. 293, 18 Pac. 24; *True v. Rocky Ford Canal, Reservoir & Land Co.*, 36 Colo. 43, 85 Pac. 842; *Fearnley v. Fearnley*, 44 Colo. 417, 98 Pac. 819.

Connecticut. *Galvano Type Engraving Co. v. Jackson*, 77 Conn. 564, 60 Atl. 127.

Georgia. *Illges v. Dexter*, 77 Ga. 36

Idaho. *Burke, etc. Co. v. Wells, etc., Co.*, 7 Ida. 42, 60 Pac. 87; *Givens v. Keeney*, 7 Ida. 335, 63 Pac. 110; *Kroeger v. Good*, 13 Ida. 184, 89 Pac. 632; *Harris v. Faris-Kesl Construction Co.*, 13 Ida. 211, 89 Pac. 760; *Schurger v. Moorman*, 20 Ida. 97, 36 L. R. A. (N.S.) 313, 117 Pac. 122; *State v. Twin Falls Land & W. Co.*, 21 Ida. 410, L. R. A. 1916F, 236, 121 Pac. 1039; *Sauve v. Title Guaranty & Surety Co.*, 29 Ida. 146, 158 Pac. 112.

Illinois. *Torrence v. Shedd*, 156 Ill. 194, 41 N. E. 95, 42 N. E. 171; *Street v. Storage Co.*, 157 Ill. 605, 41 N. E. 1108; *Illinois Terra Cotta Lumber Co.*

v. Owen, 167 Ill. 360, 47 N. E. 722 [reversing, 64 Ill. App. 632]; *Close v. Browne*, 230 Ill. 228, 13 L. R. A. (N.S.) 634, 82 N. E. 629.

Indiana. *Ketcham v. Coal Co.*, 88 Ind. 515; *New York, etc., Ry. v. Ry.*, 116 Ind. 60, 18 N. E. 182; *Dougherty v. Rogers*, 119 Ind. 254, 3 L. R. A. 847, 20 N. E. 779.

Iowa. *Streator Clay Manufacturing Co. v. Henning Vineyard Co.*, 176 Ia. 297, 155 N. W. 1001; *Rowe v. Rowe*, — Ia. —, 174 N. W. 354.

Kansas. *Clark v. Townsend*, 96 Kan. 650, 153 Pac. 555 [rehearing denied, *Clark v. Townsend*, 96 Kan. 650, 154 Pac. 1009]; *Roseman v. Nienaber*, 100 Kan. 174, 166 Pac. 491; *Lantry Contracting Co. v. Atchison, T. & S. F. Ry. Co.*, 102 Kan. 799, 172 Pac. 527.

Kentucky. *Crane v. Williamson*, 111 Ky. 271, 63 S. W. 610, 975.

Louisiana. *Watson v. Succession of Barber*, 105 La. 456, 29 So. 949.

Massachusetts. *Rackemann v. Improvement Co.*, 167 Mass. 1, 57 Am. St. Rep. 427, 44 N. E. 990; *Graves v. Apt.*, — Mass. —, 124 N. E. 432.

Michigan. *Mathews v. Phelps*, 61 Mich. 327, 1 Am. St. Rep. 581, 28 N. W. 108; *Hoose v. Ins. Co.*, 84 Mich. 309, 11 L. R. A. 340, 47 N. W. 587.

Mississippi. *Newman v. Supreme Lodge, Knights of Pythias*, 110 Miss. 371, 70 So. 241.

Missouri. *Nordyke & Marmon Co. v. Kehler*, 155 Mo. 643, 78 Am. St. Rep. 600, 56 S. W. 287.

Montana. *Brockway v. Blair*, 53 Mont. 531, 165 Pac. 455.

Nebraska. *Rice v. McCague*, 61 Neb. 861, 86 N. W. 486; *Fiscus v. Wilson*, 74 Neb. 444, 104 N. W. 856; *Grothe v. Lane*, 77 Neb. 605, 110 N. W. 305; *Nebraska Hardware Co. v. Humphrey Hardware Co.*, 81 Neb. 693, 116 N. W. 650.

New Hampshire. *Saddlery Hardware Mfg. Co. v. Hillsborough Mills*, 68 N. H. 216, 73 Am. St. Rep. 569, 44 Atl. 300.

tract,³ the relation of the parties to the contract,⁴ and the objects

New Jersey. *Ryer v. Turkel*, 75 N. J. L. 677, 70 Atl. 68; *Jersey City v. Flynn*, 74 N. J. Eq. 104, 70 Atl. 497.

New York. *Reynolds v. Ins. Co.*, 47 N. Y. 597; *Smith v. Kerr*, 108 N. Y. 31, 2 Am. St. Rep. 362, 15 N. E. 70; *Berry Harvester Co. v. Machine Co.*, 152 N. Y. 540, 46 N. E. 952; *Sattler v. Hallock*, 160 N. Y. 201, 73 Am. St. Rep. 686, 46 L. R. A. 679, 54 N. E. 667; *Gillet v. Bank*, 160 N. Y. 549, 55 N. E. 292; *Cohen v. Envelope Co.*, 166 N. Y. 292, 59 N. E. 906.

North Carolina. *Bank v. Redwine*, 171 N. Car. 559, 88 S. E. 878; *Edwards v. Jefferson Standard Life Ins. Co.*, 173 N. Car. 614, 92 S. E. 695.

Ohio. *Mosier v. Parry*, 60 O. S. 388, 54 N. E. 364; *Third National Bank v. Laidlaw*, 86 O. S. 91, 98 N. E. 1015.

Pennsylvania. *Wilson v. Wernwag*, 217 Pa. St. 82, 66 Atl. 242.

South Carolina. *Berry v. Marion County Lumber Co.*, 108 S. Car. 108, 93 S. E. 328.

South Dakota. *Janssen v. Muller*, 38 S. D. 611, 162 N. W. 393.

Tennessee. *Hardwick v. American Can Co.*, 113 Tenn. 657, 88 S. W. 797; *Southern Publishing Association v. Clements Paper Co.*, 139 Tenn. 429, L. R. A. 1918D, 580, 201 S. W. 745.

Utah. *Johnson v. Geddes*, 49 Utah 137, 161 Pac. 910.

Vermont. *Trow v. Preferred Acc. Ins. Co.*, 80 Vt. 321, 67 Atl. 821.

Virginia. *Walker v. Gateway Milling Co.*, 121 Va. 217, 92 S. E. 826.

West Virginia. *White v. White*, 64 W. Va. 30, 60 S. E. 885; *L. Schreiber & Sons Co. v. Miller Supply Co.*, 77 W. Va. 236, 87 S. E. 353; *Snider v. Robinett*, 78 W. Va. 88, 88 S. E. 599.

Wisconsin. *Sheldon's Estate (Wis.)*, 97 N. W. 524; *Polebitzke v. Week Lumber Co.*, 163 Wis. 322, 158 N. W. 62;

Denio Milling Co. v. Malin, 25 Wyom. 143, 165 Pac. 1113.

Such evidence may be considered to supplement a defective description. *Varner-Collins Hardware Co. v. New Milford Security Co.*, — Okla. —, 153 Pac. 667.

³ **United States.** *Ferguson v. Omaha & S. W. R. Co.*, 227 Fed. 513; *Pitt Construction Co. v. City of Dayton*, 237 Fed. 305.

Alaska. *Daigle v. Maddocks*, 2 Alaska 387.

Arkansas. *Goodwin v. Baker*, 129 Ark. 513, 197 S. W. 10.

Colorado. *True v. Rocky Ford Canal, Reservoir & Land Co.*, 36 Colo. 43, 85 Pac. 842.

Florida. *Pensacola Gas Co. v. Lotze*, 23 Fla. 368, 2 So. 609.

Michigan. *Mathews v. Phelps*, 61 Mich. 327, 1 Am. St. Rep. 581, 28 N. W. 108.

New Jersey. *Ryer v. Turkel*, 75 N. J. L. 677, 70 Atl. 68.

New Hampshire. *Crocker v. Hill*, 61 N. H. 345, 60 Am. Rep. 322.

Pennsylvania. *Wilson v. Wernwag*, 217 Pa. St. 82, 66 Atl. 242.

Tennessee. *McKay v. Louisville & N. R. Co.*, 133 Tenn. 590, 182 S. W. 87.

West Virginia. *Short v. Patton*, 79 W. Va. 179, 90 S. E. 598.

⁴ **Illinois.** *Holmes v. Bemis*, 124 Ill. 453, 17 N. E. 42 [affirming, 25 Ill. App. 232]; *Holmes v. Parker*, 125 Ill. 478, 17 N. E. 759 [affirming, 25 Ill. App. 225]; *Hall v. Bank*, 133 Ill. 234, 24 N. E. 546.

Indiana. *H. G. Olds Wagon Works v. Combs*, 124 Ind. 62, 24 N. E. 589.

Michigan. *Morgan v. Ry.*, 57 Mich. 430, 25 N. W. 161, 26 N. W. 865; *Darrah v. Gow*, 77 Mich. 16, 43 N. W. 851.

New York. *Farr v. Nichols*, 132 N. Y. 327, 30 N. E. 834.

sought to be accomplished by the contract.⁵ The surrounding circumstances have been considered in order to determine whether letters which were exchanged between the parties amounted to a contract.⁶ It will be presumed that the parties were acquainted with facts which were probably notorious at the time that the contract was made, and that they made their contract with reference to such facts.⁷ The preliminary negotiations of the parties have been considered in the construction of ambiguous contracts in order to enable the court to place itself in the position in which the parties were when the contract was made.⁸ Such preliminary negotiations may be considered if the contract is ambiguous and if one of the parties understands the sense which the adversary

South Dakota. *Blood v. Elevator Co.*, 1 S. D. 71, 45 N. W. 200.

West Virginia. *Heatherly v. Bank*, 31 W. Va. 70, 5 S. E. 754.

An agreement by an agent of a common carrier to get cars for a shipper must be construed in the light of former dealings between the parties, and such former dealings may, accordingly, show that such promise was not an absolute promise. *McNeer v. Railway*, 76 W. Va. 803, 86 S. E. 887.

⁵ **United States.** *Rockefeller v. Merritt*, 76 Fed. 909, 35 L. R. A. 633, 22 C. C. A. 608; *Kauffman v. Raeder*, 108 Fed. 171, 54 L. R. A. 247, 47 C. C. A. 278; *Merrill-Ruckgaber Co. v. United States*, 49 Ct. Cl. 553.

Alabama. *Davis v. Robert*, 89 Ala. 402, 18 Am. St. Rep. 126, 8 So. 114.

Colorado. *Jennings v. Brotherhood Acc. Co.*, 44 Colo. 68, 96 Pac. 982.

Connecticut. *Construction Information Co. v. Cass*, 74 Conn. 213, 50 Atl. 563.

Indiana. *Cravens v. Cotton Mills*, 120 Ind. 6, 16 Am. St. Rep. 298, 21 N. E. 981.

Maine. *Bell v. Jordan*, 102 Me. 67, 65 Atl. 759.

Massachusetts. *Rackemann v. Improvement Co.*, 167 Mass. 1, 57 Am. St. Rep. 427, 44 N. E. 990; *Graves v. Apt*, — Mass. —, 124 N. E. 432.

Missouri. *Nordyke & Marmon Co. v. Kehlor*, 155 Mo. 643, 78 Am. St. Rep. 600, 56 S. W. 287.

Nebraska. *Nebraska Hardware Co. v. Humphrey Hardware Co.*, 81 Neb. 693, 116 N. W. 659.

North Carolina. *McMahan v. Black Mountain Ry. Co.*, 170 N. Car. 456, 87 S. E. 237.

Ohio. *Mosier v. Parry*, 60 O. S. 388, 54 N. E. 364.

Tennessee. *Lancaster Mills v. Cotton-press Co.*, 89 Tenn. 1, 24 Am. St. Rep. 586, 14 S. W. 317; *McKay v. Louisville & N. R. Co.*, 133 Tenn. 590, 182 S. W. 874.

The purpose of the contract will be considered as affecting damages. *Roas v. Maine Cent. R. Co.*, 114 Me. 287, 96 Atl. 223.

Such evidence is not admissible if the purpose is set out in the written contract. *Bockian v. United Candy Co.*, 91 N. J. L. 314, 102 Atl. 393.

West Virginia. *White v. White*, 64 W. Va. 30, 60 S. E. 885; *Short v. Patton*, 79 W. Va. 179, 90 S. E. 598.

⁶ *McConnell v. Harrell & Nicholson Co.*, 183 Mich. 369, 149 N. W. 1042.

⁷ *Anse La Butte Oil & Mineral Co. v. Babb*, 122 La. 415, 47 So. 754.

⁸ **Connecticut.** *Goldfarb v. Cohen*, 92 Conn. 277, 102 Atl. 649.

Kansas. *Clark v. Townsend*, 96 Kan. 650, 153 Pac. 555 [rehearing denied,

party placed upon the terms of the contract.⁹ If, however, the contract is unambiguous and is in writing, evidence of preliminary negotiations is inadmissible to affect the construction of the contract if the validity of the contract is established or conceded. The parol evidence rule is intended to prevent the admission of such evidence.¹⁰ The surrounding circumstances are to be considered as they exist at the time of the execution of the contract.¹¹ Thus in contracts of guaranty,¹² contracts between promoters of a corporation,¹³ and contracts of bailment,¹⁴ the surrounding facts, the relations of the parties and the object of the contract may all be looked to. Even though the contract is in writing extrinsic evidence of the surrounding facts and circumstances is admissible to aid the court to determine the intention of the parties.¹⁵ Thus extrinsic evidence of the surrounding facts is admissible to show want of consideration,¹⁶ the existence of consideration,¹⁷ whether

Clark v. Townsend, 96 Kan. 650, 154 Pac. 1009].

South Dakota. Janssen v. Muller, 38 S. D. 611, 162 N. W. 393.

Virginia. Walker v. Gateway Milling Co., 121 Va. 217, 92 S. E. 826.

Washington. Velikanje v. Dickman, 98 Wash. 584, 168 Pac. 465.

See, however, Snider v. Robinett, 78 W. Va. 88, 88 S. E. 599.

Prior dealings between the parties may be considered. Southern Publishing Association v. Clements Paper Co., 139 Tenn. 429, L. R. A. 1918D, 580, 201 S. W. 745.

They will be considered to determine whether a provision is for a penalty or for liquidated damages. United States v. Bethlehem Steel Co., 205 U. S. 105, 51 L. ed. 731.

⁹ See § 2036.

¹⁰ Bockian v. United Candy Co., 91 N. J. L. 314, 102 Atl. 393; Snider v. Robinett, 78 W. Va. 88, 88 S. E. 599. See §§ 2137 et seq.

¹¹ Polebitzke v. Week Lumber Co., 163 Wis. 322, 158 N. W. 62.

¹² Cambria Iron Co. v. Keynes, 56 O. S. 501, 47 N. E. 548; Third National Bank v. Laidlaw, 86 O. S. 91, 98 N. E. 1015.

¹³ Mosier v. Parry, 60 O. S. 388, 54 N. E. 364.

¹⁴ Lancaster Mills v. Cotton-press Co., 89 Tenn. 1, 24 Am. St. Rep. 586, 14 S. W. 317.

¹⁵ United States. Western Union Telegraph Co. v. Telephone Co., 105 Fed. 684.

Idaho. State v. Twin Falls Land & W. Co., 21 Ida. 410, L. R. A. 1916F, 236, 121 Pac. 1039.

Kansas. Bank v. Brigham, 61 Kan. 727, 60 Pac. 754 [reversing, 58 Pac. 1117].

Massachusetts. Alvord v. Cook, 174 Mass. 120, 54 N. E. 499.

Michigan. White v. Rice, 112 Mich. 403, 70 N. W. 1024.

Montana. Brockway v. Blair, 53 Mont. 531, 165 Pac. 455.

North Carolina. Edwards v. Jefferson Standard Life Ins. Co., 173 N. Car. 614, 92 S. E. 695.

Pennsylvania. Douthett v. Gas Co., 202 Pa. St. 416, 51 Atl. 981.

West Virginia. Uhl v. Ry., 51 W. Va. 106, 41 S. E. 340.

¹⁶ Spies v. Rosenstock, 87 Md. 14, 39 Atl. 268.

¹⁷ Fearnley v. Fearnley, 44 Colo. 417, 98 Pac. 819.

a contract is severable or not,¹⁸ or the mode of performance.¹⁹ Where one tenant in common agreed to sell realty to another, it was permitted to show that they were partners and that the balance due one of them from the firm was to be applied on the price of the land.²⁰ Thus in a contract to release dower in consideration of one-fourth of the proceeds of the property extrinsic evidence is admissible to show that the proceeds are the rents, and that an expensive building was erected upon the property after this contract was made.²¹ So where a note was given for \$240, payable in case certain taxes were not rebated, "or such part of the above sum as may not be rebated," extrinsic evidence was admissible to show that the taxes amounted to \$842, and that the note was not to be paid if \$240 or more of such taxes were rebated.²² So where a village made a contract to take the water it might "need or desire for any and all purposes," extrinsic evidence is admissible to show that when the contract was made the village had a partial supply of water.²³

It is only when the contract is ambiguous that evidence of surrounding circumstances can be considered for the purpose of ascertaining the intention of the parties.²⁴ If the meaning of a written contract is clear, evidence of the surrounding facts is inadmissible to contradict its terms.²⁵ Thus where in return for money put into his business by his wife a husband gives her a note, promising to pay her son \$800 after her death, evidence of his means and the amount expended by him for her in her last illness is inadmissible to show that he is not liable on the note.²⁶

¹⁸ *Morrison v. Baechtold* 93 Md. 319, 48 Atl. 926.

¹⁹ *Yorston v. Brown*, 178 Mass. 103, 59 N. E. 654.

²⁰ *Redfield v. Gleason*, 61 Vt. 220, 15 Am. St. Rep. 889, 17 Atl. 1075.

²¹ *Irwin v. Powell*, 188 Ill. 107, 58 N. E. 941.

²² *Carr v. Jones*, 29 Wash. 78, 69 Pac. 646.

²³ *Gregory v. Village of Lake Linden*, 136 Mich. 368, 90 N. W. 29.

²⁴ *Jameson v. Chanslor-Canfield Midway Oil Co.*, 176 Cal. 1, 167 Pac. 369; *Trumbauer v. Rust*, 36 S. D. 301, 154 N. W. 801.

²⁵ *Alabama*. *Moody v. Ry.*, 124 Ala. 195, 26 So. 952.

Arkansas. *Moore v. Terry*, 66 Ark. 393, 50 S. W. 998.

California. *Salter v. Ives*, 171 Cal. 790, 155 Pac. 84; *Jameson v. Chanslor-Canfield Midway Oil Co.*, 176 Cal. 1, 167 Pac. 369.

West Virginia. *Camden v. McCoy*, 48 W. Va. 377, 37 S. E. 637.

Wisconsin. *Johnson v. Pugh*, 110 Wis. 167, 85 N. W. 641.

²⁶ *Baxter v. Camp*, 71 Conn. 245, 71 Am. St. Rep. 169, 42 L. R. A. 514, 41 Atl. 803. (Though in a suit by her administrator it might be available as a set-off.)

§ 2061. Function of court and jury in construction—Terms and extrinsic fact not in dispute. The construction of a contract is a question for the court if the terms of the contract and the extrinsic facts which may affect construction are free from dispute.¹

¹ **United States.** *Titus v. Whiteside*, 228 Fed. 965; *New York & Philadelphia Coal & Coke Co. v. Meyersdale Coal Co.*, 236 Fed. 536, 149 C. C. A. 588; *Carlin Construction Co. v. Guerini Stone Co.*, 241 Fed. 545, 154 C. C. A. 321.

Alabama. *McFadden v. Henderson*, 128 Ala. 221, 20 So. 640; *Elliott v. Howison*, 146 Ala. 568, 40 So. 1018; *Lutz v. Van Heynigen Brokerage Co.*, — Ala. —, 75 So. 284.

Arkansas. *Arkansas Fire Ins. Co. v. Wilson*, 67 Ark. 553, 77 Am. St. Rep. 129, 48 L. R. A. 510, 55 S. W. 933; *Dugan v. Kelly*, 75 Ark. 55, 86 S. W. 831; *Fletcher v. Simms*, 75 Ark. 162, 86 S. W. 993; *Thomas v. Johnson*, 78 Ark. 574, 95 S. W. 468; *Storm v. Montgomery*, 79 Ark. 172, 95 S. W. 149; *Radford v. Practical Premium Co.*, 125 Ark. 199, 188 S. W. 562; *Engles v. Blocker*, 127 Ark. 385, 192 S. W. 193; *Farmers' Union Mercantile Co. v. Pinkerton*, 128 Ark. 640, 104 S. W. 709.

California. *Green v. Soule*, 145 Cal. 96, 78 Pac. 337.

Connecticut. *Levin v. New Britain Knitting Co.*, 78 Conn. 338, 61 Atl. 1073.

District of Columbia. *Rheam v. Martin*, 26 D. C. App. 181.

Georgia. *McLelland v. Singletary*, 113 Ga. 601, 38 S. E. 942; *Nelson v. Spence*, 129 Ga. 35, 58 S. E. 697.

Illinois. *Illinois Central Ry. Co. v. Foulks*, 191 Ill. 57, 60 N. E. 800 [affirming, 92 Ill. App. 301]; *Foster v. Chicago*, 197 Ill. 264, 64 N. E. 322 [affirming, 96 Ill. App. 4]; *Traders', etc., Ins. Co. v. Humphrey*, 207 Ill. 540, 69 N. E. 875 [affirming, 109 Ill. App.

246]; *Dunn v. Crichfield*, 214 Ill. 292, 73 N. E. 386; *Rosenbaum v. Devine*, 271 Ill. 354, 111 N. E. 97.

Indiana. *Ault Woodenware Co. v. Baker*, 26 Ind. App. 374, 58 N. E. 265.

Iowa. *Grasmier v. Wolf (Ia.)*, 90 N. W. 813; *Comptograph Co. v. Burroughs Adding Machine Co.*, 179 Ia. 83, 159 N. W. 465.

Kentucky. *Licking Rolling Mill Co. v. Snyder*, 28 Ky. Law Rep. 357, 89 S. W. 249; *Georgetown Water, Gas, Electric & Power Co. v. Smith (Ky.)*, 97 S. W. 1119, 30 Ky. Law Rep. 253.

Maryland. *Phoenix Pad Manufacturing Co. v. Roth*, 127 Md. 540, 96 Atl. 762.

Michigan. *Sherk v. Holmes*, 125 Mich. 118, 83 N. W. 1016; *Douglass v. Paine*, 141 Mich. 485, 104 N. W. 781; *Cutler v. Spens*, 191 Mich. 603, 158 N. W. 224.

Minnesota. *Bell Lumber Co. v. Seaman*, 136 Minn. 106, 161 N. W. 383.

Missouri. *McClurg v. Whitney*, 82 Mo. App. 625.

Nebraska. *McCormick, etc., Co. v. Davis*, 61 Neb. 406, 85 N. W. 390, *Hinman v. Mfg. Co.*, 65 Neb. 187, 90 N. W. 934.

New Jersey. *Grueber Engineering Co. v. Waldron*, 71 N. J. L. 597, 60 Atl. 386; *Decker v. George W. Smith & Co.*, 88 N. J. L. 630, 96 Atl. 915; *Sommer Faucet Co. v. Commercial Casualty Ins. Co.*, 89 N. J. L. 693, 99 Atl. 342.

New York. *Sattler v. Hallock*, 160 N. Y. 291, 73 Am. St. Rep. 686, 46 L. R. A. 679, 54 N. E. 667.

North Carolina. *Brite v. Mfg. Co.*, 129 N. Car. 34, 39 S. E. 634; *Banks v. Blades Lumber Co.*, 142 N. Car. 49, 54 S. E. 844; *Young v. Fosburg Lumber*

This rule applies to written contracts,² including written contracts which consist of a number of different writings,³ such as letters,⁴

Co., 147 N. Car. 26, 60 S. E. 654; Gay v. Roanoke R. & Lumber Co., 148 N. Car. 336, 62 S. E. 436; Barkley v. Atlantic Coast Realty Co., 170 N. Car. 481, 87 S. E. 210.

Oklahoma. Brown v. Coppadge, 54 Okla. 88, 153 Pac. 817; Pressley v. Incorporated Town, 54 Okla. 747, 154 Pac. 660; Comanche Mercantile Co. v. Wheeler, 55 Okla. 328, 155 Pac. 583.

Oregon. Dahlstrom v. Hudelson, 80 Or. 520, 157 Pac. 798.

Pennsylvania. Continental Title & Trust Co. v. Devlin, 209 Pa. St. 380, 58 Atl. 843; Keefer v. School District, 203 Pa. St. 334, 52 Atl. 245; Markley v. Godfrey, 254 Pa. St. 99, 98 Atl. 785.

South Carolina. Leaphart v. Bank, 45 S. Car. 563, 55 Am. St. Rep. 800, 33 L. R. A. 700, 23 N. E. 939; Batesburg Cotton Oil Co. v. Southern Ry. Co., 103 S. Car. 494, 88 S. E. 360.

South Dakota. Hughes v. Rudy, 15 S. D. 460, 90 N. W. 136.

Texas. Amory Mfg. Co. v. Gulf, etc., R. R. Co., 89 Tex. 419, 59 Am. St. Rep. 65, 37 S. W. 856.

Utah. Manti City Sav. Bank v. Peterson, 33 Utah 209, 126 Am. St. Rep. 817, 93 Pac. 566.

Vermont. Bianchi Granite Co. v. Terre Haute Monument Co., 91 Vt. 177, 99 Atl. 875.

Virginia. Veitch v. Jenkins, 107 Va. 68, 57 S. E. 574.

Washington. Dennis v. Montesano National Bank, 38 Wash. 435, 80 Pac. 764; McGarry v. Superior Portland Cement Co., 95 Wash. 412, 163 Pac. 928.

West Virginia. McNeer v. Chesapeake & O. Ry. Co., 76 W. Va. 803, 86 S. E. 887.

Admission of inadmissible evidence as to the meaning of a term may therefore be non-prejudicial. Gordon

v. St. Paul Fire & Marine Insurance Co., 197 Mich. 226, L. R. A. 1918E, 402, 163 N. W. 956.

Illinois. Dunn v. Crichfield, 214 Ill. 292, 73 N. E. 386.

Kansas. Brown v. St. John Trust Co., 71 Kan. 134, 80 Pac. 37.

Michigan. Gordon v. St. Paul Fire & Marine Insurance Co., 197 Mich. 226, L. R. A. 1918E, 402, 163 N. W. 956.

North Carolina. Banks v. Blades Lumber Co., 142 N. Car. 49, 54 S. E. 844.

Oklahoma. Bales v. Northwestern Consol. Milling Co., 21 Okla. 421, 96 Pac. 599.

Pennsylvania. Continental Title & Trust Co. v. Devlin, 209 Pa. St. 380, 58 Atl. 843.

³ McDonough v. Williams, 77 Ark. 261, 8 L. R. A. (N.S.) 452, 92 S. W. 783; Bales v. Northwestern Consol. Milling Co., 21 Okla. 421, 96 Pac. 599.

As a written contract and photographs. G. R. Bianchi Granite Co. v. Terre Haute Monument Co., 91 Vt. 177, 99 Atl. 875.

⁴ United States. Scanlan v. Hodges, 52 Fed. 354, 3 C. C. A. 113; New York & Philadelphia Coal & Coke Co. v. Meyersdale Coal Co., 236 Fed. 536, 149 C. C. A. 588.

Arkansas. Radford v. Practical Premium Co., 125 Ark. 199, 188 S. W. 562; Engles v. Blocker, 127 Ark. 385, 192 S. W. 193.

North Carolina. Lindsay v. Ins. Co., 115 N. Car. 212, 20 S. E. 370.

Oklahoma. Comanche Mercantile Co. v. Wheeler, 55 Okla. 328, 155 Pac. 583.

South Carolina. Camps v. Carpin, 19 S. Car. 121.

Tennessee. Teasdale v. Manchester, 104 Tenn. 267, 56 S. W. 853.

Wisconsin. Ranney v. Higby, 5 Wis. 62.

or letters and telegrams.⁵ It applies to a written offer made by one party and acted upon by the other,⁶ such as a circular which has been issued by a building and loan association and in reliance upon which stock has been taken.⁷ It applies where the written contract has been lost and its contents are proved by secondary evidence.⁸ It applies to contracts part oral and part written,⁹ or to contracts entirely oral,¹⁰ if the facts from which the terms of the contract are to be ascertained are undisputed and only one inference is possible therefrom. The rule that the construction of a written contract is for the court is sometimes so stated as to be limited to cases in which the contract itself is free from ambiguity.¹¹ This method of stating the rule, however, is probably intended to exclude from the power of the court to construe contracts, only contracts in which there is a genuine dispute either as to the terms of the contract itself, or as to the surrounding facts and circumstances which would affect the construction of the contract.

If the court erroneously submits a question of construction to the jury, and the jury answers it correctly, the error is not reversible.¹²

§ 2062. Single inference possible. If the contract is ambiguous so that explanatory evidence is admissible and such evidence establishes certain facts without dispute so that only one inference can be drawn therefrom, the construction of such contract is for

⁵ *McDonough v. Williams*, 77 Ark. 261, 8 L. R. A. (N.S.) 452, 92 S. W. 783.

⁶ *Williamson v. Loan Association*, 54 S. Car. 582, 71 Am. St. Rep. 822, 32 S. E. 765.

⁷ *Williamson v. Eastern Building & Loan Association*, 54 S. Car. 582, 71 Am. St. Rep. 822, 32 S. E. 765.

⁸ *Wellman v. Jones*, 124 Ala. 580, 27 So. 416.

⁹ *Sea Insurance Co. v. Johnston*, 105 Fed. 286, 44 C. C. A. 477.

¹⁰ *Maryland. American Towing & Lightering Co. v. Baker-Whiteley Coal Co.*, 111 Md. 504, 75 Atl. 341.

Michigan. Douglass v. Paine, 141 Mich. 485, 104 N. W. 781.

North Carolina. Wilson v. Levi Cotton Mills, 140 N. Car. 52, 52 S. E. 250.

West Virginia. McNeer v. Chesapeake & Ohio Ry., 76 W. Va. 803, 86 S. E. 887.

Wisconsin. James v. Carson, 94 Wis. 632, 69 N. W. 1004. The "construction of an oral as well as of a written contract is for the court." *Penn. etc., Insurance Co. v. Crane*, 134 Mass. 56, 58, 45 Am. Rep. 282.

¹¹ *Brown v. St. John Trust Co.*, 71 Kan. 134, 80 Pac. 37; *Young v. Foshburg Lumber Co.*, 147 N. Car. 26, 60 S. E. 654; *Gay v. Roanoke R. & Lumber Co.*, 148 N. Car. 336, 62 S. E. 436; *Manti City Sav. Bank v. Peterson*, 33 Utah 209, 126 Am. St. Rep. 817, 93 Pac. 566; *Dennis v. Montesano National Bank*, 38 Wash. 435, 80 Pac. 764.

¹² *Farmers' Union Mercantile Co. v. Pinkerton*, 128 Ark. 640, 194 S. W. 709.

the court in spite of such ambiguity.¹ If the meaning of the contract depends upon the language used and upon the undisputed facts, it is error for the courts to submit its construction to the jury,² although if the jury construes the contract clearly, such error is not reversible. The construction of a contract is for the court even if the jury is to pass on the question of its discharge by a later contract,³ or if the jury is to pass upon the question of the breach of such contract.⁴

The court must in such cases decide by what law the contract is governed in case of a so-called conflict of law;⁵ whether a contract is illegal;⁶ whether a written instrument purports on its face to be a complete contract;⁷ whether a written instrument is an absolute conveyance or a mortgage,⁸ and whether the conceded overestimates in the proof of loss amount to fraud or false swearing within the meaning of the conditions of a policy of fire insurance.⁹ If the question of a reasonable time for performance depends upon facts which are not in dispute and from which only one reasonable inference can be drawn, such question is for the court.¹⁰

§ 2063. Terms in dispute. If, on the other hand, the terms of the contract are in dispute,¹ or if it is possible to draw more than one inference from the surrounding circumstances which are

¹ *Licking Rolling Mill Co. v. Synder* (Ky.), 89 S. W. 249, 28 Ky. Law Rep. 357.

² *Bell Lumber Co. v. Seaman*, 136 Minn. 106, 161 N. W. 383.

³ *Danziger v. Shoe Co.*, 204 Ill. 145, 68 N. E. 534 [affirming, 107 Ill. App. 47].

⁴ *Georgetown Water, Gas, Electric & Power Co. v. Smith* (Ky.), 30 Ky. Law Rep. 253, 97 S. W. 1119.

⁵ *Demland v. Loan Co.*, 20 Ohio C. C. 223, 11 Ohio C. D. 249.

⁶ *Carpenter v. Taylor*, 164 N. Y. 171, 58 N. E. 53.

⁷ *Harrison v. McCormick*, 89 Cal. 327, 23 Am. St. Rep. 469, 26 Pac. 830.

⁸ *Nelson v. Spence*, 129 Ga. 35, 58 S. E. 697.

⁹ *Riley v. Aetna Insurance Co.*, 80 W. Va. 236, L. R. A. 1917E, 983, 92 S. E. 417.

¹⁰ *Kiser v. Denney*, 99 Neb. 3, 154 N. W. 835; *Markley v. Godfrey*, 254 Pa. St. 99, 98 Atl. 785.

¹ *Alabama*. *Lutz v. Van Heynigen Brokerage Co.*, — Ala. —, 75 So. 284.

Indiana. *Annadall v. Union Cement & Lime Co.*, 165 Ind. 110, 74 N. E. 893.

Maryland. *Joseph Joseph & Bros. Co. v. Schonthal Iron & Steel Co.*, 99 Md. 382, 58 Atl. 205.

Massachusetts. *Knowlton v. Parsons*, 198 Mass. 439, 84 N. E. 798.

Michigan. *McNamara v. Michigan Trust Co.*, 148 Mich. 346, 111 N. W. 1066.

Minnesota. *O'Connell v. Ward*, 130 Minn. 443, 153 N. W. 865.

Michigan. *Storch v. Rose*, 152 Mich. 521, 116 N. W. 402.

New Jersey. *Furman v. Feibleman & Lehman Co.*, 88 N. J. L. 711, 96 Atl. 886; *Sommer Faucet Co. v. Commercial*

established by the evidence, or from other established facts to which resort may be had to ascertain the intention of the parties,² the jury must determine such facts or decide which of such inferences is the correct one.³ Whether one who has signed an instrument as executed as a party thereto is to be determined as a question of fact by the jury.⁴ This rule applies where the terms of a contract partly written and partly oral,⁵ or entirely oral,⁶ or originally oral and subsequently reduced in part to writing,⁷ are in dispute. If the words or figures in a written contract can not be read with certainty and there is a dispute as to what such words or figures really are, the question is one for the jury.⁸

In such cases the court should submit the question of fact to the jury under proper alternative instructions as to the construction to be given to the contract in the event of each possible finding of fact by the jury.⁹ In case of dispute as to whether a con-

Casualty Ins. Co., 89 N. J. L. 693, 99 Atl. 342

Oregon Pacific Export Lumber Co. v. North Pacific Lumber Co., 46 Or. 194, 80 Pac. 105.

South Dakota. Belknap v. Belknap. 20 S. D. 482, 107 N. W. 692.

Vermont Douglass v. Morrisville, 89 Vt. 393, 95 Atl. 810.

Wisconsin. Kaley v. Van Ostrand, 134 Wis. 443, 114 N. W. 817.

²Schuster v. Snawder (Ky.), 101 S. W. 1194, 31 Ky. Law Rep. 254; Williar v. Nagle, 109 Md. 75, 71 Atl. 427; Way v. Greer, 196 Mass. 237, 14 L. R. A. (N.S.) 459, 81 N. E. 1002.

³Williar v. Nagle, 109 Md. 75, 71 Atl. 427.

⁴Schuster v. Snawder (Ky.), 101 S. W. 1194, 31 Ky. Law Rep. 254.

⁵Philadelphia v. Stewart, 201 Pa. St. 526, 51 Atl. 348.

⁶Arkansas. Elgin v. Barker, 106 Ark. 482, 153 S. W. 598.

Illinois. Bump v. McGrannahan (Ill.), 111 N. E. 640.

Indiana. Annadall v. Union Cement & Lime Co., 165 Ind. 110, 74 N. E. 893.

Iowa. Sauser v. Kearney, 147 Ia. 335, 126 N. W. 322.

Massachusetts. Phenix Nerve Beverage Co. v. Dennis & Lovejoy Wharf & Warehouse Co., 189 Mass. 82, 75 N. E. 268.

Michigan. McNamara v. Michigan Trust Co., 148 Mich. 346, 111 N. W. 1066.

North Carolina. Wilson v. Cotton Mills, 140 N. Car. 52, 52 S. E. 250 [sub nomine, Wilson v. Levi Cotton Mills].

West Virginia. McNeer v. Chesapeake & O. Ry. Co., 76 W. Va. 803, 86 S. E. 887.

Wisconsin. Kaley v. Van Ostrand, 134 Wis. 443, 114 N. W. 817.

⁷Picard v. Beers, 195 Mass. 419, 81 N. E. 246.

⁸United States Health & Accident Insurance Co. v. Clark, 41 Ind. App. 345, 83 N. E. 760.

⁹Alabama. Boykin v. Bank, 72 Ala. 262, 47 Am. Rep. 408.

Arkansas. Johnson v. Smothers, 79 Ark. 629, 96 S. W. 386.

Connecticut. Earley v. Hall, 89 Conn. 606, 95 Atl. 2.

Idaho. Martin v. Dowd, 8 Ida. 453, 69 Pac. 276.

tract imposes joint or several liability, such question must be determined by the jury.¹⁰

§ 2064. Extrinsic facts in dispute or inferences doubtful. The rule that questions as to the terms of the contract must be submitted to the jury, applies in written contracts where the admissible extrinsic evidence is conflicting or admits of different inferences.¹ Thus where the evidence is conflicting as to the meaning of a technical term in dispute;² or where questions as to what are "traveling expenses";³ or a "complete piped well";⁴ or a "thousand, brick measure";⁵ or a "winder," where the evidence is conflicting as to whether a winder includes a header and the adverse

Iowa. *Becker v. Churdan*, 175 Ia. 150, 157 N. W. 221.

Kansas. *Royer v. Western Silo Co.*, 99 Kan. 309, 161 Pac. 654.

Kentucky. *Locke v. Lyon Medicine Co. (Ky.)*, 27 Ky. Law Rep. 1, 84 S. W. 307.

Massachusetts. *Picard v. Beers*, 195 Mass. 419, 81 N. E. 246.

Michigan. *Storch v. Rose*, 152 Mich. 521, 116 N. W. 402; *Cutler v. Spens*, 191 Mich. 603, 158 N. W. 224.

Minnesota. *Alworth v. Gordon*, 81 Minn. 445, 84 N. W. 454; *State v. Fellows*, 98 Minn. 179, 107 N. W. 542, 108 N. W. 825; *O'Connell v. Ward*, 130 Minn. 443, 153 N. W. 865.

Nebraska. *Coquillard v. Hovey*, 23 Neb. 622, 8 Am. St. Rep. 134, 37 N. W. 479.

Oregon. *Pacific Export Lumber Co. v. North Pacific Lumber Co.*, 46 Or. 194, 80 Pac. 105; *Paulson v. Weeks*, 80 Or. 468, 157 Pac. 590.

Vermont. *Blaisdell v. Davis*, 72 Vt. 295, 48 Atl. 14; *White v. Lumiere North American Co.*, 79 Vt. 206, 6 L. R. A. (N.S.) 807, 64 Atl. 1121; *Douglas v. Morrisville*, 89 Vt. 393, 95 Atl. 810.

Wisconsin. *French v. Fidelity & Casualty Co.*, 135 Wis. 259, 115 N. W. 869.

¹⁰ *Knowlton v. Parsons*, 198 Mass. 439, 84 N. E. 798.

¹ **Alabama.** *Weir v. Long*, 145 Ala. 328, 39 So. 974.

Arkansas. *Johnson v. Smothers*, 79 Ark. 629, 96 S. W. 386.

Connecticut. *Levin v. New Britain Knitting Co.*, 78 Conn. 338, 61 Atl. 1073.

Kentucky. *Locke v. Lyon Medicine Co.*, 84 S. W. 307, 27 Ky. Law Rep. 1.

Massachusetts. *Way v. Greer*, 196 Mass. 237, 14 L. R. A. (N.S.) 459, 81 N. E. 1002.

Minnesota. *State v. Fellows*, 98 Minn. 179, 107 N. W. 542, 108 N. W. 825.

Vermont. *White v. Lumiere North American Co.*, 79 Vt. 206, 6 L. R. A. (N.S.) 807, 64 Atl. 1121.

Washington. *Durand v. Heney*, 33 Wash. 38, 73 Pac. 775.

Wisconsin. *French v. Fidelity & Casualty Co.*, 135 Wis. 259, 115 N. W. 869.

² *Schneider Granite Co. v. Milling Co.*, 78 Mo. App. 622; *Rhein v. Burns*, 162 Wis. 309, 156 N. W. 138.

³ *Wilcox v. Baer*, 85 Mo. App. 587.

⁴ *Becker v. Churdan*, 175 Ia. 159, 157 N. W. 221.

⁵ *Paine & Nixon Co. v. United States Fidelity & Guaranty Co.*, 135 Minn. 9, 159 N. W. 1075.

party concedes that it includes a weigher;⁶ or what is a reasonable amount of "printed matter and samples,"⁷ depends on conflicting extrinsic evidence and the jury must determine the intention of the parties. So if the question is which of two unidentified plans is referred to in a written contract, this should be submitted to the jury.⁸ If the question of what amounts to a reasonable time depends upon facts which are in dispute, or if more than one inference can be drawn from the undisputed facts, the question of what amounts to a reasonable time is a question for the jury.⁹

§ 2065. Construction can not extend to reformation. Under cover of construction a court can not reform a written contract to make it express the real intention of the parties, which by mistake is not expressed in the words thereof.¹ This principle is sometimes stated in the form that the court has no power to make a contract for the parties.²

The fact that the construction which is reached by the application of legal rules and upon consideration of admissible evidence,

⁶ *Rhein v. Burns*, 162 Wis. 309, 156 N. W. 138.

⁷ *Jensen v. Perry*, 126 Pa. St. 495, 12 Am. St. Rep. 888, 17 Atl. 665.

⁸ *Cook v. Littlefield*, 98 Me. 299, 56 Atl. 899.

⁹ *Holden v. Royall*, 169 N. Car. 676, 86 S. E. 583; *Paulson v. Weeks*, 80 Or. 468, 157 Pac. 590 (obiter).

¹ *United States. Robbins v. Rollins*, 127 U. S. 622, 32 L. ed. 292; *Pacific Hardware & Steel Co. v. United States*, 49 Ct. Cl. 327.

Alabama. *Lee v. Cochran*, 157 Ala. 311, 47 So. 581; *Jones v. Lanier*, — Ala. —, 73 So. 535.

Florida. *Continental Casualty Co. v. Bows*, 72 Fla. 17, 72 So. 278.

Illinois. *Conway Co. v. Chicago*, 274 Ill. 369, 113 N. E. 703.

Kentucky. *Garnes v. Frazier* (Ky.), 118 S. W. 998.

Maryland. *Washington, B. & A. R. Co. v. Moss*, 127 Md. 12, 96 Atl. 273.

Montana. *Brian v. Oregon Short Line Ry. Co.*, 40 Mont. 109, 25 L. R. A. (N.S.) 459, 20 Am. & Eng. Ann. Cas. 311, 105 Pac. 489.

Nebraska. *Te Poel v. Shutt*, 57 Neb. 592, 78 N. W. 288.

New Jersey. *Kupfersmith v. Delaware Ins. Co.*, 84 N. J. L. 271, 45 L. R. A. (N.S.) 847, Ann. Cas. 1914C, 1172, 86 Atl. 399; *Kimble v. Newark*, 91 N. J. 249, 102 Atl. 637; *Kimble v. Mayor*, — N. J. —, L. R. A. 1918E, 793, 102 Atl. 637.

North Carolina. *Sinclair v. Hicks*, 116 N. Car. 606, 21 S. E. 395; *Cuthbertson v. Morgan*, 149 N. Car. 72, 62 S. E. 744.

Utah. *Wm. B. Hughes Produce Co. v. Pulley*, 47 Utah 544, L. R. A. 1916D, 728, 155 Pac. 337; *Johnson v. Geddes*, 49 Utah 137, 161 Pac. 910.

West Virginia. *Carper v. United Fuel Gas Co.*, 78 W. Va. 433, L. R. A. 1917A, 171, 89 S. E. 12.

Wisconsin. *Zohrlaut v. Mengelberg*, 144 Wis. 564, 124 N. W. 247.

Wyoming. *Phillips v. Hamilton*, 17 Wyo. 41, 95 Pac. 846.

² *Peterson v. Modern Brotherhood of America*, 125 Ia. 562, 67 L. R. A. 631, 101 N. W. 289.

does not reach a just result, does not authorize a court of law to add, by construction, terms which are not fairly set forth by the parties in the language which they have chosen to use.³ Thus a clause fixing a price per car, "excepting only empty freight cars and such loaded freight cars as are destined to or originate at points outside the city, on or beyond the first party's line," can not be restricted to such empty cars as originate outside the city, but applies to all empty cars.⁴ If a contract confers upon B the right to remove all the coal from underneath A's land, the court can not add to such contract a provision requiring B to leave sufficient coal to support A's land or to substitute artificial supports in case he wishes to remove the coal which he has purchased.⁵ At the same time there are a number of well-settled rules of law, such as those with reference to the subject of implied warranties,⁶ which in effect add provisions to an express contract. The addition of these terms, however, can be justified upon the theory that the law is to be regarded as a part of the contract.⁷ If oral evidence of the actual intention of the parties is offered without objection to supplement an evident omission, the court may consider such evidence in determining the intention of the parties and in supplying such omission.⁸

³ *Washington, B. & A. R. Co. v. Moss*, 127 Md. 12, 96 Atl. 273.

⁴ *Louisville, etc., Ry. v. Ry.*, 100 Ky. 690, 39 S. W. 42.

⁵ *Griffin v. Fairmount Coal Co.*, 59

W. Va. 490, 2 L. R. A. (N.S.) 1115, 53 S. E. 24.

⁶ See §§ 392 and 393.

⁷ See § 2048.

⁸ *Pacific Surety Co. v. Towe*, 224 Mass. 98, 112 N. E. 653.

CHAPTER LXIV

JOINT AND SEVERAL LIABILITY

- § 2066. Nature of liability of two or more promisors.
- § 2067. Intention controls—Words importing joint liability.
- § 2068. Words importing several liability.
- § 2069. Words importing joint and several liability.
- § 2070. Liability of sole promisor.
- § 2071. Effect of joint liability—Parties to actions.
- § 2072. Death of joint promisor.
- § 2073. Judgment against one joint promisor.
- § 2074. Release of joint promisor.
- § 2075. Effect of several contract.
- § 2076. Effect of joint and several contract.
- § 2077. Words importing joint or several rights.
- § 2078. Joint and several rights.
- § 2079. Effect of joint interest—Promisees must join in action.
- § 2080. Death of joint promisee.
- § 2081. Release by joint promisee.
- § 2082. Effect of several interests.

§ 2066. Nature of liability of two or more promisors. If two or more persons constitute one party to a contract, the question as to the nature of their rights and liabilities presents itself. If two or more persons are promisors in a contract, their liability may be joint, or several, or joint and several. If their liability is joint, each of the promisors is liable, and may be held for the entire liability arising under the contract.¹ A several contract is one in which each of the promisors undertakes only a limited amount of the entire liability,² or which in each severally undertakes the entire liability.³ A joint and several contract with reference to

¹ *Mason v. Eldred*, 73 U. S. (6 Wall.) 231, 18 L. ed. 783; *Hambleton v. Jameson*, 162 Ia. 186, 143 N. W. 1010. (Repudiation by one joint promisor may be treated by the promisee as discharge.) *Meyer v. Estes*, 164 Mass. 457, 32 L. R. A. 283, 41 N. E. 683.

See *The Joint and Several Liability of Partners*, by Francis M. Burdick, 11 *Columbia Law Review*, 101.

² *Evands v. Sanders*, 49 Ky. (10 B. Mon.) 291.

³ *Lurton v. Gilliam*, 2 Ill. 577, 33 Am. Dec. 430; *Werlin v. Equitable Surety Co.*, 227 Mass. 157, 116 N. E. 484; *Kimble v. Newark*, 91 N. J. 249, 102 Atl. 637; *Payne v. Jelleff*, 67 Wis. 246, 30 N. W. 526.

the promisors is one which the promisee at his election may treat either as the joint contract of all the promisors or as the several contract of each promisor.⁴

The classification of contracts as to the liability of two or more promisors was very different at Roman law from the classification which has been adopted by the common law. Relics of the Roman law classification appear in the statutes of Louisiana, in which, however, certain common-law terms have been adopted. A joint obligation by the Louisiana statute is one in which several persons join in the same contract to do the same thing, but upon which judgment must be rendered against each defendant separately for his proportion while an obligation in solido is one in which several persons bind themselves in such a way that each is separately bound to perform the whole of the obligation. The joint contract of Louisiana law is therefore like our several contract as to liability, although it is like our joint contract as to the necessity of joining the parties;⁵ while the obligation in solido corresponds to our joint obligation.⁶ "A joint obligation under the laws of Louisiana binds the parties thereto only for their proportion of the debt, whilst a solidary obligation, on the contrary, binds each of the obligors for the whole debt."⁷

§ 2067. Intention controls—Words importing joint liability. Whether the liability of the promisors is joint, or several, or joint and several, depends upon the intention of the parties as ascertained from the contract by the ordinary rules of construction.¹ In the absence of statute the liability of two or more promisors upon the same contract is a joint liability, if the rest of the contract does not show that a different liability was intended.² Words which indicate the common assumption of an obligation strengthen

⁴ *Ex parte Honey*, L. R. 7 Ch. App. 178; *People v. Harrison*, 82 Ill. 84; *Anderson v. Stayton State Bank*, 82 Or. 357, 159 Pac. 1033; *Municipal Court of Providence v. Whaley*, 25 R. I. 289, 105 Am. St. Rep. 890, 63 L. R. A. 235, 55 Atl. 750.

⁵ See § 2071.

⁶ See § 2067.

⁷ *Groves v. Sentell*, 153 U. S. 465, 476, 38 L. ed. 785; *Drew v. Bank*, 125 La. 673, 51 So. 683.

See also, *Nabors v. Producers' Oil Co.*, 140 La. 985, L. R. A. 1917D, 1115, 74 So. 527.

¹ *Nabors v. Producers' Oil Co.*, 140 La. 985, L. R. A. 1917D, 1115, 74 So. 527; *Payne v. Payne*, 129 Wis. 450, 109 N. W. 105.

² *England. White v. Tyndall*, 13 App. Cas. 263.

United States. Noyes v. Barnard, 63 Fed. 782, 11 C. C. A. 424.

Indiana. Eller v. Lacy, 137 Ind. 436, 36 N. E. 1088.

this inference. Thus the use of such words as "we promise,"³ "we will undertake,"⁴ "the plaintiffs are to pay,"⁵ "the directors promise,"⁶ followed by the signatures of the promisors, imports a joint liability. A memorandum to the effect that a certain amount is due to A which is signed by B and C, is the joint obligation of B and C.⁷ A contract by which two or more persons "jointly guaranty the payment" of a certain amount "pro rata," is held to be a joint contract.⁸

If two or more parties make a promise which in terms imposes a joint liability, the fact that the consideration for such promise is a several benefit to one or more of such parties, does not prevent the promise from being joint.⁹ The use of words which impose a joint liability creates such a liability in spite of the fact that the entire consideration is received by one of the parties,¹⁰ as in the case of principal and surety.¹¹ A contract by which two sisters, A and B, together with their husbands, agree to support their mother, C, and which provided that she might live with whichever family she wished for as long a time as she chose, is a joint contract and it is not binding only upon the sister with whom the mother chose for the time being to reside. Accordingly, if C elects

Louisiana. *Nabors v. Producers' Oil Co.*, 140 La. 985, L. R. A. 1917D, 1115, 74 So. 527.

Maine. *Eveleth v. Sawyer*, 96 Me. 227, 52 Atl. 639.

Missouri. *Hill v. Combs*, 92 Mo. App. 242.

New Jersey. *Alpaugh v. Wood*, 53 N. J. L. 638, 23 Atl. 261.

New York. *Walter v. Rafalsky*, 186 N. Y. 543, 79 N. E. 1118.

Nevada. *Turley v. Thomas*, 31 Nev. 181, 135 Am. St. Rep. 667, 101 Pac. 568.

North Dakota. *Clements v. Miller*, 13 N. D. 176, 100 N. W. 239.

West Virginia. *Elliott v. Bell*, 37 W. Va. 834, 17 S. E. 399.

Wisconsin. *Bacon v. Bicknell*, 17 Wis. 523.

Contra, *Schultz v. Howard*, 63 Minn. 196, 56 Am. St. Rep. 470, 65 N. W. 263.

³ *Albany, etc., Co. v. Bank*, 17 Ind. App. 531, 60 Am. St. Rep. 178, 47 N.

E. 227; *Barnett v. Juday*, 38 Ind. 86; *Taylor v. Reger*, 18 Ind. App. 466, 63 Am. St. Rep. 352, 48 N. E. 262; *McCoy v. Jones*, 61 O. S. 119, 55 N. E. 219.

⁴ *New Haven, etc., Ry. v. Hayden*, 119 Mass. 361.

⁵ *Eller v. Lacy*, 137 Ind. 436, 36 N. E. 1088.

⁶ *McKensey v. Edwards*, 88 Ky. 272, 21 Am. St. Rep. 339, 3 L. R. A. 397, 10 S. W. 815.

⁷ *Bacon v. Bicknell*, 17 Wis. 523.

⁸ *Wood v. Farmer*, 200 Mass. 209, 86 N. E. 297.

⁹ *Walter v. Rafalsky*, 186 N. Y. 543, 79 N. E. 1118.

¹⁰ *Black Mountain Ry. v. Ocean Accident & Guarantee Corp.*, 172 N. Car. 636, 90 S. E. 763; *Schwitz v. Thomas*, 38 S. D. 180, 160 N. W. 734.

¹¹ *Black Mountain Ry. v. Ocean Accident & Guarantee Corp.*, 172 N. Car. 636, 90 S. E. 763; *Schwitz v. Thomas*, 38 S. D. 180, 160 N. W. 734.

to live with A all her life, A may recover contribution from B.¹² If, however, the defendant sets up the fact that he was surety and alleges extension of time as a separate defense, and the plaintiff concedes that such defendant was a surety, it is said that the contract is so far severable that a several judgment is proper, since the liability is joint as to A, but several as between B and C.¹³

The context may show that such a promise is several and not joint. Thus a promise to pay a certain sum for one road grader, "to be paid by us in proportion to road tax in above-mentioned districts on lands and property which we now own" in such districts,¹⁴ or to "pay to the city the cost of the curbstone so placed opposite our land," signed by owners in severalty,¹⁵ is several. The use of words such as "we agree"¹⁶ may show an intention to assume a joint and several liability. A contract contained the words, "We, the undersigned, do business under the name of Oliphant & Co." * * * "We also agree." This was signed by the firm name only. A renewal of this option made a part of the original was signed by all the members of the firm. This was held as to the covenant not to engage in business to be joint and several.¹⁷ A contract between two railroad companies, as one party, and a sleeping-car company as the other, whereby certain sleeping-cars were to be run "over the line of said roads between" two cities "in connection with the night passenger express through trains between said cities," was held to be a joint contract.¹⁸

By statute in some jurisdictions contracts joint in form are in effect turned into joint and several contracts.¹⁹ By statute it is provided in some jurisdictions that if the parties who unite in a

¹² *Payne v. Payne*, 129 Wis. 450, 109 N. W. 105.

¹³ *McCoy v. Jones*, 61 O. S. 119, 55 N. E. 219.

¹⁴ *Western Wheel Scraper Co. v. Locklin*, 100 Mich. 339, 58 N. W. 1117.

¹⁵ *Springfield v. Harris*, 107 Mass. 532.

¹⁶ *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 78 Am. St. Rep. 612, 46 L. R. A. 255, 43 Atl. 723.

¹⁷ *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 78 Am. St. Rep. 612, 46 L. R. A. 255, 43 Atl. 723 [affirming in part and reversing in part, 56 N. J. Eq. 680, 39 Atl. 923].

¹⁸ *Stanley v. R. R.*, 18 O. S. 552. (Hence construed so as to apply only to through trains running on both roads as a continuous line.)

¹⁹ *United States. Sawin v. Kenney*, 93 U. S. 289, 23 L. ed. 926.

California. Farmer's Exchange Bank v. Morse, 129 Cal. 239, 61 Pac. 1088; *Gummer v. Mairs*, 140 Cal. 535, 74 Pac. 26.

Iowa. Cole v. Harvey, 142 Ia. 574, 120 N. W. 97.

Massachusetts. Coram v. Davis, 216 Mass. 448, 103 N. E. 1027.

Missouri. Bagnell Timber Co. v. Missouri K. & T. R. Ry. Co., 242 Mo. 11, 145 S. W. 469.

promise receive some benefit from the consideration, their promise is presumed to be joint and several.²⁰ By statute in Louisiana a note containing the words "we promise," is a several note, binding each maker only for his proportionate share.²¹

§ 2068. Words importing several liability. Language which shows an intention on the part of each promisor to assume only a part of the entire liability imports a several contract.¹ Thus such language as "we promise each to pay" a certain proportion of the debt, as a pro rata share of the purchase price;² or of the expenses of litigation in which the same question is presented, involving the separate interests of the promisors;³ or "we promise to pay the amount set opposite our respective names," as in contracts for subscriptions;⁴ or "we, the undersigned, promise to pay the following subscriptions," with an amount opposite the name of each subscriber,⁵ imports a several contract. Hence, one subscriber can not use as a defense the fact that some of the other subscribers are minors or insolvent, since such fact does not increase his liability.⁶

Tennessee. *Jarnagin v. Stratton*, 95 Tenn. 619, 30 L. R. A. 495, 32 S. W. 625.

See also, *Forst v. Leonard*, 112 Ala. 296, 20 So. 587.

So where the payee signs as an apparent joint maker. *Fisher v. Diehl*, 94 Md. 112, 50 Atl. 432.

²⁰ *Bell v. Adams*, 150 Cal. 772, 90 Pac. 118; *Rutherford v. Holbert*, 42 Okla. 735, L. R. A. 1915B, 221, 142 Pac. 1099.

²¹ *Groves v. Sentell*, 153 U. S. 465, 38 L. ed. 785.

¹ *Moss v. Wilson*, 40 Cal. 159; *McArthur v. Board*, 119 Ia. 562, 93 N. W. 580; *Strong v. Schaffer*, 39 S. D. 250, L. R. A. 1918F, 648, 163 N. W. 1035; *Colt v. Learned*, 118 Mass. 380; *Davis & Rankin Building & Manufacturing Co. v. Cupp*, 89 Wis. 673.

A liquor dealer's bond imposes a several liability. *Strong v. Schaffer*, 39 S. D. 250, L. R. A. 1918F, 648, 163 N. W. 1035.

² *McArthur v. Board*, 119 Ia. 562, 93 N. W. 580; *Fuselier v. Lacour*, 3 La.

Ann. 162; *Larkin v. Butterfield*, 29 Mich. 254.

³ *Adriatic Fire Ins. Co. v. Treadwell*, 108 U. S. 361, 27 L. ed. 754.

⁴ **California.** *Moss v. Wilson*, 40 Cal. 159; *O'Connor v. Hooper*, 102 Cal. 528, 36 Pac. 939.

Illinois. *Robertson v. March*, 4 Ill. 198.

Michigan. *Davis, etc., Co. v. Murray*, 102 Mich. 217, 60 N. W. 437.

Nebraska. *Davis v. Creamery Co.*, 48 Neb. 471, 67 N. W. 436.

Texas. *Darnall v. Lyon* (Tex. Civ. App.), 19 S. W. 506.

Vermont. *Connecticut, etc., Ry. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181.

Wisconsin. *Davis, etc., Co. v. Cupp*, 89 Wis. 673, 62 N. W. 520; *Hodges v. Nalty*, 104 Wis. 464, 80 N. W. 726.

⁵ *Landwerlen v. Wheeler*, 106 Ind. 523, 5 N. E. 888; *Bank v. Smith*, 44 Utah 284, 140 Pac. 122.

⁶ *Chicago, etc., Co. v. Higginbotham* (Miss.), 29 So. 79.

The presumption in contracts of subscription is that a several liability is intended.⁷ Hence, a promise "to pay the above amount,"⁸ has been held to import a several liability. Subscription contracts in which the subscribers promise a gross sum to the adversary party, of which each subscriber is, by the terms of the contract, to pay a definite amount, are ordinarily held to be several with reference to the liability of the subscribers.⁹ A promise by A to sell property for three thousand dollars, to a number of subscribers, who agree to pay one hundred dollars for each share, the total number of shares to be thirty, imposes a several liability upon the subscribers.¹⁰ A written contract between A, a contractor, and B, C and D, and a number of other subscribers, which provides that "we, the said subscribers, hereto agree to pay the above amount (\$3,750) for such butter factory when completed," and which also provides that when such amount was subscribed, the subscribers were to incorporate and the stock of such corporation was to be divided in shares which were to be issued to the subscribers in proportion to their paid-up interests, is held to be a several contract; and if the contractor completes the factory, he can recover from each subscriber only the amount which appeared opposite his name. If any subscriptions prove to be invalid, the contractor can not recover the deficit from the remaining subscribers, nor can he enforce a lien upon the building.¹¹ However, it is held that a contract by which a number of subscribers to a proposed telephone system agree to pay their pro rata share of the cost of installing the system, creates a joint liability as between the subscribers and one who deals with them as a voluntary association.¹²

If the language used shows a clear intent to incur a joint liability there is nothing in the nature of a contract of subscription that makes this impossible. Thus the words "we, the subscribers, agree to pay" a gross sum.¹³ are held to impose a joint liability.

⁷ Hall v. Thayer, 53 Mass. (12 Met.) 130; Davis v. Belford, 70 Mich. 120, 37 N. W. 919; Davis & Rankin Building & Manufacturing Co. v. Cupp, 89 Wis. 673, 62 N. W. 520.

⁸ Davis v. Belford, 70 Mich. 120, 37 N. W. 919.

⁹ McArthur v. Board, 119 Ia. 562, 93 N. W. 580; Waddy Bluegrass Creamery Co. v. Davis-Rankin Building & Mfg. Co., 103 Ky. 579, 45 S. W. 895; Davis

& Rankin Building & Mfg. Co. v. Murray, 102 Mich. 217, 60 N. W. 437.

Contra, Clements v. Miller, 13 N. D. 176, 100 N. W. 239.

¹⁰ McArthur v. Board, 119 Ia. 562, 93 N. W. 580.

¹¹ Davis & Rankin Building & Manufacturing Co. v. Cupp, 89 Wis. 673, 62 N. W. 520.

¹² Clements v. Miller, 13 N. D. 176, 100 N. W. 239.

¹³ Davis v. Shafer, 50 Fed. 764.

A contract of subscription to carry out certain purposes whereby the subscribers undertake each to pay a certain sum is several as to such payments, but is joint as to the covenants to devote the fund thus raised to certain specified purposes.¹⁴ Hence, a repudiation by a part only of the subscribers does not end the contract. The adversary party may perform and recover the several subscriptions from the subscribers.¹⁵ Hence, though no joint recovery can be had on the subscriptions, the subscribers should be joined as defendants in an action involving the common fund.¹⁶

A contract by which a number of promisors agree to pay a gross sum in certain proportions, is generally held to create a several liability.¹⁷ In some jurisdictions, however, such liability has been held to be joint and several. A contract by which A, B and C, as subscribers, agree to pay a certain sum to X for value, which is followed by the names of A, B and C, with a certain sum of money opposite each name, is said to create a joint obligation, but one which X may at his election treat as a several obligation as against each subscriber.¹⁸

§ 2069. Words importing joint and several liability. If the language used shows an intention to assume a liability, either joint or several in its nature, at the option of the promisee, this imports a joint and several obligation.¹ Thus the use of such language as "we, or either of us,"² "we jointly and severally promise,"³ or the use of the singular number, such as "I promise,"⁴ followed by the signature of two or more promisors, imports a joint and several liability. So a note containing the words "I promise to

¹⁴ *Current v. Fulton*, 10 Ind. App. 617, 38 N. E. 419; *Gibbons v. Bente*, 51 Minn. 499, 22 L. R. A. 80, 53 N. W. 756.

¹⁵ *Gibbons v. Bente*, 51 Minn. 499, 22 L. R. A. 80, 53 N. W. 756; and see to the same effect *Current v. Fulton*, 10 Ind. App. 617, 38 N. E. 419.

¹⁶ *Cornish v. West*, 82 Minn. 107, 52 L. R. A. 355, 84 N. W. 750.

¹⁷ *Adriatic Fire Ins. Co. v. Treadwell*, 108 U. S. 361, 27 L. ed. 754; *Western Wheel Scraper Co. v. Locklin*, 100 Mich. 339, 58 N. W. 1117; *Taylor v. Coon*, 79 Wis. 76, 48 N. W. 123.

¹⁸ *Rutherford v. Holbart*, 42 Okla. 735, L. R. A. 1915B, 221, 142 Pac. 1099.

¹ *Connecticut. Salomon v. Hopkins*, 61 Conn. 47, 23 Atl. 716.

Indiana. Maiden v. Webster, 30 Ind. 317.

Massachusetts. Hemmenway v. Stone, 7 Mass. 58, 5 Am. Dec. 27.

Oregon. Anderson v. Stayton State Bank, 82 Or. 357, 159 Pac. 1033.

Wisconsin. Dart v. Sherwood, 7 Wis. 523, 76 Am. Dec. 228; *Dill v. White*, 52 Wis. 456.

² *Pogue v. Clark*, 25 Ill. 333.

³ *Rees v. Abbott*, Cowp. 832.

⁴ *Connecticut. Monson v. Drakeley*, 40 Conn. 552, 16 Am. Rep. 74; *Salomon v. Hopkins*, 61 Conn. 47, 23 Atl. 716.

pay," signed at the bottom by A and on the back before delivery by B, was held to be a joint and several note.⁵ In New York, however, it has been held that a note in the form "I promise," is necessarily a several note only.⁶ The liability of partners is a joint and several liability.⁷ Under a statute which provides that if parties who unite in a promise receive the benefit from the consideration, their promise is presumed to be joint and several,⁸ a contract by which a number of mine owners employ a manager, imposes a joint and several liability upon the mine owners.⁹

§ 2070. Liability of sole promisor. While the intention of the parties is paramount in determining the nature of the liability of two or more promisors, it is impossible, no matter how clear the intention of the parties, to impose a joint liability upon a sole promisor. A contract made with one person alone is necessarily a several contract, even if words which are appropriate to joint contracts, such as "we promise,"¹ are employed.

§ 2071. Effect of joint liability—Parties to actions. The adjective law is so closely connected with the substantive law that a statement of the effect of these different types of contract is in outward form almost exclusively a matter of procedure, though it affects the substantive rights of the parties. All the joint promisors are liable upon the joint contract,¹ so that a promise to re-

Indiana. *Maiden v. Webster*, 30 Ind. 317.

Minnesota. *Walford v. Bowen*, 57 Minn. 267, 59 N. W. 195.

New Hampshire. *Ladd v. Baker*, 26 N. H. 76, 57 Am. Dec. 355.

Ohio. *Wallace v. Jewell*, 21 O. S. 163, 8 Am. Rep. 48.

Vermont. *Arbuckle v. Templeton*, 65 Vt. 205, 25 Atl. 1095.

West Virginia. *Keller v. McHuffman*, 15 W. Va. 64.

Wisconsin. *Dart v. Sherwood*, 7 Wis. 523, 76 Am. Dec. 228; *Dill v. White*, 52 Wis. 456, 9 N. W. 404.

So by statute, *Miller v. Lewiston National Bank*, 18 Ida. 124, 108 Pac. 901; *Dill v. White*, 52 Wis. 456.

⁵ *Booth v. Huff*, 116 Ga. 8, 94 Am. St. Rep. 98, 42 S. E. 381; *Dow Law*

Bank v. Godfrey, 126 Mich. 521, 86 Am. St. Rep. 559, 85 N. W. 1075.

⁶ *Brownell v. Winnie*, 29 N. Y. 400, 86 Am. Dec. 314.

⁷ *Wood v. Carter*, 67 Neb. 133, 93 N. W. 158.

⁸ *Bell v. Adams*, 150 Cal. 772, 90 Pac. 118. See § 2068.

⁹ *Bell v. Adams*, 150 Cal. 772, 90 Pac. 118.

¹ *Holmes v. Sinclair*, 19 Ill. 71; *Whitmore v. Nickerson*, 125 Mass. 496, 28 Am. Rep. 257.

¹ *Allin v. Shadburne*, 31 Ky. (1 Dana) 68, 25 Am. Dec. 121; *Green v. Rick*, 121 Pa. St. 130, 6 Am. St. Rep. 670, 2 L. R. A. 48, 15 Atl. 497; *Sully v. Campbell*, 99 Tenn. 434, 43 L. R. A. 161, 42 S. W. 15; *Camp v. Simon*, 23 Utah 56, 63 Pac. 332.

lease one on his paying his proportionate share of the debt is without consideration.² All the promisors upon a joint contract should be made defendants.³ Such defect in parties is waived if it is not taken advantage of properly by the defendants who are made parties to such action.⁴ If the declaration or petition does not show on its face that the promise is a joint promise and that the other promisor is alive, advantage of such defect must be taken by a plea in abatement.⁵ Under the Code of Civil Procedure such objection must be made by demurrer or by answer.⁶ If one of the defendants was dead, it was not necessary to allege such fact in the declaration as a reason for omitting him.⁷ In Louisiana the plaintiff may sue one party who is liable in solido without making the other obligor a party.⁸ In an action against joint promisors, a joint judgment should be rendered against all,⁹ except such as can not be served with process,¹⁰ and after such judgment has been obtained the plaintiff may issue execution against any of the defendants he chooses. The fact that one of the defendants who are joint promisors, is an infant, and that he can interpose the defense of infancy successfully, does not prevent judgment from being rendered against the remaining joint promisors.¹¹ If some of the joint obligors are insolvent the payee can enforce payment of the entire debt against those who are solvent.¹² Secret arrangements made between the joint contractors can not affect their liability to the promisee. Thus A, B and C signed a note and mortgage, joint in form, with the understanding that A should take and pay for two-thirds of the property and B and C together the remaining

² *Davidson v. Burke*, 143 Ill. 139, 36 Am. St. Rep. 367, 32 N. E. 514. See § 609.

³ *Clements v. Miller*, 13 N. D. 176, 100 N. W. 239; *McArthur v. Ladd*, 5 Ohio 514; *Kamm v. Harker*, 3 Or. 208.

⁴ *McArthur v. Ladd*, 5 Ohio 514.

⁵ *Posch v. Lion Bonding & Surety Co.*, 137 Minn. 169, 163 N. W. 131; *McArthur v. Ladd*, 5 Ohio 514.

⁶ *Posch v. Lion Bonding & Surety Co.*, 137 Minn. 169, 163 N. W. 131.

⁷ *Richards v. Heather*, 1 Barn. & Ald. 29.

⁸ *Shreveport v. U. S. Fidelity & Guaranty Co.*, 131 La. 933, 60 So. 621.

⁹ *United States v. Gilman v. Rives*, 36 U. S. (10 Pet.) 298, 9 L. ed. 432.

Indiana. Bragg v. Wetzel, 5 Blackf. (Ind.) 95, 18 Am. Dec. 131.

Massachusetts. Meyer v. Estes, 184 Mass. 457, 32 L. R. A. 283, 41 N. E. 683.

Michigan. Dumanoise v. Townsend, 80 Mich. 302, 45 N. W. 179.

Missouri. Lemon v. Wheeler, 96 Mo. App. 651, 70 S. W. 924.

Ohio. Pollard v. Collier, 8 Ohio 43.

South Carolina. Lucas v. Sanders, 1 McMul. (S. Car.) 311.

¹⁰ *Perkins County v. Miller*, 55 Neb. 141, 75 N. W. 577.

¹¹ *Cole v. Manners*, 76 Neb. 454, 107 N. W. 777.

¹² *Camp v. Simon*, 23 Utah 56, 63 Pac. 332.

one-third. B and C were liable to the promisee for the entire debt.¹³ A statute which provides that the plaintiff may, if he wishes, join some of the parties who are severally liable upon the same instrument, does not apply to parties who are jointly liable.¹⁴

§ 2072. Death of joint promisor. At common law, the death of a joint promisor discharged his estate and left the survivors liable for the entire amount of the debt.¹ The promisee could not join the administrator of the deceased joint promisor with the surviving joint promisors.² In equity relief against the estate of the deceased promisor could be given if the survivors were insolvent.³ The survivor could have contribution from the estate of the deceased promisor.⁴ The result of the common-law rule that the death of the promisor discharged his estate proved to be so unjust that it has been altered by statute in many states. Under some of these statutes it is provided that the death of a joint promisor does not alter his liability and that it may be enforced against his estate.⁵ Under such statute, however, the survivor may be held for the entire debt.⁶ On the other hand, under such a statute the surviving promisor and the administrator of the deceased promisor may be joined at the election of the promisee.⁷ Some of the statutes as construed by the courts practically result in causing the

¹³ *Sully v. Campbell*, 99 Tenn. 434, 43 L. R. A. 161, 42 S. W. 15.

¹⁴ *Kamm v. Harker*, 3 Or. 208; *Providence County Savings Bank v. Vadenais*, 25 R. I. 295, 55 Atl. 754.

Contra, *Whittenhall v. Korber*, 12 Kan. 472.

¹ *Ashby v. Ashby*, 7 B. & C. 444; *Burgoyne v. Trust Co.*, 5 O. S. 586; *Murphey v. Weil*, 92 Wis. 467, 66 N. W. 532.

² *Eggleston v. Buck*, 31 Ill. 254; *Cochrane v. Cushing*, 124 Mass. 219.

³ *Illinois*. *Moore v. Rogers*, 19 Ill. 347.

Massachusetts. *New Haven, etc., Co. v. Hayden*, 119 Mass. 361.

New York. *Hamersley v. Lambert*, 2 Johns. Ch. 508; *Pope v. Cole*, 55 N. Y. 124.

Ohio. *Burgoyne v. Trust Co.*, 5 O. S. 586.

South Carolina. *Ayer v. Wilson*, 2 Mill (S. Car.) 319, 12 Am. Dec. 677.

⁴ *Erwin v. Dundas*, 45 U. S. (4 How.) 58, 11 L. ed. 875.

⁵ *New York*. *Potts v. Dounce*, 173 N. Y. 335, 66 N. E. 4.

Ohio. *Eckert v. Myers*, 45 O. S. 525, 15 N. E. 862.

Tennessee. *Taylor v. Taylor*, 24 Tenn. (5 Humph.) 110.

Vermont. *Hogan v. Sullivan*, 79 Vt. 36, 64 Atl. 234.

Wyoming. *Chadwick v. Hopkins*, 4 Wyom. 379, 62 Am. St. Rep. 38, 34 Pac. 899.

⁶ *Lee v. Blodgett*, 214 Mass. 374, 102 N. E. 67; *Hogan v. Sullivan*, 79 Vt. 36, 64 Atl. 234.

⁷ *Burgoyne v. Trust Co.*, 5 O. S. 586; *Weil v. Guerin*, 42 O. S. 299.

death of a joint promisor to turn the contract into a joint and several contract.⁸ If the statute has the effect of turning a joint contract into a joint and several contract upon the death of a joint promisor, the surviving promisor may set up as a defense to an action against himself the pendency of an action against such joint promisor and the administrator of the deceased promisor in jurisdictions in which the pendency of a joint action upon a joint and several obligation is a defense to a subsequent several action against one of such promisors.⁹

§ 2073. Judgment against one joint promisor. A judgment rendered against one joint promisor in an action in which the remaining joint promisors could have been made parties is a bar to a subsequent action against such other joint promisors.¹ A judgment against less than all of the joint promisors operates as a merger of the entire cause of action,² although the defendants against whom such judgment was rendered might have taken advantage of the defect of party defendants if they had wished to do so.³ If an action is brought against two or more joint

⁸ Philadelphia, etc., Co. v. Butler, 181 Mass. 468, 63 N. E. 940; Weil v. Guerin, 42 O. S. 209; Burgoyne v. Trust Co., 5 O. S. 586.

⁹ Weil v. Guerin, 42 O. S. 299.

¹ England. King v. Hoare, 2 Dowl. & L. 382; Ex parte Higgins, 3 De G. & J. 33; Hammond v. Schofield [1891], 1 Q. B. 453; Hoare v. Niblett [1891], 1 Q. B. 781.

United States. Mason v. Eldred, 73 U. S. (6 Wall.) 231, 18 L. ed. 783 [overruling, Sheehy v. Mandeville, 10 U. S. (6 Cranch) 253, 3 L. ed. 215]; Sessions v. Johnson, 95 U. S. 347, 24 L. ed. 596.

Contra, by statute in some states. Mason v. Eldred, 73 U. S. (6 Wall.) 231, 18 L. ed. 783 (under Michigan statute).

Illinois. Fleming v. Ross, 225 Ill. 149, 80 N. E. 92.

Iowa. Citizens' Savings Bank v. Olson, 47 Ia. 492.

Kentucky. Burrus v. Anderson, — Ky. (3 Met.) 500.

Maryland. Thomas v. Mohler, 25 Md. 36.

Michigan. Beals v. Smith, 91 Mich. 146, 51 N. W. 885.

Missouri. Bagnell Timber Co. v. Missouri, K. & T. Ry. Co., 242 Mo. 11, 145 S. W. 469.

New Jersey. Coles v. McKenna, 80 N. J. L. 48, 76 Atl. 344.

Ohio. Sloo v. Lea, 18 Ohio 279.

Oklahoma. McMaster v. City National Bank, 23 Okla. 550, 138 Am. St. Rep. 831, 101 Pac. 1103.

In an early case it was held that a judgment against one joint trespasser was a bar against the other. Lendall v. Pinfold, 1 Leon. 19.

Oregon. Anderson v. Stayton State Bank, 82 Or. 357, 159 Pac. 1033.

Wisconsin. Lower v. Bandow, 48 Wis. 638, 4 N. W. 774.

² Anderson v. Stayton State Bank, 82 Or. 357, 159 Pac. 1033.

³ Anderson v. Stayton State Bank, 82 Or. 357, 159 Pac. 1033.

promisors, the promisee can not dismiss the action against some and have judgment against others.⁴ If all the promisors are within the jurisdiction of the court and served with summons, it is error to render judgment against one as on default, and enter judgment on the merits in favor of the other joint promisors.⁵ If a joint judgment upon conversion is reversed as to one and affirmed as to the other, such judgment operates as a bar to a subsequent action against both.⁶ If a judgment by default is taken against joint promisors and subsequently some of such joint promisors are given leave to answer and the judgment is set aside as to them, the courts should set it aside as to all such joint promisors, and it is error for the court to continue such judgment as to some joint promisors while setting it aside as to others.⁷ If the promisee makes the joint promisors defendants by summons and summons can not be served upon all, judgment against those upon whom summons can be served does not operate as a bar to the subsequent action against the joint promisors upon whom summons could not be served when the original action was brought.⁸ If, however, it is conceded by the pleadings that one of the joint promisors is a surety and if he interposes a defense of which the principal could not take advantage, such as an extension of time, it is not error to render judgment against the principal while a motion for a new trial to set aside a verdict in favor of the surety is pending.⁹ A defendant who has denied joint liability, but who has admitted a several liability for a certain amount, can not complain of a several judgment against him for the amount for which he admits liability.¹⁰ If an action is brought on the erroneous theory of a joint contract, no recovery can be had against one promisor on his several contract in jurisdiction where the common-law rule has not been modified by statute so as to permit of greater freedom of amendment.¹¹ An action was brought against a county treasurer and his bondsmen on a joint bond covering his first term. The evidence showed a defalcation during his second term. It was held that as no judgment could be rendered against

⁴ Van Leyen v. Wreford, 81 Mich. 606, 45 N. W. 1116.

⁵ Kingsland v. Koeppe, 137 Ill. 344, 13 L. R. A. 649, 28 N. E. 48; Sloo v. Lea, 18 Ohio 279.

⁶ Sloo v. Lea, 18 Ohio 279.

⁷ Aucker v. Adams, 23 O. S. 543.

⁸ Yoho v. McGovern, 42 O. S. 11;

Stone v. Whittaker, 61 O. S. 194, 55 N. E. 614.

⁹ McCoy v. Jones, 61 O. S. 119, 55 N. E. 219.

¹⁰ Hempy v. Ransom, 33 O. S. 312.

¹¹ Gleason v. Milk Supply Co., 93 Me. 544, 74 Am. St. Rep. 370, 45 Atl. 825;

Atkins v. Brown, 59 Me. 90.

the bondsmen on such joint bond, no several judgment could be rendered against the treasurer.¹² By statute in some states the promisee may sue less than all the promisors.¹³ Such statutes in effect make a joint contract joint and several.

§ 2074. Release of joint promisor. At common law a technical release under seal which was given to one joint promisor enured to the benefit of all.¹ In some of the cases in which a release of a joint promisor was held to discharge all, emphasis was laid upon the fact that no intention to reserve rights against the other joint promisors appeared upon the face of the release.² It was, however, held at common law that the release of one joint promisor operated as a discharge of all even if the release contained an express reservation of the rights of the promisee against the remaining joint promisors.³ This result was reached upon the theory that the promisee could not change the legal liability of the parties except with the consent of all, that the words of the release and the reservation were inconsistent and that in order to uphold the release the reservation of the rights of the promisee against the remaining promisors must be ignored as contrary to the paramount intent of the parties.⁴ If, however, all the parties to the original liability assented to the release and reservation of right

¹² *King County v. Ferry*, 5 Wash. 536, 34 Am. St. Rep. 880, 19 L. R. A. 500, 32 Pac. 538.

¹³ *Miller v. Sullivan*, 89 Tex. 480, 35 S. W. 362.

¹ *United States. Hunt v. Rousmaniere*, 26 U. S. (1 Pet.) 1, 7 L. ed. 27.

Arkansas. *Tancred v. First National Bank*, 124 Ark. 154, 187 S. W. 160.

Massachusetts. *Hale v. Spaulding*, 145 Mass. 482, 1 Am. St. Rep. 475, 14 N. E. 534; *Brooks v. Neal*, 223 Mass. 467, 112 N. E. 78.

Minnesota. *Randahl v. Lindholm*, 86 Minn. 16, 89 N. W. 1129.

Nebraska. *Scofield v. Clark*, 48 Neb. 711, 67 N. W. 754; *Banking House v. Rose*, 78 Neb. 693, 111 N. W. 590.

New York. *Rowley v. Stoddard*, 7 Johns. (N. Y.) 207.

Oregon. *Crawford v. Roberts*, 8 Or. 324.

West Virginia. *Maslin v. Hiett*, 37 W. Va. 15, 16 S. E. 437. A release of one partner has been held not to operate as a discharge of the other. *Webb v. Butler*, 192 Ala. 287, Ann. Cas. 1916D, 815, 68 So. 369.

For the effect of releases and covenants not to sue, see also § 2446.

² *Merriman v. Barker*, 121 Ind. 74, 22 N. E. 992; *Hale v. Spaulding*, 145 Mass. 482, 1 Am. St. Rep. 475, 14 N. E. 534; *Whittemore v. Oil Co.*, 124 N. Y. 565, 21 Am. St. Rep. 708, 27 N. E. 244.

³ *Cheetham v. Ward*, 1 B. & P. 630; *Nicholson v. Revill*, 4 A. & E. 675; *Kearsley v. Cole*, 16 M. & W. 128; *Rice v. Webster*, 18 Ill. 331; *Farmers' Savings Bank v. Aldrich (Ia.)*, 133 N. W. 383.

⁴ See § 2039.

of action against one of the joint debtors, full effect would be given, both to such release and to such reservation.⁵

Equity, on the other hand, seemed to regard the reservation of the rights of the promisee against the other promisors as of at least as paramount importance as the release of the individual promisor, and to hold that a reservation of rights against the remaining promisors would prevent them from taking advantage of the release.⁶

The unsatisfactory character of the common-law rule may be shown from the fact that the common-law courts practically evaded it by ignoring the usual rules of construction and treating such releases of less than all of the joint promisors with reservation of the rights of the promisee against the remaining joint promisors as covenants not to sue rather than as releases.⁷ In many jurisdictions legislation has solved the problem by statutes which provide expressly that the release of two joint promisors does not necessarily operate as a discharge of the other.⁸

Where the common-law rule was in force its operation was greatly restricted. The common-law rule applied only to the technical release under seal.⁹ A statutory release might have the same effect.¹⁰ If presenting a claim under a statutory assignment for the benefit of creditors operates as a discharge, presenting a claim against the estate of one joint promisor operates as a discharge of the remaining joint promisors.¹¹ An oral contract for the discharge of a joint promisor did not operate as a discharge of the other promisors.¹² Since a joint promisor is bound to pay the entire debt, payment by him of less than the entire debt is not a valuable consideration for a promise on the part of the original promisee to discharge such joint obligor,¹³ and accordingly such

⁵ *Kearsley v. Cole*, 16 M. & W. 128.

⁶ *Whittemore v. Judd Linseed & Sperm Oil Co.*, 124 N. Y. 565, 21 Am. St. Rep. 708, 27 N. E. 244.

⁷ *Price v. Barker*, 4 Ell. & Bl. 760; *Bradford v. Prescott*, 85 Me. 482, 27 Atl. 461.

⁸ *United States v. Hosler v. Ireland*, 219 Fed. 489, 135 C. C. A. 201.

New York v. Harbeck v. Pupen, 123 N. Y. 115, 25 N. E. 311.

Ohio v. Sprague v. Childs, 16 O. S. 167.

South Carolina v. Meyer v. Boucher, 107 S. Car. 254, 92 S. E. 471.

South Dakota v. Central Banking &

Trust Co. v. Pusey, 22 S. D. 223, 116 N. W. 1126.

⁹ *Haney, etc., Co. v. Creamery Co.*, 108 Ia. 313, 79 N. W. 79; *Williamson v. McGinnis*, 50 Ky. (11 B. Mon.) 74, 52 Am. Dec. 561; *Shaw v. Pratt*, 39 Mass. (22 Pick.) 305.

¹⁰ *Munyan v. French*, 60 N. J. L. 12, 36 Atl. 771.

¹¹ *Munyan v. French*, 60 N. J. L. 12, 36 Atl. 771.

¹² *Valley Savings Bank v. Mercer*, 97 Md. 458, 55 Atl. 435.

¹³ See § 609.

contract does not release the party who makes such payment.¹⁴ A joint obligor may be discharged by a valid accord and satisfaction if sufficient consideration for such agreement exists,¹⁵ and it has been held that such a discharge will operate as a discharge of the remaining joint promisors.¹⁶ By statute in Louisiana, a release of a party who is liable in solido operates as a release of the other obligors unless the promisee expressly reserves his right against the latter.¹⁷ If an action has been brought jointly against the makers of a joint note and one of such joint makers, a married woman, alleges facts which, if true, prevent her from being liable upon such instrument, and if the other joint makers testify to such facts, it is not error for the plaintiff to dismiss the action as against such married woman and to prosecute the action to final judgment against the remaining joint makers.¹⁸ A covenant not to sue made with one joint promisor does not discharge the others.¹⁹

§ 2075. Effect of several contract. If the promisors are severally liable, the promisee must sue each for his proportion of the indebtedness. He can not, in the absence of statute, join two or more several promisors in an action upon the contract if they object thereto.¹

Under some statutes, however, persons severally liable upon the same contract may be joined as defendants.² Under such a statute a joint action may be brought against delinquent subscribers who have incurred a separate liability.³ A statute which authorizes a joint action against persons severally liable upon the same contract, authorizes a joint action against a number of subscribers who are severally liable, each for a certain amount.⁴ A maker and an endorser are severally liable upon the same instrument within the meaning of a statutory provision which author-

¹⁴ *Hatzel v. Moore*, 120 Fed. 1015.

¹⁵ *Rocky Mountain Stud Farm Co. v. Lunt*, 46 Utah 299, 151 Pac. 521.

¹⁶ *Rocky Mountain Stud Farm Co. v. Lunt*, 46 Utah 299, 151 Pac. 521.

¹⁷ *J. I. Case Threshing Machine Co. v. Bridger*, 133 La. 754, 63 So. 319.

¹⁸ *Banking House v. Rose*, 78 Neb. 693, 111 N. W. 590.

¹⁹ *Lacy v. Kinnaston*, Holt. 178, 1 *Ld. Raym.* 688, 4 *Salk.* 575, 12 *Mod.*

548; *Harrison v. Close*, 2 Johns. (N. Y.) 448, 3 *Am. Dec.* 444.

¹ *Price v. Ry.*, 18 *Ind.* 137; *Perry v. Turner*, 55 *Mo.* 418.

² *People v. Edwards*, 9 *Cal.* 286; *Hastings Industrial Co. v. Jones*, 167 *Ky.* 714, 181 *S. W.* 364.

³ *Hastings Industrial Co. v. Jones*, 167 *Ky.* 714, 181 *S. W.* 364.

⁴ *Hastings Industrial Co. v. Jones*, 167 *Ky.* 714, 181 *S. W.* 364.

izes the plaintiff to join them as defendants.⁵ This rule applies both to parties who are severally liable for the entire performance and to those who are severally liable for performance of a part of the entire obligation. Under a statute which provides that a joint action may be brought against a maker and an endorser of a negotiable instrument, if such instrument is protested, such joint action may be brought if notice and protest have been waived by the endorser.⁶

A release of one of two or more promisors who are liable severally, does not operate as a discharge of the other promisors,⁷ unless the principal is released and it is sought to enforce liability against a surety. If the liability is several, but the action is brought against both, a judgment against one is not a bar to the other.⁸

Since a joint obligation as the term is used in the Louisiana statutes is equivalent to a several liability as far as the liability of the promisors is concerned, a release of a party who is a joint obligor does not release the remaining obligors.⁹

The death of one of two or more promisors severally liable does not discharge his estate.¹⁰ A judgment against one who is severally liable on an instrument,¹¹ such as a maker,¹² is not a bar to an action against another party who is severally liable,¹³ such as an indorser,¹⁴ even if the indorser was originally joined in the original action but was dismissed without prejudice.¹⁵

§ 2076. Effect of joint and several contract. A joint and several promise amounts in legal effect to a joint promise by all and to a several promise by each.¹ Accordingly, the party for

⁵ *Loustalot v. Calkins*, 120 Cal. 688, 53 Pac. 258.

⁶ *First National Bank v. Lowther-Kaufman Oil & C. Co.*, 66 W. Va. 505, 28 L. R. A. (N.S.) 511, 66 S. E. 713.

⁷ *Jemison v. Governor*, 47 Ala. 390 (except as far as the insolvency of some of the remaining parties may affect contribution).

See also, *Frederick v. Moore*, 52 Ky. (13 B. Mon.) 470.

⁸ *Hempy v. Ransom*, 33 O. S. 312.

⁹ *Drew v. Bank of Monroe*, 125 La. 673, 51 So. 683.

¹⁰ *McCreedy v. Freedly*, 3 Rawle (Pa.) 251.

¹¹ *Petri v. Manny*, 99 Wash. 601, 1 A. L. R. 1595, 170 Pac. 127.

¹² *Petri v. Manny*, 99 Wash. 601, 1 A. L. R. 1595, 170 Pac. 127.

¹³ *Petri v. Manny*, 99 Wash. 601; 1 A. L. R. 1595, 170 Pac. 127.

¹⁴ *Petri v. Manny*, 99 Wash. 601, 1 A. L. R. 1595, 170 Pac. 127.

¹⁵ *Petri v. Manny*, 99 Wash. 601, 1 A. L. R. 1595, 170 Pac. 127.

¹ *Municipal Court of Providence v. Whaley*, 25 R. I. 289, 105 Am. St. Rep. 890, 63 L. R. A. 235, 55 Atl. 750.

whose benefit such bond is given may bring an action thereon against one of the obligors, although he is himself one of the other obligors.² If the promisors are jointly and severally liable upon their promise, the promisee may at his option sue all within the jurisdiction of the court jointly, or he may sue each of them separately.³ Even if the joint and several promisors are principal and sureties, the promisee may, at his election, bring an action against any one of such promisors.⁴ The promisee's election of either of these remedies bars the other.⁵ Bringing suit is held in some jurisdictions to be such election,⁶ while in others only satisfaction is a final election.⁷ A several judgment rendered against one joint and several promisor in an action in which another promisor is not served with process does not bar the right of action against such other promisor.⁸ He can not, however, join in one action any number less than all.⁹ This objection must, however, be interposed before going to trial on the merits or it

² *Municipal Court of Providence v. Whaley*, 25 R. I. 289, 105 Am. St. Rep. 890, 63 L. R. A. 235, 55 Atl. 750.

³ *United States. Minor v. Bank*, 26 U. S. (1 Pet.) 46, 7 L. ed. 47.

California. Coburn v. Goodall, 72 Cal. 498, 1 Am. St. Rep. 75, 14 Pac. 190.

Connecticut. Olmstead v. Bailey, 35 Conn. 584.

Massachusetts. Peckham v. North Parish, 33 Mass. (16 Pick.) 274.

North Dakota. Clements v. Miller, 13 N. D. 176, 100 N. W. 239.

Ohio. Clinton Bank v. Hart, 5 O. S. 33.

Oregon. Anderson v. Stayton State Bank, 82 Or. 357, 159 Pac. 1033; *Noble v. Beeman-Spaulding-Woodward Co.*, 65 Or. 93, 46 L. R. A. (N.S.) 162, 131 Pac. 1007.

Washington. Pacific Bridge Co. v. U. S. Fidelity and Guaranty Co., 33 Wash. 47, 73 Pac. 772.

⁴ *News-Times Publishing Co. v. Doolittle*, 51 Colo. 386, 118 Pac. 974; *Miller v. State (Okla.)*, 152 Pac. 409.

⁵ *Ex parte Rowlandson*, 3 P. Wms. 405; *Ex parte Brown*, 1 Ves. & B. 60; *United States v. Price*, 50 U. S. (9

How.) 83, 13 L. ed. 56; *Weil v. Guerin*, 42 O. S. 299.

⁶ *Weil v. Guerin*, 42 O. S. 299.

⁷ *Prosser v. Evans* [1895], 1 Q. B. 108; *People v. Harrison*, 82 Ill. 84.

⁸ *Illinois. People v. Harrison*, 82 Ill. 84.

Georgia. Booth v. Huff, 116 Ga. 8, 94 Am. St. Rep. 98, 42 S. E. 381.

Massachusetts. Byers v. Franklin Coal Co., 106 Mass. 131.

Ohio. Clinton Bank v. Hart, 5 O. S. 33; *Avery v. Vansickle*, 35 O. S. 370.

Oregon. Noble v. Beeman-Spaulding-Woodward Co., 65 Or. 93, 46 L. R. A. (N.S.) 162, 131 Pac. 1007.

Washington. Petri v. Manny, 99 Wash. 601, 1 A. L. R. 1595, 170 Pac. 127.

Wisconsin. Davis v. Schmidt, 126 Wis. 461, 110 Am. St. Rep. 938, 106 N. W. 119.

⁹ *Cummings v. People*, 50 Ill. 132; *Fay v. Jenks*, 78 Mich. 312, 44 N. W. 380.

Contra, by statute, *Council Bluffs Savings Bank v. Griswold*, 50 Neb. 753, 70 N. W. 376.

will be waived.¹⁰ If, however, in such an action judgment is rendered against one promisor by confession, the action may be continued against the others.¹¹ A default judgment against one of two or more joint and several promisors is not a bar to an action against another joint promisor.¹² A statute which provides that an action may be brought against one or more of the parties who are severally liable upon the same contract, has been held to apply to joint and several contracts and to authorize the promisee to bring an action against more than one and less than all of such parties.¹³ Under some statutes a judgment may be entered against some joint and several promisors and the case may be continued as against the remaining joint and several promisors.¹⁴

A discharge of one joint and several promisor under seal has been held to enure to the benefit of all,¹⁵ at least unless the right to proceed against the remaining promisors is expressly reserved in the release. It is easy to see why, under technical common-law notions, such a release should discharge the remaining promisors from their joint liability.¹⁶ It is not easy to see why such a release should have any effect upon their several liability. Whether they are to be held jointly or severally depends on the wish of the promisee, and no good reason appears for extending the technical rule that a release of one joint promisor releases all to the case of joint and several promisors.

By statute in Louisiana the right to proceed against the remaining promisors may be reserved expressly.¹⁷

§ 2077. Words importing joint or several rights. If two or more persons are promisees, their rights arising under the contract may be either joint or several. Whether their rights are

¹⁰ *Minor v. Bank*, 26 U. S. (1 Pet.) 46, 7 L. ed. 47; *Barry v. Foyles*, 26 U. S. (1 Pet.) 311, 7 L. ed. 157.

¹¹ *United States v. Leffler*, 36 U. S. (11 Pet.) 86, 9 L. ed. 642.

¹² *Noble v. Beeman-Spaulding-Woodward Co.*, 65 Or. 95, 46 L. R. A. (N.S.) 162, 131 Pac. 1007.

¹³ *People v. Love*, 25 Cal. 520; *Council Bluffs Savings Bank v. Griswold*, 50 Neb. 753, 70 N. W. 376; *Decker v. Trilling*, 24 Wis. 610.

See also, *Clapp v. Preston*, 15 Wis. 543.

¹⁴ *King v. Bell*, 36 O. S. 460; *Mason v. Alexander*, 44 O. S. 318.

¹⁵ *Hochmark v. Richler*, 16 Colo. 265, 26 Pac. 818; *Benjamin v. McConnell*, 9 Ill. 536, 46 Am. Dec. 474; *American Bank v. Doolittle*, 31 Mass. (14 Pick.) 123; *Huber Mfg. Co. v. Silvers*, 85 Neb. 760, 124 N. W. 148; *Crane v. Alling*, 15 N. J. L. 423.

¹⁶ See § 2074.

¹⁷ *J. I. Case Threshing Machine Co. v. Bridger*, 133 La. 754, 63 So. 319.

joint or several depends upon the nature of the interest, together with the intention of the parties as disclosed by the language of the contract and by the evidence which is admissible to explain such language.¹

If the consideration moves from the promisees jointly, the promise to them will be held to be a joint promise unless the provisions of the contract show an intent to make a several promise.² If a payment is obtained from a common fund by the fraud of the person to whom such payment is made, the quasi-contractual right which arises upon such payment is a joint right in favor of the persons who own such fund.³ However, the fact that a promisee has, by a separate contract with a third person, given the latter an interest in the contract, does not make the latter a joint promisee.⁴

If the consideration moves from the promisees separately, a promise to them is prima-facie several.⁵ A contract between four producers of coal, whereby one "agrees to represent the entire interests and sales of the coal of the other three parties," is a several contract as to such promisees.⁶ So if a member of a partnership buys out the interests of his co-partners and agrees to hold them harmless from liabilities owing by the firm, such contract is several as to the promisees.⁷

In either case this presumption may be rebutted by clear and unequivocal language which shows that the promise is made to them either jointly or severally.⁸ If A and B promise jointly to perform for C and C agrees to pay a certain amount to A and a certain amount to B, it has been held that A and B may treat such contract as joint;⁹ but on this point there is a conflict of author-

¹ *Nabors v. Producers' Oil Co.*, 140 La. 985, L. R. A. 1917D, 1115, 74 So. 527; *Ryan v. Martin*, 16 Wis. 57.

² *Nabors v. Producers' Oil Co.*, 140 La. 985, L. R. A. 1917D, 1115, 74 So. 527; *Eveleth v. Sawyer*, 96 Me. 227, 52 Atl. 639; *Robbins v. Ayres*, 10 Mo. 538, 47 Am. Dec. 125; *Slaughter v. Davenport*, 151 Mo. 28, 51 S. W. 471.

³ *Ellaworth v. Trinkle*, 96 Kan. 666, 153 Pac. 543.

⁴ *Brown v. Salisbury*, 123 Fed. 203; *Lewis v. Greider*, 51 N. Y. 231.

⁵ *Hall v. Leigh*, 12 U. S. (8 Cranch)

50, 3 L. ed. 484; *Burton v. Henry*, 90 Ala. 281, 7 So. 925.

⁶ *Shipman v. Mining Co.*, 158 U. S. 356, 39 L. ed. 1015.

⁷ *Morgan v. Wardell*, 178 Mass. 350, 55 L. R. A. 33, 59 N. E. 1037.

⁸ *Hall v. Leigh*, 12 U. S. (8 Cranch) 50, 3 L. ed. 484; *Schultz v. Howard*, 63 Minn. 196, 56 Am. St. Rep. 470, 65 N. W. 363; *Southern Kansas Railway Co. v. Morris*, 100 Tex. 611, 123 Am. St. Rep. 834, 102 S. W. 396; *Ryan v. Martin*, 16 Wis. 57.

⁹ *Fauble v. Davis*, 48 Ia. 462.

ity, and the better rule seems to be that A and B may sue separately.¹⁰

§ 2078. Joint and several rights. In the absence of statute the interest of the promisees can not be made joint and several at the same time by any form of words.¹ Such a contract creates a joint interest in the promisees,² and not a several interest which may be enforced by any one of such promisees severally.³

A different rule has been applied under the Negotiable Instruments Law.⁴ A promissory note which is made payable to the order of A or B, may be indorsed by A alone so as to make the indorsee a bona fide holder.⁵ The fact that a negotiable instrument is endorsed to two endorsees in the alternative, does not destroy its negotiability under the Negotiable Instruments Law.⁶ While the mere form of the promise can not make the interest of the promisees joint and several, it has been held that the nature of the transaction may in some exceptional instances have this effect. This security was given jointly to several creditors to protect their several claims. It was held that they could enforce the application of such security to their claims either jointly or severally.⁷

§ 2079. Effect of joint interest—Promisees must join in action. The joint promisees must all, if living, join in the action.¹

¹⁰ *Curry v. Kansas & Colorado Pacific Ry. Co.*, 58 Kan. 6, 48 Pac. 579.

¹ *Keightley v. Watson*, 3 Exch. 716; *Slingsby's Case*, Coke, Part V, 18b; *Bradburne v. Botfield*, 14 M. & W. 559; *Starret v. Gault*, 165 Ill. 99, 46 N. E. 220; *Eveleth v. Sawyer*, 96 Me. 227, 52 Atl. 639; *Capen v. Barrows*, 67 Mass. (1 Gray) 376.

² *Watson v. Evans*, 1 Hurlst. & C. 662; *Westgate v. Healy*, 4 R. I. 523.

³ *Musselman v. Oakes*, 19 Ill. 81, 68 Am. Dec. 583.

⁴ *Voris v. Schoonover*, 91 Kan. 530, 50 L. R. A. (N.S.) 1097, 138 Pac. 607.

⁵ *Voris v. Schoonover*, 91 Kan. 530, 50 L. R. A. (N.S.) 1097, 138 Pac. 607.

See to the same effect, *Union Bank v. Spies*, 151 Ia. 178, 130 N. W. 928.

⁶ *Page v. Ford*, 65 Or. 450, 45 L. R. A. (N.S.) 247, 131 Pac. 1013.

⁷ *Lyon v. Ballentine*, 63 Mich. 97, 6 Am. St. Rep. 284, 29 N. W. 837.

¹ *Alabama*. *Painter v. Munn*, 117 Ala. 322, 67 Am. St. Rep. 170, 23 So. 83. *Arkansas*. *Livingston v. Pugsley*, 124 Ark. 432, 187 S. W. 925 (obiter).

Florida. *Chamberlain v. Lesley*, 39 Fla. 452, 22 So. 736.

District of Columbia. *Magruder v. Belt*, 7 D. C. App. 303.

Illinois. *Archer v. Bogue*, 4 Ill. 526.

Kentucky. *Quisenberry v. Artia*, 62 Ky. (1 Duv.) 30.

Maine. *Holyoke v. Loud*, 69 Me. 59.

Massachusetts. *Hewes v. Bayley*, 37 Mass. (20 Pick.) 96.

Missouri. *Slaughter v. Davenport*, 151 Mo. 26, 51 S. W. 471.

They can not sue separately.² Even the name of a joint promisee who does not, in fact, wish to sue must be included³ if he is indemnified against liability for costs. Some statutes now provide for including an unwilling joint promisee among the defendants, stating the reason therefor.⁴ Under the doctrine that the action must be in the name of the real party in interest, some exceptions to the rule that joint promisees must join are recognized at modern law. A bond given in accordance with statute to obtain an attachment, though joint in form, may be sued upon by such of the obligees as are injured by the issuance of such attachment.⁵ However, an opposite view has been taken of an injunction bond, where all the obligees have been required to join, even if one only is injured.⁶

§ 2080. Death of joint promisee. At common law on the death of a joint promisee his interest passed to the surviving promisees.¹ If by the death of the other joint promisees the interest has vested in the survivor, he may assign it.² The surviving joint promisees must allege the joint contract and the death of the joint promisees who do not appear as plaintiffs.³ Equity would compel the survivors to account to the personal representative of the deceased

New York. *Dob v. Halsey*, 16 Johns. (N. Y.) 34, 8 Am. Dec. 293.

Ohio. *Tapscott v. Williams*, 10 Ohio 442.

Pennsylvania. *Sweigart v. Berk*, 8 S. & R. (Pa.) 308.

Rhode Island. *Clapp v. Pawtucket Institution*, 15 R. I. 489, 2 Am. St. Rep. 915, 8 Atl. 697.

Vermont. *Angus v. Robinson*, 59 Vt. 585, 59 Am. Rep. 758, 8 Atl. 497; *Davis v. Ins. Co.*, 70 Vt. 217, 39 Atl. 1095.

² *Livingston v. Pugsley*, 124 Ark. 432, 187 S. W. 925 (obiter).

³ *Wright v. McLemore*, 16 Tenn. (10 Yerg.) 235.

⁴ *Cullen v. Knowles* [1898], 2 Q. B. 380.

⁵ *Alexander v. Jacoby*, 23 O. S. 358.

⁶ *Montana Mining Co. v. Milling Co.*, 19 Mont. 313, 48 Pac. 305.

¹ **England.** *Jell v. Douglas*, 4 B. & Ald. 374; *Martin v. Crump*, 2 Salk. 444,

Comb. 474 [sub nomine, *Martin v. Crompe*, 1 Ld. Raym. 340].

Illinois. *Erwin v. Felter*, 283 Ill. 36, L. R. A. 1918E, 776, 119 N. E. 926.

Kentucky. *McCalla v. Rigg*, 10 Ky. (3 A. K. Mar.) 259.

Massachusetts. *Donnell v. Manson*, 109 Mass. 576.

Minnesota. *Hedderly v. Downs*, 31 Minn. 183, 17 N. W. 274; *Semper v. Coates*, 93 Minn. 76, 100 N. W. 662.

South Carolina. *Kinsler v. McCants*, 4 Rich. L. (S. Car.) 46, 53 Am. Dec. 711.

A certificate of deposit in favor of "A or B or the survivor" passes, on A's death, to B, and A's estate has no interest therein. *Erwin v. Felter*, 283 Ill. 36, L. R. A. 1918E, 776, 119 N. E. 926.

² *Semper v. Coates*, 93 Minn. 76, 100 N. W. 662.

³ *Jell v. Douglas*, 4 B. & Ald. 374.

co-promisee for the latter's interest in the contract.⁴ The administrator of the deceased joint promisee can not sue without joining the other joint promisees.⁵ In many jurisdictions these rules have been modified by statute, and the administrator of the deceased joint promisee is allowed to join with the surviving promisees.

§ 2081. Release by joint promisee. At law a release given by a joint promisee discharged the debt as to all the promisees.¹ Thus a release given by one partner binds his co-partners.² It has been held that a release by one of two or more joint promisees does not necessarily bar the rights of the other promisees in equity.³ If a mortgage is released by all of the joint mortgagees except one and the debt is not released, the mortgagee who did not release such mortgage may enforce it in equity.⁴ If the release has been given by a joint promisee in fraud of the rights of his co-promisees and in collusion with the promisor, equity will grant affirmative relief, and set such release aside.⁵

§ 2082. Effect of several interests. A promise to two or more promisees severally gives to each a right to demand performance,¹ and each may bring an action upon the contract.² A contract by which A employs B and C as his counsel, which provides that A "has and hereby does covenant with said B and said C severally that said A will pay to said B and to said C each in case of A's success in such suit, the sum of five thousand dollars," is a several

⁴ *Martin v. Crump*, 2 Salk. 444, Comb. 474 [sub nomine, *Martin v. Crompe*, 1 Ld. Raym. 340].

⁵ *Peck v. Lampkin*, — Ala. —, 75 So. 580.

¹ *Rawstorne v. Gandell*, 15 M. & W. 304; *Clark v. Patton*, 27 Ky. (4 J. J. Mar.) 33, 20 Am. Dec. 203; *Eastman v. Wright*, 23 Mass. (6 Pick.) 316; *Wiggin v. Tudor*, 40 Mass. (23 Pick.) 434; *Weakly v. Hall*, 13 Ohio 167 (release by owner in common of chose in action).

See also, *Black Mountain R. Co. v. Ocean Accident & Guarantee Corp.*, 175 N. Car. 566, 96 S. E. 25.

For the effect of releases and covenants not to sue, see § 2446.

² *Phillips v. Clagett*, 11 M. & W. 84; *Piersons v. Hooker*, 3 Johns. (N. Y.) 68, 3 Am. Dec. 467.

Payment of a judgment in favor of one promisee is a bar to an action by the other promisee. *Black Mountain R. Co. v. Ocean Accident & Guarantee Corp.*, 175 N. Car. 566, 96 S. E. 25.

³ *Upjohn v. Ewing*, 2 O. S. 13.

⁴ *Upjohn v. Ewing*, 2 O. S. 13.

⁵ *Piercy v. Fynney*, L. R. 12 Eq. 69; *Skaife v. Jackson*, 3 Barn. & C. 421.

¹ *Hall v. Leigh*, 12 U. S. (8 Cranch) 50, 3 L. ed. 484.

² *Hall v. Leigh*, 12 U. S. (8 Cranch) 50, 3 L. ed. 484.

contract; and if A discharges C and retains B, C may maintain an action against A upon such contract.³ If goods belong to A and B jointly and A enters into a contract with a carrier for the transportation of such goods, he may maintain a separate action upon such contract.⁴ The several promisees must each maintain his own action, and can not join in a common action.⁵ Attorneys who have several contracts with the same client may, however, join to have set aside a fraudulent compromise between such client and the adversary party.⁶ On the death of one of two or more several promisees, his rights pass to his legal representatives and not to the remaining promisees.⁷

³Ryan v. Martin, 16 Wis. 57.

⁴Southern Kansas Railway Co. v. Morris, 100 Tex. 611, 123 Am. St. Rep. 834, 102 S. W. 396.

⁵United States. Hall v. Leigh, 12 U. S. (8 Cranch) 50, 3 L. ed. 484.

Colorado. Number Five Mining Co. v. Bruce, 4 Colo. 293.

Kansas. Curry v. Ry., 58 Kan. 6, 48 Pac. 579.

Michigan. Rorabacher v. Lee, 16 Mich. 169.

Vermont. Geer v. School District, 6 Vt. 76.

⁶McIntosh v. Zaring, 150 Ind. 301, 49 N. E. 164.

⁷Carthrae v. Brown, 30 Va. (3 Leigh.) 98.

CHAPTER LXV

ENTIRE AND SEVERABLE CONTRACTS

- § 2083. Definition and nature of entire and severable contracts.
- § 2084. Practical importance of distinction.
- § 2085. Intention of parties controlling.
- § 2086. Methods of ascertaining intention—Form of contract.
- § 2087. Character of subject-matter.
- § 2088. Apportionment of consideration.
- § 2089. Application of general principles to specific types of contract.
- § 2090. Specific illustrations.

§ 2083. Definition and nature of entire and severable contracts. If a contract contains two or more covenants on either side, the question arises as to whether it is entire or severable. An entire contract is one the covenants of which have not been separated by the parties, and which accordingly can not be separated by the court.¹ It is also said to be a contract in which the parties intend that each covenant shall be connected with and related to every other covenant.² It is also said to be a contract which is intended to accomplish a single object.³ It is also said that an entire contract is one in which there is an entire consideration on each side.⁴ This, however, is rather a statement of a common test for determining whether a contract is entire or severable than an accurate definition. Since apportionment of consideration is not an unvarying test,⁵ it does not serve as the basis of a satisfactory definition.

¹ **Alabama.** Ollinger & Bruce Dry Dock Co. v. Gibbony, — Ala. —, 81 So. 18.

Minnesota. Johnson v. Fehsefeldt, 106 Minn. 202, 20 L. R. A. (N.S.) 1060, 118 N. W. 797.

Mississippi. Ganong v. Brown, 88 Miss. 53, 117 Am. St. Rep. 731, 40 So. 556.

Oklahoma. Dunn v. T. J. Cannon Co., 51 Okla. 382, 151 Pac. 1167.

Rhode Island. Garon v. Credit Foncier Canadien, 37 R. I. 273, 92 Atl. 561

[rehearing denied, Garon v. Credit Foncier Canadien, 92 Atl. 1022].

Wisconsin. Sixta v. Ontonagon Valley Land Co., 157 Wis. 293, 147 N. W. 1042.

² **Pacific Timber Co. v. Iowa Windmill & Pump Co.**, 135 Ia. 308, 112 N. W. 771; **Dunn v. T. J. Cannon Co.**, 51 Okla. 382, 151 Pac. 1167.

³ **International Contracting Co. v. United States**, 47 Ct. Cl. 158.

⁴ **In re Hellams**, 223 Fed. 460.

⁵ See § 2088.

Such a contract is sometimes called an indivisible contract.⁶

If a contract which contains two or more covenants on one side is regarded by the parties as really consisting of two or more separate contracts, the contract is said to be severable.⁷ It is said that if the consideration is single, the contract is indivisible and entire.⁸ This last statement, however, is rather a test for ascertaining the true intention of the parties than a test for determining the legal effect of the contract when the intention is ascertained.

§ 2084. Practical importance of distinction. An abstract definition of an entire contract or of a severable contract is difficult; and this difficulty extends to the rules for ascertaining the intention of the parties and the legal effect of any given contract. This difficulty arises in part out of the general difficulties of ascertaining the intention of the parties,¹ and in part out of the fact that the question of the entire or severable character of any given contract may arise in a number of different ways. It may arise in connection with the sufficiency of a consideration on the one side to support two or more covenants on the other.² It may arise in connection with the effect of an illegal covenant upon the remaining valid covenants of the contract.³ It may arise in connection with the effect of the Statute of Frauds upon a contract some of whose covenants are within the scope of the statute, but the remaining covenants of which are without the scope of the statute.⁴ It may arise in connection with an attempt to affirm part of a

⁶ *Garon v. Credit Foncier Canadien*, 37 R. I. 273, 92 Atl. 561 [rehearing denied, *Garon v. Credit Foncier Canadien*, 92 Atl. 1022].

"An indivisible contract, as the phrase implies, is a contract whose constituent parts can not be separated. Therefore there are only two courses open to the defendant: it must accept the contract as a whole, or reject it as a whole. If accepted, the defendant must repurchase the stock. If rejected, the defendant must return the money to the plaintiffs." *Garon v. Credit Foncier Canadien*, 37 R. I. 273, 92 Atl. 561 [rehearing denied, *Garon v. Credit Foncier Canadien*, 92 Atl. 1022].

⁷ *Manistee Navigation Co. v. Louis Sands Salt & Lumber Co.*, 174 Mich. 1, 140 N. W. 565; *Cantwell v. Crawley*, 188 Mo. 44, 86 S. W. 251.

⁸ *Cantwell v. Crawley*, 188 Mo. 44, 86 S. W. 251; *Thompson-Starett Co. v. E. B. Ellis Granite Co.*, 86 Vt. 282, 84 Atl. 1017; *Waite v. Stanley*, 88 Vt. 407, 92 Atl. 633 [citing, *Fay v. Oliver*, 20 Vt. 118, 49 Am. Dec. 764; *White v. White*, 68 Vt. 161, 34 Atl. 425].

¹ See §§ 2020 et seq.

² See § 525.

³ See §§ 1030 et seq.

⁴ *Mattison v. Connerly*, 46 Mont. 103, 126 Pac. 851.

See § 1425.

voidable contract and to ratify the rest, which can be done if the contract is severable, but not if it is entire. It may arise in connection with questions of performance, in cases in which certain covenants have been performed substantially and others have not, and the question is presented of the effect of breaches of certain covenants as operating as a discharge of the remaining covenants.⁵ It may arise in connection with the effect of a judgment upon certain covenants as merging the remaining covenants of the contract.⁶ A contract by which A agrees to support B for life in consideration of a conveyance by B to A, is said to be severable so that a decree in B's favor against A for rescission does not prevent A from recovering the value of the services and support furnished under such contract.⁷ It does not seem necessary, however, to invoke the theory that such contract is severable in order to reach this result. The suit for rescission did not involve the question of compensation for services rendered; and accordingly the right to recover compensation for services was not barred by the decree for rescission.⁸

Under the Louisiana statute,⁹ the divisibility of an obligation depends upon whether the object of the obligation is a thing or fact which is susceptible of division.¹⁰

The theory of severable contracts is sometimes misapplied in cases in which a covenant is void; and the power of the law to give effect to the remaining valid covenants of the contract, ignoring the covenant which is merely void, is justified by calling the contract severable, although it is essentially an entire contract.¹¹ While a contract by which an employer stipulates for immunity from liability is void and unenforceable, it does not render invalid the remaining provisions of the contract.¹² While such a contract is entire since the parties intended the immunity from liability to be related to all of the remaining covenants, and since the consideration is not apportioned among the different covenants, the

⁵ West v. McDonald, 64 Or. 203, 127 Pac. 784.

See Ch. LXXXIV.

⁶ Lima v. Campbell, 219 Mass. 253, 106 N. E. 858; Jameson v. Board of Education, 78 W. Va. 612, L. R. A. 1916F, 926, 89 S. E. 255.

See Ch. LXXVI.

⁷ Lima v. Campbell, 219 Mass. 253, 106 N. E. 858.

⁸ See § 1142.

⁹ Art. 2108 of the Civil Code.

¹⁰ Stockstill v. Byrd, 132 La. 404, 61 So. 446.

¹¹ Ramaay v. Crevlin, 254 Fed. 813; Piper v. Boston & Maine Ry., 75 N. H. 435, 75 Atl. 1041.

¹² See §§ 1035 et seq.

result of enforcing certain covenants while ignoring others has been justified on the theory that the contract was severable.¹³ Under a statute which forbids anything but money to be given for stock in a corporation, the parties can not give a promissory note therefor; but the objections to such a transaction are removed by a subsequent arrangement by which cash is paid for such stock by third persons, who are to be reimbursed by the purchaser.¹⁴

§ 2085. Intention of parties controlling. Whether a contract is entire or severable depends primarily upon the intention of the parties,¹ as determined by the ordinary rules of construction.² The language used by the parties and the subject-matter of the contract must be regarded in ascertaining the intention of the parties on this question,³ as on other questions.⁴ The intention of the parties must be ascertained from the contract taken as a whole,⁵ and not from the separate parts thereof taken without regard to

¹³ *Piper v. Boston & Maine Ry.*, 75 N. H. 435, 75 Atl. 1041.

¹⁴ *Ramsay v. Crevlin*, 254 Fed. 813.

(A new contract which eliminates the void or illegal covenants of the original contract may itself be valid. See §§ 1041 et seq. It is not therefore necessary to invoke the theory that such contracts are severable.)

¹ *Arkansas*. *Carr v. Hahn*, 133 Ark. 401, 202 S. W. 685.

California. *Los Angeles Gas & Electric Co. v. Amalgamated Oil Co.*, 156 Cal. 776, 106 Pac. 55.

Iowa. *Quarton v. American Law Book Co.*, 143 Ia. 517, 32 L. R. A. (N. S.) 1, 121 N. W. 1009; *Comptograph Co. v. Burroughs Adding Machine Co.*, 179 Ia. 83, 159 N. W. 465.

Georgia. *Willet Seed Co. v. Kirkby-Gundestrup Seed Co.*, 145 Ga. 559, 89 S. E. 486.

Kansas. *Crawford v. Surety Investment Co.*, 91 Kan. 748, 130 Pac. 481.

Louisiana. *Stockstill v. Byrd*, 132 La. 404, 61 So. 446.

Massachusetts. *Barlow Mfg. Co. v. Stone*, 200 Mass. 158, 86 N. E. 306.

Mississippi. *Ganong v. Brown*, 88

Miss. 53, 117 Am. St. Rep. 731, 40 So. 556.

Oregon. *Hodson-Feenaughty Co. v. Coast Culvert & Flume Co.*, 91 Or. 630, 178 Pac. 382.

Pennsylvania. *Producers' Coke Co. v. Hillman*, 243 Pa. St. 313, 90 Atl. 144.

Vermont. *Thompson-Starett Co. v. E. B. Ellis Granite Co.*, 86 Vt. 282, 84 Atl. 1017.

Washington. *Godefroy v. Hupp*, 93 Wash. 371, 160 Pac. 1056; *Loveland v. Reese Co.*, — Wash. —, 177 Pac. 719.

West Virginia. *Parkersburg & Marietta Sand Co. v. Smith*, 76 W. Va. 246, 85 S. E. 516.

² See Ch. LXIII.

³ *Crawford v. Surety Investment Co.*, 91 Kan. 748, 130 Pac. 481; *Hodson-Feenaughty Co. v. Coast Culvert & Flume Co.*, 91 Or. 630, 178 Pac. 382.

⁴ See Ch. LXIII.

⁵ *Baily v. DeCrespigny*, L. R. 4 Q. B. 180; *International Contracting Co. v. United States*, 47 Ct. Cl. 158; *Gilmore & Co. v. Samuels & Co.*, 135 Ky. 706, 21 Am. & Eng. Ann. Cas. 611, 123 S. W. 271; *Ganong v. Brown*, 88 Miss. 53, 114 Am. St. Rep. 731, 40 So. 556.

See § 2038.

one another.⁶ The surrounding circumstances may be considered in ascertaining the intention of the parties.⁷ If the contract is ambiguous, the practical construction which is placed upon a contract by the parties is of great weight in determining whether it is entire or severable.⁸

§ 2086. Methods of ascertaining intention—Form of contract.

The form in which the contract is made or the number of instruments in which its terms are to be sought, is not conclusive of the question of its entire or severable character. A contract which is found in one instrument or instruments executed at the same time, may nevertheless be severable.¹ On the other hand, a contract the terms of which are to be sought in a number of different instruments, may be entire.² It seems to be assumed that if a contract is contained in one instrument, it is *prima facie* an entire contract.³

§ 2087. Character of subject-matter. If the subject-matter of the contract is indivisible, the contract must necessarily be entire.¹ A contract to dredge a channel to a certain depth and to dredge the harbor to a different depth is an entire contract in spite of the fact that different depths are provided for, since such covenants are intended to result in an entire improvement and each of them is essential to the other.²

On the other hand, the fact that the subject-matter is divisible is not conclusive of the character of the contract; for the subject-matter may be divisible, but the contract itself may be entire.³ A covenant to locate and operate a sawmill on another's land,

⁶ *International Contracting Co. v. United States*, 47 Ct. Cl. 158; *Ganong v. Brown*, 38 Miss. 53, 117 Am. St. Rep. 731, 40 So. 556.

⁷ "The general rule is that whether or not a contract is entire or indivisible is one of construction, to be determined by the court according to the intention of the contracting parties as ascertained from the contract itself and upon a consideration of all the circumstances surrounding the making of it." *Crawford v. Surety Inv. Co.*, 91 Kan. 748, 139 Pac. 481.

⁸ *Manistee Navigation Co. v. Louis*

Sands Salt & Lumber Co., 174 Mich. 1, 140 N. W. 565.

¹ *Edgerton v. Power*, 18 Mont. 350, 45 Pac. 204.

² *Sprigg v. Rutland Ry.*, 77 Vt. 347, 60 Atl. 143.

³ *Lemmon v. East Palestine Rubber Co.*, 260 Pa. St. 28, 103 Atl. 510.

¹ See Art. 2108 of the Civil Code of Louisiana; *Stockstill v. Byrd*, 132 La. 404, 61 So. 446.

² *International Contracting Co. v. United States*, 47 Ct. Cl. 158.

³ *International Contracting Co. v. United States*, 47 Ct. Cl. 158; *Bam-*

such other person to furnish timber, and such contract not to be assignable by either, is entire so that a breach of a substantial part of such contract, such as the covenant against assignment, operates as a discharge of the whole contract.⁴ A contract to furnish different quantities of different articles is not rendered a severable contract as to performance by the fact that different kinds of articles are provided for.⁵

§ 2088. Apportionment of consideration. One of the most certain of the single tests for determining the intention of the parties is whether the consideration on the one side is apportioned to each of the different covenants on the other, or whether the consideration on the one side is the entire consideration for all the covenants upon the other side.¹ If the consideration agreed upon for each covenant is apportioned to each covenant separately, the contract is *prima facie* severable.² If the consideration is not apportioned to the various covenants on the part of the adversary party, the contract is *prima facie* entire.³ A contract

berger v. Burrows, 145 Ia. 441, 124 N. W. 333; *Stockstill v. Byrd*, 132 La. 404, 61 So. 446. See in accordance with this theory, Art. 2108 of the Civil Code of Louisiana. *Stockstill v. Byrd*, 132 La. 404, 61 So. 446.

⁴*Stockstill v. Byrd*, 132 La. 404, 61 So. 446.

⁵*Willett Seed Co. v. Kirkeby-Gundestrup Seed Co.*, 145 Ga. 559, 89 S. E. 486.

¹*United States. In re Hellams*, 223 Fed. 460.

Illinois. Antigo Bank v. Union Trust Co., 149 Ill. 343, 23 L. R. A. 611, 36 N. E. 1029.

Minnesota. Bentley v. Edwards, 125 Minn. 179, 51 L. R. A. (N.S.) 254, Ann. Cas. 1915C, 882, 146 N. W. 347.

Ohio. Petersburg Fire Brick & Tile Co. v. American Clay Machinery Co., 89 O. S. 365, L. R. A. 1915B, 536, 106 N. E. 33.

Oklahoma. Dunn v. T. J. Cannon Co., 51 Okla. 382, 151 Pac. 1167.

Vermont. Waite v. Stanley, 88 Vt. 407, L. R. A. 1916C, 886, 92 Atl. 633.

Wisconsin. Sixta v. Ontonagon Valley Land Co., 157 Wis. 293, 147 N. W. 1042.

²*Indiana. Weil v. Stone*, 33 Ind. App. 112, 104 Am. St. Rep. 243, 69 N. E. 698.

Iowa. Comptograph Co. v. Burroughs Adding Machine Co., 179 Ia. 83, 159 N. W. 465.

Massachusetts. Barlow Mfg. Co. v. Stone, 200 Mass. 158, 86 N. E. 306.

Montana. Mattison v. Connerly, 46 Mont. 103, 126 Pac. 851.

Washington. Godefroy v. Hupp, 93 Wash. 371, 160 Pac. 1056.

West Virginia. Parkersburg & Marietta Sand Co. v. Smith, 76 W. Va. 246, 85 S. E. 516.

Ohio. Petersburg Fire Brick & Tile Co. v. American Clay Machinery Co., 89 O. S. 365, L. R. A. 1915B, 536, 106 N. E. 33.

Oklahoma. Davidson v. Gaskill, 32 Okla. 40, 38 L. R. A. (N.S.) 692, 121 Pac. 649.

Vermont. Waite v. Stanley, 88 Vt. 407, L. R. A. 1916C, 886, 92 Atl. 633.

for the sale of realty and personalty at a lump sum is entire.⁴ A contract for the sale of a number of articles in a lump sum is an entire contract,⁵ and no recovery can be had except for a substantial performance of all of its covenants.⁶ A contract by which A agrees to furnish prizes to B for a trade contest, and to furnish the services of an organizer in consideration of which B gives his notes to A, is an entire contract,⁷ and breach of one of such covenants will operate as a discharge of the entire contract.⁸ A covenant by which A agrees to appoint B as agent to sell A's land, gives to B an option to purchase in case he elects to exercise it, is an entire contract,⁹ and breach of either covenant operates as a discharge of the contract.¹⁰ An agreement to pay a commission for effecting an exchange of different properties, on the other hand, is ordinarily severable as to each article of property.¹¹ A contract by which A agrees to pay to B a certain sum of money for infringing B's patent, a certain royalty for the use of the patent pending litigation, and an additional sum in case the validity of such patent is determined by such litigation, is said to be a severable contract.¹² At least A is not obliged to pay such further sum until the validity of such patent is thus established.¹³ A contract by which A agrees to drive certain pilings for B, to do certain work in excavating, to do certain work in removing an embankment, and to provide a pump, is a severable contract, if a separate price is provided for each separate class of work.¹⁴ If a contract for a lease of realty and for the sale of personalty appertains the consideration to each, the part of such contract which

Washington. *Loveland v. Reese Co.*, — Wash. —, 177 Pac. 719.

West Virginia. *Jameson v. Board of Education*, 78 W. Va. 612, L. R. A. 1916F, 926, 89 S. E. 255.

Wisconsin. *Sixta v. Ontonagon Valley Land Co.*, 157 Wis. 293, 147 N. W. 1042.

⁴ *Waite v. Stanley*, 88 Vt. 407, L. R. A. 1916C, 886, 92 Atl. 633.

⁵ *Petersburg Fire Brick & Tile Co. v. American Clay Machinery Co.*, 89 O. S. 365, L. R. A. 1915B, 536, 106 N. E. 33.

⁶ *Petersburg Fire Brick & Tile Co. v. American Clay Machinery Co.*, 89 O. S. 365, L. R. A. 1915B, 536, 106 N. E. 33.

⁷ *Loveland v. Reese Co.*, — Wash. —, 177 Pac. 719.

⁸ *Loveland v. Reese Co.*, — Wash. —, 177 Pac. 719.

⁹ *Sixta v. Ontonagon Valley Land Co.*, 157 Wis. 293, 147 N. W. 1042.

¹⁰ *Sixta v. Ontonagon Valley Land Co.*, 157 Wis. 293, 147 N. W. 1042.

¹¹ *Godefroy v. Hupp*, 93 Wash. 371, 160 Pac. 1056.

¹² *Comptograph Co. v. Burroughs Adding Machine Co.*, 179 Ia. 83, 159 N. W. 465.

¹³ *Comptograph Co. v. Burroughs Adding Machine Co.*, 179 Ia. 83, 159 N. W. 465.

¹⁴ *Parkersburg & Marietta Sand Co. v. Smith*, 76 W. Va. 246, 85 S. E. 516.

provides for the sale of personalty is valid, although the oral contract for a lease is unenforceable because of the Statute of Frauds.¹⁵

The rule that an apportionment of consideration determines the character of the contract, is not an arbitrary rule, however, but is merely a convenient rule for ascertaining the intention of the parties in most cases. The consideration may be apportioned, but the remaining provisions of the contract may show that the contract is entire.¹⁶ A contract to furnish an engine at a certain price and to install it in a boat at a certain price, is said to be an entire contract within the meaning of the mechanics' lien law, which requires the lien to be taken within a certain time after performance.¹⁷ A contract for the sale of a number of articles at a certain price for each article is rendered entire by a provision guaranteeing that the purchaser's sales of such articles at retail for the ensuing year would equal one and one-half times the amount of the order.¹⁸ The fact that the considerations are apportioned and that they are paid at different times, is not always

¹⁵ *Mattison v. Connerly*, 46 Mont. 103, 126 Pac. 851.

¹⁶ *Carr v. Hahn*, 133 Ark. 401, 202 S. W. 685; *Sauser v. Kearney*, 147 Ia. 335, 126 N. W. 322; *Elliott Supply Co. v. Green*, 35 N. D. 641, 160 N. W. 1002; *Producers' Coke Co. v. Hillman*, 243 Pa. St. 313, 90 Atl. 144.

¹⁷ *Carr v. Hahn*, 133 Ark. 401, 202 S. W. 685.

¹⁸ "The reasons given by appellant for contending that this contract is divisible are as follows: (1) It contains an itemized list of the articles ordered. (2) This list describes each article by name and design and gives the number, the price per dozen, and the price for the fraction of a dozen so ordered. (3) The contract nowhere states the total price of the articles ordered. (4) Since each article is itemized it can be told at a glance what the purchaser was paying for each. (5) The warranty in the contract that 'any article which is not exactly as represented may be returned to us and we will replace it with a new article without charge, regardless of

the cost of the article,' presupposes a collection of individual articles, each one separate and distinct from the other, rather than an indivisible mass of goods. (6) The articles were purchased for the purpose of selling to the retail trade, and that it is a matter of common knowledge that silverware is more often purchased by the piece than by the entire set. (7) That the articles enumerated were of several different and distinct designs, and hence did not constitute one entire set. All of these facts stated by the appellant may be conceded, however, and yet leave the court still in doubt as to the nature of the contract. * * * And we believe that there is in the contract in question a clear indication of what that intention was, and that it was that the contract should be entire. An important part of the contract is the so-called sales guarantee. This provides that:

"We [the seller] guarantee that the purchaser will sell a quantity of silverware in one year, which at the retail price will equal at least one and one-

conclusive in proving the contract to be entire.¹⁹ A contract by which A bought a stock of lumber from B for which A was to pay at once, and by which B agreed not to engage in business in competition with A, the consideration of which was to be paid by A at a subsequent time, is an entire contract.²⁰ A contract for terminating a prior contract for the sale of a certain quantity of a given article by the producer to one who has bought to resell, on condition that the producer shall furnish sufficient quantities of such article to enable the buyer to fill his existing contracts, is entire, even though payment for each lot was to be made as it was delivered.²¹ The fact that the parties have fixed a certain price

half times the amount of this order. If sales are less than this amount, we agree to take back at the purchase price the goods remaining on hand, at the expiration of this contract.'

"It is clear from this that the seller desired a showing in the showcases of the entire order. His guarantee was that the sales in one year would 'at the retail price equal at least one and one-half times the amount of this order.' It was provided that there should be no countermand 'of this order.' The order in short was treated as an entirety. There was no guarantee of sales if less than the goods contracted for were bought, nor if less than the goods contracted for were exhibited. Added to this is the fact that the plaintiff, Officer Bevin, testified in his deposition that the goods were sold in specified lots. Added to this is the fact that when on the trial defendant moved for a directed verdict the plaintiff objected on the ground that the parole evidence of the shortage varied the written contract." *Elliott Supply Co. v. Green*, 35 N. D. 641, 160 N. W. 1002.

¹⁹ *Sauser v. Kearney*, 147 Ia. 335, 126 N. W. 322; *Producers' Coke Co. v. Hillman*, 243 Pa. St. 313, 90 Atl. 144.

²⁰ *Sauser v. Kearney*, 147 Ia. 335, 126 N. W. 322.

²¹ "In support of the text the case of *Shaw v. Turnpike Company*, 2 P. &

W., 454, is cited, in which a contract that provided for apportionment of consideration was held to be entire, and the plaintiff was denied the right to recover except on full performance. In the case cited by the learned trial judge, and in those cited by counsel for appellee, in support of the construction that prevailed, the fact that the contract provided for payment pro tanto upon delivery of fractional parts of the whole amount contracted for, was allowed to be determining, only because there was entire absence of anything indicating a different purpose. Certainly in no one of these cases is it held that a provision such as this is of such controlling effect, that it must be allowed to defeat the plain and manifest object of the contract. And yet that would be the effect here if it should be allowed to govern. Each party to this contract had a definite object in view which was so clearly expressed that there was no room for doubt by either. The plaintiff, whose sole object was to secure a cancellation of the agreement which required it to deliver to the defendants for sale its entire output of coke during the remaining months of the year, must have fully understood the object of the defendants in requiring as a condition of their assent a promise from the plaintiff company that it would pro-

per unit as a means of estimating the entire consideration to be paid by multiplying such price by the total quantity, does not of itself show that such contract is a severable contract.²² A con-

tract the defendants from liability on contracts of sale they had already entered into, by furnishing them the coke sufficient to meet their engagements, at a definite fixed price. The contract here set up is a promise by the plaintiff company, on a sufficient consideration, that it would make these deliveries, not only some, but all of them, for the one definite purpose to save harmless the defendants who otherwise, because of market vicissitudes, would be exposed to the danger of loss. These engagements by the defendants were for deliveries at specified times, in specified amounts, and at specified rates; and the promise by the plaintiff, as averred, was to supply the defendants with an adequate amount of coke to meet them all, amounting in the aggregate to 14,300 tons. There is no mistaking the end or object in view, and it is quite as apparent that to hold this contract severable and not entire, would defeat the object both parties had in view. The consideration paid by the defendants—surrender of their rights under the earlier contract—was based upon a contemplated entire performance by the plaintiff, for, except as this was so, the agreement accomplished nothing in the way of protection to the defendants.

"Where a bill of parcels is taken, and includes the articles bought under one whole price, it would, if accepted, afford evidence of an intention by both parties to treat the contract as entire. And wherever the failure as to part would materially defeat the object of the contract and would have affected the sale had such failure been anticipated, the contract would be entire." Story on Contracts, Section 24.

"While it is not averred in the affi-

davit that failure to complete the contract of plaintiffs would have affected the sale in this case, it is a reasonable inference in view of the situation of the parties and the object contemplated that it would have done so. It was not required that it should have been averred in the affidavit. The courts always seek to avoid, as far as they consistently can, a construction that would render a contract ineffectual. The present is a case in which the manifest purpose of the agreement would be defeated were it held to be a divisible contract, thereby allowing the plaintiff not simply to disappoint the defendants in what it was intended they should receive for a specific and express purpose, but requiring from the defendants payment for so much performance as met the pleasure, convenience and advantage of the plaintiff. As against such construction the defendants might well reply, in *haec foedera non venimus*. We have discussed the case as though the contract were as averred in the affidavit. The defendants should be allowed an opportunity to prove the averment. The assignment of error relating to the matter discussed is sustained. The other assignments call for no examination at this time. The judgment is reversed with a *procedendo*." *Producers' Coke Co. v. Hillman*, 243 Pa. St. 313, 90 Atl. 144.

²² *Minnesota*. *Johnson v. Fehsefeldt*, 106 Minn. 202, 20 L. R. A. (N.S.) 1069, 118 N. W. 797; *Bentley v. Edwards*, 125 Minn. 179, 51 L. R. A. (N.S.) 254, Ann. Cas. 1915C, 882, 146 N. W. 347.

Montana. *Waite v. Shoemaker*, 50 Mont. 264, 146 Pac. 736.

Ohio. *Stein v. The Prairie Rose*, 17 O. S. 471, 93 Am. Dec. 631.

tract to furnish services at a certain price per unit,²³ or to furnish goods at a certain price per unit,²⁴ or to lease property at a certain amount per time unit,²⁵ have each been held to be entire. The fact that separate items are entered for work and material in a contract for constructing or repairing an article, does not show that such contract is severable, if such items are inserted so as to show the adversary party how the total consideration was reached.²⁶

The fact that provision is made for payment in installments does not of itself tend to show that the contract is severable, unless each installment is apportioned by the parties to a certain portion of the performance.²⁷ A contract to work for a certain period of time at a specified salary is entire, although the salary is payable monthly.²⁸

§ 2089. Application of general principles to specific types of contract. While the courts generally repeat the formula that the intention of the parties is decisive as to the entire or severable character of the contract, and while apportionment of consideration is generally said to be merely an indication of the intention of the parties upon this point, as a matter of fact more weight seems to be given to such evidence of intention in some types of contract than in others. If the question of the entire or severable character of the contract arises with reference to the consideration, it follows from the nature of the case that the test of the apportionment or non-apportionment of the consideration is practically final. If by the terms of the contract a consideration on the one side is to support two or more covenants on the other, and no attempt is made to apportion such consideration, the contract is regarded as entire.¹ If, on the other hand, the consideration is

West Virginia. *Jameson v. Board of Education*, 78 W. Va. 612, L. R. A. 1916F, 926, 89 S. E. 255.

Wisconsin. *Prautsch v. Rasmussen*, 133 Wis. 181, 113 N. W. 416.

²³ *Johnson v. Fehsefeldt*, 106 Minn. 202, 20 L. R. A. (N.S.) 1069, 118 N. W. 797; *Waite v. Shoemaker*, 50 Mont. 264, 146 Pac. 736.

²⁴ *Prautsch v. Rasmussen*, 133 Wis. 181, 113 N. W. 416.

²⁵ *Stein v. The Prairie Rose*, 17 O. S. 471, 93 Am. Dec. 631.

²⁶ *Ollinger & Bruce Dry Dock Co. v. Gibbony*, — Ala. —, 81 So. 18.

²⁷ *Newman Lumber Co. v. Purdum*, 41 O. S. 373; *Jameson v. Board of Education*, 78 W. Va. 612, L. R. A. 1916F, 926, 89 S. E. 255.

²⁸ *Jameson v. Board of Education*, 78 W. Va. 612, L. R. A. 1916F, 926, 89 S. E. 255.

¹ **United States.** *Franklin Telegraph Co. v. Harrison*, 145 U. S. 459, 36 L. ed. 776; *Mississippi River Logging Co. v. Robson* 69 Fed. 773, 16 C. C. A. 400;

avowedly apportioned to certain covenants, full effect must be given to such provision, and if the effect thereof is to leave the

Standard Underground Cable Co. v. Electric Co., 76 Fed. 422, 22 C. C. A. 258; **Bowen v. Bank**, 87 Fed. 430; **S. Jarvis Adams Co. v. Knapp**, 121 Fed. 34; **Tuttle v. Cedar Rapids**, 176 Fed. 86, 90 C. C. A. 606; **Fleischman v. Rahmstorf**, 226 Fed. 443, 141 C. C. A. 273.

Alabama. **McCurry v. Gibson**, 108 Ala. 451, 54 Am. St. Rep. 177, 18 So. 906; **Harris v. Theus**, 149 Ala. 133, 123 Am. St. Rep. 17, 10 L. R. A. (N.S.) 204, 43 So. 131.

Arkansas. **Williams v. Perkins**, 21 Ark. 18; **Johnson v. Wilkerson**, 96 Ark. 320, 131 S. W. 690; **Wilkes v. Stacy**, 113 Ark. 556, 169 S. W. 796.

California. **Lompoc Valley Bank v. Stephenson**, 156 Cal. 350, 104 Pac. 449.

Colorado. **Gibbs v. Wallace**, 58 Colo. 364, 147 Pac. 686.

Georgia. **Cothran v. Witham**, 123 Ga. 190, 51 S. E. 285.

Idaho. **Blackwell v. Kercheval**, 27 Ida. 537, 149 Pac. 1060.

Illinois. **Dillman v. Nadelhoffer**, 160 Ill. 121, 43 N. E. 378; **Bates Machine Co. v. Bates**, 192 Ill. 138, 61 N. E. 518; **Ryan v. Hamilton**, 205 Ill. 191, 68 N. E. 781 [reversing, **Hamilton v. Ryan**, 103 Ill. App. 212]; **Rohling v. Thole**, 256 Ill. 425, 100 N. E. 138; **Schlatter v. Triebel**, 284 Ill. 412, 120 N. E. 289; **Hills v. Hopp**, 287 Ill. 375, 122 N. E. 510.

Indiana. **Souffrain v. McDonald**, 27 Ind. 269; **Eisel v. Hayes**, 141 Ind. 41, 40 N. E. 119; **Koh-i-moor Laundry Co. v. Lockwood**, 141 Ind. 140, 40 N. E. 677; **Beatty v. Coble**, 142 Ind. 329, 41 N. E. 590; **Jordan v. Indianapolis Water Co.**, 159 Ind. 337, 64 N. E. 680.

Iowa. **Boyd v. Watson**, 101 Ia. 214, 70 N. W. 120; **Merchant v. O'Rourke**, 111 Ia. 351, 82 N. W. 759.

Kansas. **Winans v. Mfg. Co.**, 48 Kan. 777, 30 Pac. 163; **Carlisle v. Farmers' Elevator & Business Association**, — Kan. —, 180 Pac. 280; **Bank v. Rowlinson**, 2 Kan. App. 82, 43 Pac. 304.

Kentucky. **Allen v. Pryor**, 10 Ky (3 A. K. Mar.) 305; **Queen City Coal Co. v. Ry. (Ky.)**, 44 S. W. 103; **J. I. Case Threshing Machine Co. v. Patterson**, 137 Ky. 180, 125 S. W. 287; **Turner v. Frazier**, 157 Ky. 388, 163 S. W. 245; **Montanus v. Buschmeyer**, 158 Ky. 53, 164 S. W. 802; **Fairbanks v. Tafel**, 159 Ky. 602, 167 S. W. 887.

Maine. **International Harvester Co. v. Fleming**, 109 Me. 104, 82 Atl. 843.

Maryland. **Maughlin v. Perry**, 35 Md. 352; **Union Trust Co. v. Knabe**, 122 Md. 584, 89 Atl. 1106; **Ziehm v. Frank Steil Brewing Co.**, 131 Md. 582, 102 Atl. 1005.

Massachusetts. **McGaughey v. Richardson**, 148 Mass. 608, 20 N. E. 202; **Phelps v. Lowell Institution for Savings**, 198 Mass. 179, 83 N. E. 989.

Michigan. **Up River Ice Co. v. Denler**, 114 Mich. 296, 68 Am. St. Rep. 480, 72 N. W. 157; **Sax v. Ry.**, 125 Mich. 252, 84 Am. St. Rep. 572, 84 N. W. 314; **Lee v. United States Graphite Co.**, 161 Mich. 157, 125 N. W. 748; **Weickgenant v. Eccles**, 173 Mich. 695, 140 N. W. 513; **Weiss v. Stein**, 187 Mich. 369, 153 N. W. 810.

Minnesota. **Bowen v. Thwing**, 56 Minn. 177, 57 N. W. 468; **Kronsnabel-Smith Co. v. Kronsnabel**, 87 Minn. 230, 91 N. W. 892; **First National Bank v. Corporation Securities Co.**, 128 Minn. 341, 150 N. W. 1084.

Missouri. **Drummond Realty & Investment Co. v. W. H. Thompson Trust Co. (Mo.)**, 178 S. W. 479.

Montana. **Rose v. Northern Pacific Ry. Co.**, 35 Mont. 70, 119 Am. St. Rep. 836, 88 Pac. 767.

remaining covenants without any consideration, it must be regarded as a gratuitous promise and unenforceable.² However, even in cases of this sort, a recital of an insufficient consideration for one covenant may not render it unenforceable if the contract taken as a whole shows that such insufficient consideration was not the only consideration therefor.³

If the question of the character of the contract arises in connection with the operation of the doctrines of illegality, a somewhat different question is presented. It is assumed in cases of this sort that the contract has all the elements of a valid contract, except for the illegal covenant and the question which is presented is as to the effect of the illegal covenant of the contract upon the remaining covenants, which of themselves would be valid. In cases of this sort the law prefers, if possible, to con-

Nebraska. *Lindsey v. Heaton*, 27 Neb. 662, 43 N. W. 420; *Lyman v. Lincoln*, 38 Neb. 794, 57 N. W. 531; *Doll v. Crume*, 41 Neb. 655, 59 N. W. 806; *Boughn v. Smith*, 58 Neb. 590, 79 N. W. 160; *Patrick v. Barker*, 78 Neb. 823, 112 N. W. 358.

New Jersey. *Wallace v. Leber*, 65 N. J. L. 195, 47 Atl. 430; *Flack v. Condict*, 66 N. J. L. 351, 49 Atl. 508; *Atlantic Pebble Co. v. Lehigh Valley Ry.*, 89 N. J. L. 336, 98 Atl. 410; *Myers v. Metzger*, 61 N. J. Eq. 522, 48 Atl. 1113; *Boonton v. United Water Supply Co.*, 83 N. J. Eq. 536, 91 Atl. 814 [affirmed, *Boonton v. United Water Supply Co.*, 84 N. J. Eq. 197, 93 Atl. 1086].

New Mexico. *Locke v. Murdoch*, 20 N. M. 522, 151 Pac. 298.

North Carolina. *Kramer v. Old*, 119 N. Car. 1, 56 Am. St. Rep. 650, 34 L. R. A. 389, 25 S. E. 813; *Smitherman Cotton Mills v. Mfg. Co.*, 125 N. Car. 329, 34 S. E. 446; *Bourne v. Sherrill*, 143 N. Car. 381, 55 S. E. 799; *Partin v. Prince*, 159 N. Car. 553, 75 S. E. 1080.

Ohio. *Wetzell v. Richcreek*, 53 O. S. 62, 40 N. E. 1004; *King v. King*, 63 O. S. 363, 81 Am. St. Rep. 635, 52 L. R. A. 157, 59 N. E. 111.

Oregon. *House v. Jackson*, 24 Or. 89, 32 Pac. 1027.

Pennsylvania. *Paul v. Stackhouse*, 38 Pa. St. 302; *Bald Eagle, etc., Ry. Co. v. Ry. Co.*, 171 Pa. St. 284, 50 Am. St. Rep. 807, 29 L. R. A. 423, 33 Atl. 239; *Philadelphia Ball Club v. Lajoie*, 202 Pa. St. 210, 90 Am. St. Rep. 627, 58 L. R. A. 227, 51 Atl. 973.

Tennessee. *Fourth National Bank v. Stahlman*, 132 Tenn. 367, L. R. A. 1916A, 568, 178 S. W. 942.

Texas. *Missouri, etc., Ry. v. Carter*, 95 Tex. 461, 68 S. W. 159.

Utah. *Gagan v. Stevens*, 4 Utah 348, 9 Pac. 706.

Washington. *Frank v. Jenkins*, 11 Wash. 611, 40 Pac. 220; *Herkenrath v. Ragley*, 59 Wash. 52, 109 Pac. 279.

West Virginia. *Rhoades v. R. R.*, 49 W. Va. 494, 87 Am. St. Rep. 826, 55 L. R. A. 170, 39 S. E. 209.

Wisconsin. *Peterson v. Chase*, 115 Wis. 239, 91 N. W. 687; *My Laundry Co. v. Schmeling*, 129 Wis. 597, 109 N. W. 540; *Kradwell v. Thiesen*, 131 Wis. 97, 111 N. W. 233.

² *Lemler v. Bord*, 80 Or. 224, 156 Pac. 427, 1034; *Brown v. Wilson*, — Okla. —, L. R. A. 1917B, 1184, 160 Pac. 94.

³ *Fourth National Bank v. Stahlman*, 132 Tenn. 367, L. R. A. 1916A, 568, 178 S. W. 942.

strue a contract so as to render it enforceable as far as possible, rather than to render it unenforceable.⁴ Accordingly the courts are inclined to fix upon the apportionment of the consideration as the test, since by applying this test it is generally possible to enforce the contract in many cases where it could not be enforced without such test. If the consideration is apportioned between the legal and the illegal covenants, the contract will be regarded as severable and the legal covenants will be enforced.⁵ If, on the other hand, the consideration is entire, and is not apportioned among the different covenants, the contract is regarded as entire, and if one of the covenants is illegal, the entire contract is regarded as illegal.⁶ The fact that the consideration is apportioned is not always conclusive. In some cases in which the consideration

⁴ See § 2050.

⁵ **England.** *Burnyeat v. Hutchinson*, 5 B. & Ald. 241.

United States. *Glucose Sugar Refining Co. v. Marshalltown*, 153 Fed. 620; *Choctaw, O. & G. R. Co. v. Bond*, 160 Fed. 403, 87 C. C. A. 355 [affirming, 6 Ind. Terr. 515, 98 S. W. 335]; *In re Johnson*, 224 Fed. 180.

California. *McVicker v. McKenzie*, 136 Cal. 656, 69 Pac. 495.

Indiana. *Emshwiler v. Tyner*, 21 Ind. App. 347, 69 Am. St. Rep. 360, 52 N. E. 459.

Iowa. *Osgood v. Bauder*, 75 Ia. 550, 1 L. R. A. 655, 39 N. W. 887; *Fryer v. Harker*, 142 Ia. 708, 121 N. W. 526.

Kentucky. *Carneal v. May*, 9 Ky. (2 A. K. Mar.) 587, 12 Am. Dec. 453; *Stratton v. Wilson*, 170 Ky. 61, 185 S. W. 522.

Massachusetts. *Barriere v. Depatie*, 219 Mass. 33, 106 N. E. 572.

Nebraska. *Faist v. Dahl*, 86 Neb. 669, 126 N. W. 84.

New York. *Central New York Teleph. & Teleg. Co. v. Aberill*, 199 N. Y. 128, 32 L. R. A. (N.S.) 494, 92 N. E. 206.

North Carolina. *Herring v. Cumberland Lumber Co.*, 159 N. Car. 382, 42 L. R. A. (N.S.) 64, 74 S. E. 1011.

Pennsylvania. *Monongahela River*

Consol. Coal & Coke Co. v. Jutte, 210 Pa. St. 288, 105 Am. St. Rep. 812, 59 Atl. 1088.

Vermont. *Shaw v. Carpenter*, 54 Vt. 155, 41 Am. Rep. 837.

Washington. *Minnesota Sandstone Co. v. Clark*, 35 Wash. 466, 77 Pac. 803.

⁶ **England.** *Feathersson v. Hutchinson*, Cro. Eliz. 199.

United States. *Marshall v. Baltimore & Ohio R. R.*, 57 U. S. (16 How.) 314, 14 L. ed. 953; *Providence Tool Co. v. Norris*, 69 U. S. (2 Wall.) 45, 17 L. ed. 868; *Trist v. Child*, 88 U. S. (21 Wall.) 441, 22 L. ed. 623; *Meguire v. Corwine*, 101 U. S. 108, 25 L. ed. 899; *Hazelton v. Sheckells*, 202 U. S. 71, 50 L. ed. 939; *Lingle v. Snyder*, 160 Fed. 627, 87 C. C. A. 529; *Boatmen's Bank v. Fritzlen*, 175 Fed. 183; *Brown v. Detroit Trust Co.*, 193 Fed. 622, 113 C. C. A. 490; *Cleveland, C., C. & St. L. Ry. Co. v. Hirsch*, 204 Fed. 849, 123 C. C. A. 145; *Cooper v. Northern Pac. Ry. Co.*, 212 Fed. 533.

Alabama. *Patton v. Gilmer*, 42 Ala. 548, 94 Am. Dec. 665; *Alabama National Bank v. Halsey*, 109 Ala. 196, 19 So. 522; *Wadsworth v. Dunnam*, 117 Ala. 661, 23 So. 699; *Arnold v. Jones Cotton Co.*, 152 Ala. 501, 12 L. R. A. (N.S.) 150, 40 So. 662.

is apportioned the contract as a whole may show that the illegal purpose underlies all of the covenants; and in such case the contract will be regarded as entire, and as a consequence none of the

Arkansas. *Edwards v. Randle*, 63 Ark. 318, 58 Am. St. Rep. 108, 36 L. R. A. 174, 38 S. W. 343; *Beal-Doyle Dry Goods Co. v. Barton*, 80 Ark. 326, 97 S. W. 58; *Ensign v. Coffelt*, 102 Ark. 568, 145 S. W. 231; *Josephs v. Briant*, 108 Ark. 171, 157 S. W. 136; *Bryant Lumber Co. v. Fourche River Lumber Co.*, 124 Ark. 313, 187 S. W. 455.

California. *Valentine v. Stewart*, 15 Cal. 387; *Santa Clara, Valley Mills & Lumber Co. v. Hayes*, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 391; *Humboldt County v. Stern*, 136 Cal. 63, 68 Pac. 324; *Getz v. Federal Salt Co.*, 147 Cal. 115, 109 Am. St. Rep. 114, 81 Pac. 416.

District of Columbia. *Owens v. Wilkinson*, 20 D. C. App. 51.

Illinois. *Douthart v. Congdon*, 197 Ill. 349, 90 Am. St. Rep. 167, 64 N. E. 348; *Brieske v. Ry. Co.*, 82 Ill. App. 256; *Shortall v. Connell Co.*, 93 Ill. App. 231.

Indiana. *Ricketts v. Harvey*, 106 Ind. 564, 6 N. E. 325; *Mount v. Board of Commissioners*, 168 Ind. 661, 14 L. R. A. (N.S.) 483, 80 N. E. 629.

Iowa. *Gipps Brewing Co. v. De France*, 91 Ia. 108, 51 Am. St. Rep. 329, 28 L. R. A. 386, 58 N. W. 1087; *Koster v. Seney*, 99 Ia. 584, 68 N. W. 824; *Barngrover v. Pettigrew*, 128 Ia. 533, 111 Am. St. Rep. 206, 2 L. R. A. (N.S.) 260, 104 N. W. 904.

Kansas. *McBratney v. Chandler*, 22 Kan. 693, 31 Am. Rep. 213; *Gerlach v. Skinner*, 34 Kan. 86, 55 Am. Rep. 240, 8 Pac. 257; *Fleming v. Greene*, 48 Kan. 646, 30 Pac. 11; *Sedgwick County v. State*, 66 Kan. 634, 72 Pac. 284; *Kansas City Elev. Ry. Co. v. Service*, 77 Kan. 316, 14 L. R. A. (N.S.) 1105, 94 Pac. 262; *Patterson v. Imperial Window Glass Co.*, 91 Kan. 201, 137 Pac.

955; *Ridgway v. Wetterhold*, 96 Kan. 736, 153 Pac. 490.

Kentucky. *Kimbrough v. Lane*, 74 Ky. (11 Bush.) 556; *McLane's Administrator v. Dixon* (Ky.), 99 S. W. 601; *Clemons v. Meadows*, 123 Ky. 178, 6 L. R. A. (N.S.) 847, 94 S. W. 13; *Newport Rolling Mill Co. v. Hall*, 147 Ky. 598, 144 S. W. 760.

Louisiana. *Simpson v. Normand*, 51 La. Ann. 1355, 26 So. 266.

Maine. *Deering v. Chapman*, 22 Me. 488, 30 Am. Dec. 592; *Wirth v. Roche*, 92 Me. 383, 42 Atl. 794 [citing, *Holt v. O'Brien*, 81 Mass. (15 Gray) 311; *Bligh v. James*, 88 Mass. (6 All.) 570]; *Oakes v. Merrifield*, 93 Me. 297, 45 Atl. 31.

Maryland. *Ryan v. McLane*, 91 Md. 175, 80 Am. St. Rep. 438, 50 L. R. A. 501, 46 Atl. 340.

Massachusetts. *Holt v. O'Brien*, 81 Mass. (15 Gray) 311; *Bishop v. Palmer*, 146 Mass. 469, 4 Am. St. Rep. 339, 16 N. E. 299.

Michigan. *Snyder v. Willey*, 33 Mich. 483; *McNamara v. Gargett*, 68 Mich. 454, 13 Am. St. Rep. 355, 36 N. W. 218; *Case v. Smith*, 107 Mich. 416, 61 Am. St. Rep. 341, 31 L. R. A. 282, 65 N. W. 279; *White Star Line v. Star Line*, 141 Mich. 604, 113 Am. St. Rep. 551, 105 N. W. 135; *Anderson v. Branstrom*, 173 Mich. 157, 43 L. R. A. (N. S.) 422, 139 N. W. 40; *Simmer v. Cutter's Estate*, 194 Mich. 34, 160 N. W. 605.

Minnesota. *Handy v. St. Paul Globe Publishing Co.*, 41 Minn. 188, 16 Am. St. Rep. 695, 42 N. W. 872; *Burho v. Carmichael*, 117 Minn. 211, 135 N. W. 386.

Mississippi. *Cotten v. McKenzie*, 57 Miss. 418; *Kosciusko Oil Mill & Fertilizer Co. v. Wilson Cotton Oil Co.*, 90 Miss. 551, 8 L. R. A. (N. S.) 1053, 43

covenants can be enforced.⁷ In a number of cases in which the consideration is not apportioned the contract has nevertheless been said to be severable for the purpose of giving effect to the valid

So. 435; *American Mfg. Co. v. Crescent Drug Co.*, 113 Miss. 130, L. R. A. 1917D, 482, 73 So. 883.

Missouri. *Finck v. Schneider Granite Co.*, 187 Mo. 244, 106 Am. St. Rep. 452, 86 S. W. 213; *Bick v. Seal*, 45 Mo. App. 475; *Malone v. Casualty Co.*, 71 Mo. App. 1.

Montana. *Glass v. Basin & Bay State Min. Co.*, 31 Mont. 21, 77 Pac. 302; *Hughes v. Mullins*, 36 Mont. 267, 13 Am. & Eng. Ann. Cas. 209, 92 Pac. 758.

Nebraska. *McCormick, etc., Co. v. Miller*, 54 Neb. 644, 74 N. W. 1061; *Richardson v. Scott's Bluff Co.*, 59 Neb. 400, 90 Am. St. Rep. 682, 48 L. R. A. 294, 81 N. W. 309; *Padget v. O'Connor*, 71 Neb. 314, 98 N. W. 870; *Graham v. Hiesel*, 73 Neb. 433, 102 N. W. 1010.

New Hampshire. *Kidder v. Blake*, 45 N. H. 530; *Bixby v. Moor*, 51 N. H. 402; *Foote v. Nickerson*, 70 N. H. 496, 54 L. R. A. 554, 48 Atl. 1088; *Hill v. Hill*, 74 N. H. 288, 12 L. R. A. (N.S.) 848, 67 Atl. 406.

New York. *Foley v. Speir*, 100 N. Y. 552, 3 N. E. 477; *Baldwin v. Short*, 125 N. Y. 553, 26 N. E. 928; *Hart v. City Theatres Co.*, 215 N. Y. 322, 109 N. E. 497.

Ohio. *Crawford v. Wick*, 18 O. S. 190, 98 Am. Dec. 103; *Widoe v. Webb*, 20 O. S. 431, 5 Am. Rep. 664; *Davy v. Fidelity & C. Ins. Co.*, 78 O. S. 256, 17 L. R. A. (N.S.) 443, 85 N. E. 504; *Croneis v. Toledo Scale Co.*, 89 O. S. 168, 106 N. E. 5.

Oklahoma. *Citizens' National Bank v. Mitchell*, 24 Okla. 488, 103 Pac. 720; *Davis v. Janeway*, 55 Okla. 725, L. R. A. 1916D, 722, 155 Pac. 241; *Stewart v. Rawleigh Medical Co.*, 58 Okla. 344, L. R. A. 1917A, 1276, 159 Pac. 1187.

Pennsylvania. *Bredin's Appeal*, 92

Pa. St. 241, 37 Am. Rep. 677, *Vandegrift v. Vandegrift*, 226 Pa. St. 254, 75 Atl. 365; *Shields v. Latrobe-Connellsville Coal & Coke Co.*, 239 Pa. St. 233, 45 L. R. A. (N.S.) 38, 86 Atl. 784.

Rhode Island. *Sullivan v. Horgan*, 17 R. I. 109, 9 L. R. A. 110, 20 Atl. 232.

Tennessee. *Potts v. Gray*, 43 Tenn. (3 Coldw.) 468, 91 Am. Dec. 294.

Texas. *Gulf, Colorado & Santa Fe, etc., Ry. v. Hume*, 87 Tex. 211, 27 S. W. 110; *Edwards County v. Jennings*, 89 Tex. 618, 35 S. W. 1053 [affirming, 33 S. W. 585]; *Segal v. McCall Co.*, 108 Tex. 55, 184 S. W. 188; *Sabine Tram Co. v. Bancroft*, 16 Tex. Civ. App. 170, 40 S. W. 837; *Burck v. Abbott*, 22 Tex. Civ. App. 216, 54 S. W. 314; *Sanger v. Miller*, 26 Tex. Civ. App. 111, 62 S. W. 425; *McNeese v. Carver*, 40 Tex. Civ. App. 129, 89 S. W. 430.

Vermont. *Woodruff v. Hinman*, 11 Vt. 592, 34 Am. Dec. 712; *Cobb v. Cowdery*, 40 Vt. 25, 94 Am. Dec. 370; *Dow v. Taylor*, 71 Vt. 337, 76 Am. St. Rep. 775, 45 Atl. 220.

Washington. *Tomkins v. Seattle Construction & Dry Dock Co.*, 96 Wash. 511, 165 Pac. 384.

West Virginia. *Charleston Gas Co. v. Kanawha Gas Co.*, 58 W. Va. 22, 112 Am. St. Rep. 936, 50 S. E. 876; *Haymond v. Hyer*, 80 W. Va. 594, L. R. A. 1918B, 1, 92 S. E. 854.

Wyoming. *Kennedy v. Lonabaugh*, 19 Wyom. 352, 117 Pac. 1079.

⁷**United States.** *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136; *Fox Solid Pressed Steel Co. v. Schoen*, 77 Fed. 29; *Stanton v. Sturgis*, 140 Fed. 789; *Lingle v. Snyder*, 160 Fed. 627, 87 C. C. A. 529.

Alabama. *Arnold v. Jones Cotton Co.*, 152 Ala. 501, 12 L. R. A. (N.S.) 150, 44 So. 662.

covenants.⁸ In most of these cases, however, it is probably a misuse of terms to call the contract severable.⁹ The courts in these cases reach the right result in giving effect to the valid covenants; but they explain the result by calling a contract severable which in its nature is entire. The true explanation of most of these cases is that the objectionable covenant is merely void, but not illegal; that is, no effect can be given to it in law, but its presence does not render invalid the valid covenants of the contract.¹⁰ As it is necessary to determine whether the contract is entire or severable, because of the application of the Statute of Frauds, the courts feel obliged to construe the contract and to apply the statute so as best to prevent fraud and perjury. The courts have not always agreed, however, as to the best method of achieving this result. If the contract contains two covenants, one of which is within the statute and the other of which is not within the statute, and the consideration is apportioned between

California. *Getz v. Federal Salt Co.*, 147 Cal. 115, 109 Am. St. Rep. 114, 81 Pac. 416.

Kansas. *Patterson v. Imperial Window Glass Co.*, 91 Kan. 201, 137 Pac. 955.

Kentucky. *Clemmons v. Meadows*, 123 Ky. 178, 6 L. R. A. (N.S.) 847, 94 S. W. 13.

Louisiana. *Webb Press Co. v. Bierce*, 116 La. 905, 41 So. 203.

Michigan. *White Star Line v. Star Line*, 141 Mich. 604, 113 Am. St. Rep. 551, 105 N. W. 135.

Mississippi. *Kosciusko Oil Mill & Fertilizer Co. v. Wilson Cotton Oil Co.*, 90 Miss. 551, 8 L. R. A. (N.S.) 1053, 43 So. 435.

Missouri. *Finck v. Schneider Granite Co.*, 187 Mo. 244, 106 Am. St. Rep. 452, 86 S. W. 213.

Oklahoma. *Stewart v. Rawleigh Medical Co.*, 58 Okla. 344, L. R. A. 1917A, 1276, 159 Pac. 1187.

New Hampshire. *Hill v. Hill*, 74 N. H. 288, 12 L. R. A. (N.S.) 848, 67 Atl. 406.

Pennsylvania. *Vandegrift v. Vandegrift*, 226 Pa. St. 254, 75 Atl. 365.

Texas. *Segal v. McCall Co.*, 108 Tex. 55, 184 S. W. 188.

West Virginia. *Slaughter v. Thacker Coal & Coke Co.*, 55 W. Va. 642, 104 Am. St. Rep. 1013, 47 S. E. 247; *Charleston Natural Gas Co. v. Kanawha Natural Gas, Light & Fuel Co.*, 58 W. Va. 22, 112 Am. St. Rep. 936, 50 S. E. 876.

Wyoming. *Kennedy v. Lonabaugh*, 19 Wyom. 352, 117 Pac. 1079.

United States. *Glucose Sugar Refining Co. v. Marshalltown*, 153 Fed. 620.

Alabama. *Denson v. Alabama Fuel & Iron Co.*, — Ala. —, 73 So. 525.

New York. *Central New York Teleph. & Teleg. Co. v. Averill*, 199 N. Y. 128, 32 L. R. A. (N.S.) 494, 92 N. E. 206.

Pennsylvania. *Monongahela River Consol. Coal & Coke Co. v. Jutte*, 210 Pa. St. 288, 105 Am. St. Rep. 812, 59 Atl. 1088.

Washington. *Minnesota Sandstone Co. v. Clark*, 35 Wash. 466, 77 Pac. 803.

⁸ See § 2084.

¹⁰ See §§ 1035 et seq.

the two covenants, the courts usually give effect to the covenant which is not within the statute, although they are obliged to refuse to give effect to the other covenant because the other party did not comply with the requirements of the statute.¹¹ If the contract is for the sale of a number of different articles of goods at one transaction, the courts generally look to the total price of the goods for the purpose of determining whether the amount is so large that the contract falls within the Statute of Frauds or the Sale of Goods Act, although the parties may have apportioned the consideration to each separate article. If the consideration is not apportioned between the different covenants and the covenants are in the alternative—that is, to do one thing or the other—the courts will ordinarily refuse to enforce the contract if one of such covenants is within the Statute of Frauds and the contract does not satisfy the requirements of the statute.¹² In cases of this sort no action can be brought without proving both covenants and proving the breach thereof; and the oral evidence of the covenant which falls within the Statute of Frauds is the very thing which the statute was intended to prevent. If the consideration is not apportioned between two or more covenants, and one of such covenants falls within the Statute of Frauds while the other does not, the courts usually refuse to give effect to the covenant which does not fall within the statute, even though the promisor has promised performance of both covenants.¹³ It is generally said that performance is refused in such cases because of the Statute of Frauds. No satisfactory reason is suggested for refusing to give to the promisee less than he bargained for, if he is willing to accept it. The purpose of the Statute of Frauds seems to be carried out fully and completely when relief is refused upon the oral covenant which falls within the statute. The rule that neither of such covenants can be enforced seems to have been adopted through a mistake in analogy to the rules which apply to illegal contracts, although an oral contract which falls within the operation of the Statute of Frauds can not be said in any proper sense to be illegal.¹⁴

§ 2090. Specific illustrations. A contract by which A is to perform services for B in his law office, for a specified time, in consideration of a certain portion of the fees received, is an entire con-

¹¹ See § 1425.

¹² See § 1426.

¹³ See § 1427.

¹⁴ See §§ 1398 et seq.

tract,¹ and A can not recover if he leaves B's employment before the expiration of such period.² A contract "putting the six-thousand-acre tract" with certain brokers for sale at a certain price per acre, is an entire contract,³ and the brokers have no authority to arrange for the sale of less than the whole of such tract.⁴ A contract to repair a public building by putting in a new plant and repairing the roof and the floors, is an entire contract,⁵ and if certain items of such contract are unauthorized because they were not found in the specifications, the entire contract is unenforceable.⁶ A contract whereby A sells property to B with an option of repurchase, is entire.⁷ A contract by which A agrees to collect debts for

¹ Davidson v. Gaskill, 32 Okla. 40, 38 L. R. A. (N.S.) 692, 121 Pac. 649.

² Davidson v. Gaskill, 32 Okla. 40, 38 L. R. A. (N.S.) 692, 121 Pac. 649. See Ch. LXXXVIII.

³ Bentley v. Edwards, 125 Minn. 179, 51 L. R. A. (N.S.) 254, 146 N. W. 347.

⁴ Bentley v. Edwards, 125 Minn. 179, 51 L. R. A. (N.S.) 254, 146 N. W. 347.

⁵ Ness v. Board of Commissioners, 178 Ind. 221, 98 N. E. 33 [modifying judgment, Ness v. Board of Commissioners (Ind.), 95 N. E. 548, which denies further rehearing after first rehearing in 93 N. E. 283; modifying judgment, 91 N. E. 618; rehearing denied, 98 N. E. 1002].

⁶ Ness v. Board of Commissioners, 178 Ind. 221, 98 N. E. 33 [modifying judgment, Ness v. Board of Commissioners (Ind.), 95 N. E. 548, which denies further rehearing after first rehearing in 93 N. E. 283; modifying judgment, 91 N. E. 618; rehearing denied, 98 N. E. 1002].

⁷ Lemmon v. East Palestine Rubber Co., 260 Pa. St. 28, 103 Atl. 830; Garon v. Credit Foncier Canadien, 37 R. I. 273, 92 Atl. 561 [rehearing denied, Garon v. Credit Foncier Canadien (R. I.), 92 Atl. 1022]; Vohland v. Gelhaar, 136 Wis. 75, 16 Am. & Eng. Ann. Cas. 761, 116 N. W. 869.

"It is not denied by the defendant company that the treasurer was empowered to contract for the sale of the stock of the plaintiff, but it contends that the part of the contract which relates to procuring a purchaser for the stock is invalid. It is claimed that the treasurer was without authority to make this part of the agreement; that it was ultra vires; and that the contract was divisible, the sale of the capital stock being valid and enforceable and the agreement to furnish a purchaser for the stock, if the plaintiff desired to sell within six months, was separate and collateral to the other part of the agreement. It will be observed that the two parts of the agreement are in one and the same instrument of writing which was signed by the parties and the seal of the defendant affixed but once. The contract was clearly entire and indivisible. Such was the manifest purpose of the parties. It would be wholly without reason, under the circumstances of the case, to suppose that the plaintiff intended to enter into two contracts, one by which the defendant sold the stock to the plaintiff and another, a separate agreement, by which the plaintiff was to be protected in case the stock proved to be valueless or not above par at the end of the six months, which manifestly was

B in accordance with A's system, is entire,⁸ and if the use of A's system is subsequently forbidden by law, the entire contract is discharged.⁹ A contract by which A agrees to buy certain automobiles from B at a specified price, and to become sales agent for B at a specified commission, is said to be a severable contract.¹⁰ A contract by which A agrees to pay a certain sum annually for the use of a set of books, and to buy a new edition at a certain specified price, is severable.¹¹ A contract to bore a well is an entire contract.¹² A contract by which A agrees with a number of owners of logs to raise sunken logs and to deliver each to its respective owner, is a severable contract.¹³

the inducement for plaintiff to make the investment. The contract on its face shows that the defendant was quite willing and felt justified in agreeing to furnish a purchaser for the plaintiff's stock at the increased price, as it declares the Automobile Supplies Company had sold the whole output of its plant, thereby insuring the success of the business. It is to be noted that the plaintiff avers in his affidavit of claim that he was induced by the provision in question to enter into the contract for the purchase of stock, and the averment is not denied in the affidavit of defense. The provision for furnishing to the plaintiff a customer for his stock was, therefore, an inducement for the plaintiff to agree to purchase the stock and, hence, was part of the consideration for plaintiff to

make the purchase." *Lemmon v. East Palestine Rubber Co.*, 260 Pa. St. 28, 103 Atl. 830.

⁸ *American Mercantile Exchange v. Blunt*, 102 Me. 128, 120 Am. St. Rep. 463, 10 L. R. A. (N.S.) 414, 10 Am. & Eng. Ann. Cas. 1022, 66 Atl. 212.

⁹ *American Mercantile Exchange v. Blunt*, 102 Me. 128, 120 Am. St. Rep. 463, 10 L. R. A. (N.S.) 414, 10 Am. & Eng. Ann. Cas. 1022, 66 Atl. 212.

¹⁰ *Wilcox v. Badger Motor Car Co.*, 99 Neb. 189, 155 N. W. 891.

¹¹ *Edward Thompson Co. v. Washburn*, 191 Mass. 6, 77 N. E. 483.

¹² *West v. McDonald*, 64 Or. 203, 127 Pac. 784.

¹³ *Manistee Navigation Co. v. Louis Sands Salt & Lumber Co.*, 174 Mich. 1, 140 N. W. 565.

CHAPTER LXVI

NATURE OF LIABILITY ASSUMED

- § 2091. Nature of liability assumed.
- § 2092. Signature by one person with addition of personal description.
- § 2093. Signature by two or more persons with addition of personal description.
- § 2094. Signature by names of principal and agent.
- § 2095. Nature of liability as affected by words of instrument.
- § 2096. Liability assumed by public officers.

§ 2091. Nature of liability assumed. The nature of the liability created by signing a written instrument is a question of construction. The general rule undoubtedly is that the entire contract must be taken into consideration and from the whole of it the intention of the parties must be ascertained. The liability which it appears he intended to assume must be enforced against the party who has assumed it.¹ This rule, however, like other broad and safe rules, is too vague to guide us in determining the meaning of specific forms of contracts. When we attempt to deduce more specific statements of the law we are met with the fact that the courts are very far from harmonious on the question of what intention they will deduce from given phraseology. If an agent wishes to execute a contract in such form as to bind his principal and not himself, the safest form of signature is "X (principal), by A (agent)." This form of signature shows clearly that the agent does not intend to assume any personal liability.² Thus a note beginning, "I or we promise," and signed, "C. & A. Co., per A, Sec., B, Gen. Mangr.," is the note of the corporation only. The

¹ Whitney v. Wyman, 101 U. S. 392, 25 L. ed. 1050.

² United States. Sun Printing and Publishing Association v. Moore, 183 U. S. 642, 46 L. ed. 366.

Illinois. Williams v. Harris, 198 Ill. 501, 64 N. E. 988 [reversing, 98 Ill. App. 27].

Massachusetts. Emerson v. Mfg. Co.,

12 Mass. 237, 7 Am. Dec. 66; Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101.

Missouri. Sparks v. Transfer Co., 104 Mo. 531, 24 Am. St. Rep. 351, 12 L. R. A. 714, 15 S. W. 417.

New York. Walker v. Bank, 9 N. Y. 582.

Virginia. Shanks v. Lancaster, 46 Va. (5 Gratt.) 110, 50 Am. Dec. 108.

word "per" refers to both A and B.³ The signature, "A (agent) for X (principal)," while not technically so correct, is also sufficient to show that A does not intend to assume any personal liability.⁴ Thus a note beginning, "I promise," and signed, "Pro X, A," was held to be the note of X only.⁵ So a note beginning, "We jointly and severally promise," and signed, "A & B for X," was held to bind X only.⁶ Some authorities, however, treat such a form of signature as imposing a personal liability.⁷ Thus a signature, "Robert Early (for Sam'l Early)," was held by reason of the parentheses to bind Robert Early personally.⁸ So a note beginning, "I promise," and signed, "For the M. H. & F. S. Co., W. Macbean, President," was held to impose personal liability on Macbean.⁹ So a note signed, "A, agent for the Churchman," imposes an individual liability on A.¹⁰ The addition of the word "as" before the designation of the official capacity is often held to show an intention not to assume a personal liability. Thus a note beginning, "The trustees" of a certain church, "as such trustees, promise to pay," and signed, "A, as trustee" of such church, does not impose any personal liability.¹¹ As is indicated elsewhere,¹² the addition of a designation which is not that of an agent does not in law show an intention not to assume personal liability, whatever the parties may have believed. Thus a note beginning, "We promise to pay," and signed by certain persons with the addition of the words, "as stockholders," imposes personal liability.¹³

§ 2092. Signature by one person with addition of personal description. As in other questions of construction,¹ the object of the courts in determining the nature of the liability which is assumed by a party who executes a contract is to ascertain the

³ *Williams v. Harris*, 198 Ill. 501, 64 N. E. 988 [reversing, 98 Ill. App. 27].

⁴ *Rawlings v. Robson*, 70 Ga. 595; *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240.

⁵ *Wheelock v. Winslow*, 15 Ia. 464; *Long v. Colburn*, 11 Mass. 97, 6 Am. Dec. 160.

⁶ *Rice v. Gove*, 39 Mass. (22 Pick.) 158, 33 Am. Dec. 724.

⁷ *Tannatt v. Rocky Mountain National Bank*, 1 Colo. 278, 9 Am. Rep. 156; *Offutt v. Ayers*, 23 Ky. (7 T. B. Mon.) 356; *Peterson v. Homan*, 44

Minn. 166, 20 Am. St. Rep. 564, 46 N. W. 303.

⁸ *Early v. Wilkinson*, 50 Va. (9 Gratt.) 68.

⁹ *Macbean v. Morrison*, 8 Ky. (1 A. K. Mar.) 545.

¹⁰ *DeWitt v. Walton*, 9 N. Y. 571.

¹¹ *Little v. Bailey*, 87 Ill. 239.

¹² See §§ 1810, 1815, 1820, 1826, 1834.

¹³ *Savings Bank v. Market Co.*, 122 Cal. 28, 54 Pac. 273. (Extrinsic evidence is not admissible to show that such note was given only to ratify certain acts of the directors.)

¹ See §§ 2023 et seq.

intention of the parties from the language which they have used in the contract and from the surrounding facts and circumstances of the case. In the case of negotiable instruments the means to which the courts may resort in determining the intention of the parties is somewhat limited by the rule that the rights and liabilities of the parties to a negotiable instrument must be ascertained from the face of the instrument itself.² The rules which determine the effect of any given form of signature are qualified therefore to a very large extent by the rule that the language which is used in the body of the instrument itself aids in determining the liability of the parties and that language must be considered as well as the form of the signature.³ If there is nothing in the body of the instrument to determine the nature of the liability which is assumed and if the rights of the parties are not affected by any statutory provision, the weight of authority is to the effect that if the form of a signature to a contract is "A, agent," or some equivalent expression, omitting the word "as" before "agent," and omitting similar expressions which would tend to show that personal liability was not to be assumed, A, who signs in such a manner, incurs a personal liability,⁴ at least if there is nothing in the instrument itself to indicate who the real principal is.⁵

² See §§ 2312 et seq.

³ See § 2095.

⁴ **England.** *Thomas v. Bishop, Strange* 955.

California. *Hall v. Jameson*, 151 Cal. 606, 121 Am. St. Rep. 137, 12 L. R. A. (N.S.) 1190, 91 Pac. 518.

Georgia. *Burkhalter v. Perry*, 127 Ga. 438, 119 Am. St. Rep. 343, 56 S. E. 631; *Coaling Coal & Coke Co. v. Howard*, 130 Ga. 807, 21 L. R. A. (N.S.) 1051, 61 S. E. 987.

Illinois. *Braun v. Hess*, 187 Ill. 283, 79 Am. St. Rep. 221, 58 N. E. 371; *McDonald v. Bond*, 195 Ill. 122, 62 N. E. 881 [affirming, 96 Ill. App. 116].

Iowa. *Schumacher v. Dolan*, 154 Ia. 207, 134 N. W. 624.

Louisiana. *Dayries v. Lindsly*, 123 La. 259, 54 So. 791.

Michigan. *Keidan v. Winegar*, 95 Mich. 430, 20 L. R. A. 705, 54 N. W. 901.

Mississippi. *Stinson v. Lee*, 68 Miss. 113, 24 Am. St. Rep. 257, 9 L. R. A. 830, 8 So. 272.

Missouri. *Sparks v. Transfer Co.*, 104 Mo. 531, 24 Am. St. Rep. 351, 12 L. R. A. 714, 15 S. W. 417.

Nebraska. *Western Wheeled Scraper Co. v. McMillen*, 71 Neb. 686, 99 N. W. 512.

New Mexico. *Ellis v. Stone*, 21 N. M. 730, L. R. A. 1916F, 1228, 158 Pac. 480.

Washington. *Griffin v. Union Savings & Trust Co.*, 86 Wash. 605, 150 Pac. 1128.

West Virginia. *Exchange Bank v. Lewis County*, 28 W. Va. 273.

Especially if such contract is in excess of the authority of the agent. *Griffin v. Union Savings Bank & Trust Co.*, 86 Wash. 605, 150 Pac. 1128.

A signature, "A, attorney," imposes a personal liability. *Griffin v. Union Savings & Trust Co.*, 86 Wash. 605, 150 Pac. 1128.

⁵ *Burkhalter v. Perry*, 127 Ga. 438, 119 Am. St. Rep. 343, 56 S. E. 631 (obiter); *Griffin v. Union Savings & Trust Co.*, 86 Wash. 605, 150 Pac. 1128.

This rule is of old common-law origin. At a time when it was customary for every person, on signing an instrument, to add his station and rank in life or occupation, as a *descriptio personæ*, the word "agent," like any other word showing occupation, might well serve to describe the person rather than to show in what capacity he was contracting. The rule thus established has survived to a day when the use of a designation of an occupation as a description of the person is almost unknown in written contracts, and when it is undoubtedly the popular belief that the addition of the word agent to a signature prevents personal liability.

A signature "A, trustee," is held to impose personal liability.⁶ Even where great liberality in admitting extrinsic evidence to show the intention of the parties is displayed, it is held that the signature "A, administratrix," while a fact to be considered in discovering the intention of the parties, is no more conclusive that no personal liability was intended than would be "A, widow," or "A, native of Oregon."⁷ A distinction, according to some authorities, must be made between "agent for" and "agent of": the former showing an intention not to assume a personal liability, while the latter is treated in law as a mere *descriptio personæ*.⁸ A note signed by an individual name with the addition of "mfg. agt. & supt. of contracts," imposes a personal liability.⁹ So a note signed "A, trustee," imposes a personal liability.¹⁰ So to hold an indorser liable on a note signed "A, agent," demand must be made on A and not on the undisclosed principal.¹¹ If a church

⁶ *Duvall v. Craig*, 15 U. S. (2 Wheat.) 45, 4 L. ed. 180; *Powers v. Briggs*, 79 Ill. 403, 22 Am. Rep. 175; *McKenney v. Bowie*, 94 Me. 397, 47 Atl. 918; *Farrell v. Reed*, 46 Neb. 258, 64 N. W. 959.

⁷ *Kitchen v. Holmes*, 42 Or. 252, 70 Pac. 830.

⁸ *Colorado*. *Tannatt v. Bank*, 1 Colo. 278, 9 Am. Rep. 156.

Illinois. *Burlingame v. Brewster*, 79 Ill. 515, 22 Am. Rep. 177.

Maine. *Mellen v. Moore*, 68 Me. 390, 28 Am. Rep. 77.

Massachusetts. *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101.

Nebraska. *Western Wheeled Scraper Co. v. McMillen*, 71 Neb. 686, 99 N. W. 512.

New York. *Brockway v. Allen*, 17 Wend. (N. Y.) 40.

⁹ *Keeley Brewing Co. v. Decorating Co.*, 194 Ill. 580, 62 N. E. 923.

¹⁰ *California*. *Hall v. Jameson*, 151 Cal. 606, 121 Am. St. Rep. 137, 12 L. R. A. (N.S.) 1190, 91 Pac. 518.

Georgia. *Fargason v. Ford*, 119 Ga. 343, 46 S. E. 431.

Massachusetts. *McClellan v. Robe*, 93 Ind. 298; *Fiske v. Eldridge*, 78 Mass. (12 Gray) 474.

Nebraska. *Farrell v. Reed*, 46 Neb. 258, 64 N. W. 959.

South Carolina. *Guimarin v. Southern Life & Trust Co.*, 106 S. Car. 37, 90 S. E. 319.

¹¹ *Stinson v. Lee*, 68 Miss. 113, 24 Am. St. Rep. 257, 9 L. R. A. 830, 8 So. 272.

is not named in the body of a note, and the trustees sign individually, the addition of the words "trustees of" the church in question is not sufficient to show that no personal liability was intended.¹² So a signature "A, vestryman, * * * Grace Church," imposes a personal liability upon A.¹³ Even on this point the courts are by no means unanimous. Some authorities hold that a designation of agency may, in connection with the wording of the instrument, show that no personal liability is intended.¹⁴ A draft which is signed "A, agent," underneath which are the words "B & C," is to be regarded as a draft executed by B and C, if A was authorized to execute such instrument.¹⁵ Extrinsic evidence may be admitted to show an intention not to impose personal liability upon the agent.¹⁶ So a note signed "A, B, C, vestrymen of the Episcopal Society," was held not to impose personal liability on A, B and C.¹⁷ An indorsement by "A, Sec. & Treas.," is not the personal indorsement of A.¹⁸ A note signed "James R. Wilson, Pres. T. N. Co.," was held to be the obligation of the corporation.¹⁹ So a note beginning, "We promise," and signed, "A, treasurer," and stamped with a seal bearing the corporate name, was held to be the note of the corporation and not of A.²⁰

Under the Negotiable Instruments Act, no personal liability is imposed on one who signs in a representative capacity. It has been held that a note signed by "A, trustee,"²¹ or indorsed by "A, trustee,"²² may be shown not to be intended as the personal obligation of A. Under the Negotiable Instruments Law the addition of the word "agent" to the name of one who does not indicate his principal, does not relieve such person from personal liability.²³ A

¹² *Burlingame v. Brewster*, 79 Ill. 515, 22 Am. Rep. 177; *Hayes v. Brubaker*, 65 Ind. 27; *Hays v. Crutcher*, 54 Ind. 260.

¹³ *Tilden v. Barnard*, 43 Mich. 376, 38 Am. Rep. 197, 5 N. W. 420.

¹⁴ *Fuller v. Hooper*, 69 Mass. (3 Gray) 334; *Ballou v. Talbot*, 16 Mass. 461, 8 Am. Dec. 146; *Dispatch Line v. Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Safford v. Wyckoff*, 1 Hill (N. Y.) 11, 4 Hill (N. Y.) 442; *Citizens' National Bank v. Ariss*, 68 Wash. 448, 123 Pac. 593.

¹⁵ *Citizens' National Bank v. Ariss*, 68 Wash. 448, 123 Pac. 593.

¹⁶ *Raleigh & Gaston Railroad Co. v. Pullman Co.*, 122 Ga. 700, 50 S. E. 1008. See §§ 2206 et seq.

¹⁷ *Johnson v. Smith*, 21 Conn. 627.

¹⁸ *Falk v. Moebs*, 127 U. S. 597, 32 L. ed. 266.

¹⁹ *Olcott v. Ry.*, 27 N. Y. 546, 84 Am. Dec. 298.

²⁰ *Miller v. Roach*, 150 Mass. 140, 6 L. R. A. 71, 22 N. E. 634.

²¹ *Megowan v. Peterson*, 173 N. Y. 1, 65 N. E. 738.

²² *American Trust Co. v. Canevin*, 181 Fed. 657, 107 C. C. A. 543.

²³ *Dayries v. Lindsly*, 128 La. 259, 54 So. 791.

contract which is signed by "A, pastor of the X Church," imposes a personal liability upon A;²⁴ and at any rate if B has assumed and agreed to pay such obligation as an obligation of A's, B can not avoid liability thereon by showing that it was not A's personal obligation.²⁵

If a bank accepts a deposit in the name of "A, agent," it can not set off A's personal debt to the bank as against A's principal, the true owner of such fund.²⁶

§ 2093. Signature by two or more persons with addition of personal description. If two or more persons sign, and the question of the existence of personal liability is presented, there is as much of a conflict as where one only signs, but the states are divided on different lines. Thus if a note is signed by two or more persons with an official designation, such as "president" or "secretary" opposite the name of each, we find a conflict of authority. Some courts hold that such a form of signature imposes no individual liability.¹ Thus a note beginning, "The president and directors will pay," and signed "A, president," "B," and so forth, was held to be the obligation of the company and not to impose a personal liability.² Other authorities hold that such a form of execution creates a personal liability.³ Thus a note beginning, "We promise," and signed, "J. E. Stafford, pres., J. Zapf, mgr., Albany Furniture Co.," was held to impose joint individual liability.⁴ If a note is signed with the name of a corporation, followed by the names of two or more officers, with the name of the office opposite the name of each person, another conflict of authority exists. Some jurisdictions hold that such a note is the note of the corporation only.⁵ Thus a note signed, "A, secretary," "B, president," payable to "ourselves," and indorsed, "Worcester Brewing Co., B, president, A, secretary," was held to be the note

²⁴ *Schumacher v. Dolan*, 154 Ia. 207, 134 N. W. 624.

²⁵ *Schumacher v. Dolan*, 154 Ia. 207, 134 N. W. 624.

²⁶ *Bank v. Crayter*, — Ala. —, L. R. A. 1917F, 460, 75 So. 7.

¹ *Farmers', etc., Bank v. Colby*, 64 Cal. 352, 28 Pac. 118; *Armstrong v. Canal Co.*, 14 Utah 450, 48 Pac. 690.

² *Yowell v. Dodd*, 66 Ky. (3 Bush.) 581, 96 Am. Dec. 256.

³ *Albany, etc., Co. v. Bank*, 17 Ind. App. 531, 60 Am. St. Rep. 178, 47 N. E. 227; *Whitney v. Sudduth*, 61 Ky. (4 Met.) 296; *Titus v. Kyle*, 10 O. S. 444; *Scott v. Baker*, 3 W. Va. 285.

⁴ *Albany, etc., Co. v. Bank*, 17 Ind. App. 531, 60 Am. St. Rep. 178, 47 N. E. 227.

⁵ *American National Bank v. Mfg. Co.*, 1 Neb. (unoff.) 322, 95 N. W. 672.

of the corporation.⁶ In other jurisdictions such a contract is held to create a personal liability.⁷ A note which was signed, "The X company by A, president, B," was held to impose a personal liability upon B, although B was the secretary of such corporation.⁸ An instrument which contains the words, "We as trustees of the X Church for and in behalf of said church" promise to pay a certain amount, which was signed by "A, B and C, trustees, X Church," was held to impose a personal liability upon the trustees if they did not bind the church, although it was not decided what their liability would have been if the church had been bound by such contract.⁹ Other courts hold that such a contract creates an individual liability. Thus a note beginning, "We promise," and signed, "The Pendleton Glass Company, by B. F. Aiman, president; C. B. Orvis, vice-president; Charles H. Roach, secretary; A. B. Taylor, Benj. Rogers. J. R. Boston, directors," was held to impose individual liability on the directors.¹⁰ A note beginning, "We promise to pay," and signed, "Belle Plaine Canning Co., H. Wessel, Sec'y, A. J. Hartman, Pres.," imposes individual liability upon the officers.¹¹

§ 2094. Signature by names of principal and agent. If the note is signed by the name of the principal, with the name of the agent subscribed below that of the principal, without the use of the word "by" to show agency, a question is presented on which there is a division of authority. A question of this sort usually arises on a note of a corporation which must be executed by some one of its agents, and which is signed by the name of the corporation followed by the name of one of its agents, with the addition of "president," "secretary," or some such official designation. The weight of authority is that such a note is the note of the corporation exclusively, and that no personal liability attaches to the agent whose name is thus signed.¹ There is some authority for holding that the agent who signs in such a form incurs a personal

⁶ Produce Exchange Trust Co. v. Bieberbach, 176 Mass. 577, 58 N. E. 162.

⁷ At least as to those whose signatures are not followed by an official designation. Exchange Bank v. Schultz, 167 Ia. 136, 149 N. W. 99.

⁸ Exchange Bank v. Schultz, 167 Ia. 136, 149 N. W. 99.

⁹ Dennison v. Austin, 15 Wis. 334.

¹⁰ Taylor v. Reger, 18 Ind. App. 466, 63 Am. St. Rep. 352, 48 N. E. 262.

¹¹ McCandless v. Canning Co., 78 Ia. 161, 16 Am. St. Rep. 429, 4 L. R. A. 396, 42 N. W. 635.

¹ England. Chapman v. Smethurst [1909], 1 K. B. 927.

United States. Falk v. Moeba, 127 U. S. 597, 32 L. ed. 266.

liability.² A note which was signed "The X Company by A, president, B," was held to impose a personal liability upon B.³ A note which began, "We promise," and which was signed, "X Company, A," was held to impose a personal liability upon A *prima facie*.⁴ It has, however, been held under the Negotiable Instruments Law that an instrument which begins, "The X Company promised to pay," and which is signed, "The X Company, A, treasurer, B," does not impose a personal liability upon B if it is shown that B was the secretary and that it was not intended to bind B personally.⁵

§ 2095. Nature of liability as affected by words of instrument.

Since the contract is to be construed as a whole,¹ the words of the instrument by which a promise is made must be considered in connection with the form of the signature as determining the nature of the liability which is imposed upon the parties who sign such instrument.² A note beginning, "We, the trustees of Musconetcong Grange, No. 114, known as W. Fleming & Co.," promise,

Arkansas. Bank v. Nimnich, 122 Ark. 316, 183 S. W. 756.

California. Bean v. Pioneer Mining Co., 66 Cal. 451, 56 Am. Rep. 106, 6 Pac. 86.

Illinois. Gillet v. Bank, 7 Ill. App. 499; Scanlon v. Keith, 102 Ill. 634, 40 Am. Rep. 624.

Maine. Atkins v. Brown, 59 Me. 90; Castle v. Foundry Co., 72 Me. 167; Gleason v. Milk Supply Co., 93 Me. 544, 74 Am. St. Rep. 370, 45 Atl. 825.

Massachusetts. Draper v. Heating Co., 87 Mass. (5 All.) 338.

Nebraska. English and Scottish American Mortgage and Investment Co. v. Globe Loan & Trust Co., 70 Neb. 435, 6 Am. & Eng. Ann. Cas. 999, 97 N. W. 612.

New Jersey. Reeve v. Bank, 54 N. J. L. 208, 33 Am. St. Rep. 675, 16 L. R. A. 143, 23 Atl. 853.

Texas. Latham v. Flour Mills, 68 Tex. 127, 3 S. W. 462.

Wisconsin. Leibacher v. Kraus, 74 Wis. 387, 17 Am. St. Rep. 171, 5 L. R. A. 496, 43 N. W. 166.

² Bank v. Nimnich, 122 Ark. 316, 183 S. W. 756; Mathews v. Mattress Co., 87 Ia. 246, 19 L. R. A. 676, 54 N. W. 225; Heffner v. Brownell, 70 Ia. 591, 31 N. W. 947, 75 Ia. 341, 39 N. W. 640. The earlier case of Wheelock v. Wilson, 15 Ia. 464, is overruled.

A signature, "X Co., per A, Sec. & Treas.; A, director; B, director; C, director," imposes a personal liability on A, B and C. Bank of Corning v. Nimnich, 122 Ark. 316, 183 S. W. 756.

³ Exchange Bank v. Schultz, 167 Ia. 136, 149 N. W. 99.

⁴ Belmont Dairy Co. v. Thrasher, 124 Md. 320, 92 Atl. 766.

⁵ Germania National Bank v. Mariner, 129 Wis. 544, 109 N. W. 574.

¹ See § 2038.

² Sun Printing and Publishing Co. v. Moore, 183 U. S. 642, 46 L. ed. 366; Frambach v. Frank, 33 Colo. 529, 81 Pac. 247; Cutler v. Ashland, 121 Mass. 588; Ellis v. Stone, 21 N. M. 730, L. R. A. 1916F, 1228, 158 Pac. 480.

and signed with the word "trustees" and the individual names of the trustees, imposes a personal liability on the trustees.³ So a note beginning, "The directors promise," and signed by the directors, imposes personal liability.⁴ A note beginning, "We promise" "for the Boston Glass Manufactory," and signed by A, B and C individually, was held to be the individual note of A, B and C.⁵ A note which begins, "The X Company and we, the undersigned," and which is signed by "The X Company, by A, B and C," is held to be the personal obligation of A, B and C as well as of the X Company.⁶ A note which begins, "We promise," and which is signed by "The X Company, A," is said to impose a personal liability upon A *prima facie*,⁷ and in the absence of evidence to explain the real understanding of the parties, A will be held personally liable.⁸ A contract which uses the word "I" throughout, except that in one place it provides "that we may run same in our books as remittances for collection," has been held, when taken in connection with the fact that it was written upon a letterhead of the "X Bank, A, president," has been held to show that the contract was not the personal contract of A, but that it was the contract of the bank.⁹ A contract which begins, "The X Company promises to pay," and which is signed, "The X Company, A, treasurer, B," was held not to impose personal liability upon B, it being shown that B was the secretary of the corporation and that it was not intended to impose a personal liability upon him.¹⁰ So an instrument which, in the body thereof purports to be executed by A "for the National Umbrella Company,"¹¹ or by A "of the X Company,"¹² imposes in each case a personal

³ *Vliet v. Simanton*, 63 N. J. L. 458, 43 Atl. 738; and see *Hypes v. Griffin*, 89 Ill. 134, 31 Am. Rep. 71; *Powers v. Briggs*, 79 Ill. 493, 22 Am. Rep. 175.

⁴ *McKenssey v. Edwards*, 88 Ky. 272, 21 Am. St. Rep. 339, 3 L. R. A. 397, 10 S. W. 815. (However, in such a case it is said that the question of the nature of liability imposed must be determined on answer and not on demurrer. *McKenssey v. Edwards*, 88 Ky. 272, 21 Am. St. Rep. 339, 3 L. R. A. 397, 10 S. W. 815 [citing, *Pack v. White*, 78 Ky. 243].)

⁵ *Bradlee v. Glass Manufactory*, 32 Mass. (16 Pick.) 347.

⁶ *Nunnemacher v. Poss*, 116 Wis. 444, 92 N. W. 375.

⁷ *Belmont Dairy Co. v. Thrasher*, 124 Md. 320, 92 Atl. 766.

⁸ *Belmont Dairy Co. v. Thrasher*, 124 Md. 320, 92 Atl. 766.

⁹ *Ellis v. Stone*, 21 N. M. 730, L. R. A. 1916F, 1228, 158 Pac. 480.

¹⁰ *Germania National Bank v. Mariner*, 129 Wis. 544, 109 N. W. 574.

¹¹ *General Electric Co. v. Gill*, 127 Fed. 241.

¹² *Railway Speed Recorder Co. v. Tool Co.*, 126 Fed. 223.

liability on A. Similar phraseology is held in other cases not to impose personal liability. Thus a note beginning, "The Howard County Agricultural Association, who execute this note by her directors," "do promise," and signed "A, secretary; B, C, directors, Howard County Agricultural Association," does not impose personal liability.¹³ Under the Maine statute, a note beginning, "We, the subscribers for" a certain corporation, signed by the individual names of the makers, imposes liability in the corporation and not on the individuals signing.¹⁴ An acceptance, written on a letter bearing the corporation letterhead, and signed by an agent individually, written in reply to a proposition addressed to the corporation, binds the corporation.¹⁵ The fact that the instrument contains a promise to perform "jointly and severally," tends strongly to show that the persons whose names are signed beneath that of the principal maker intend to incur a personal liability.¹⁶ A direction in an instrument to "charge to the account of" one of the parties whose name is signed thereto, tends to show that the other parties are signing as agents and that they do not incur personal liability,¹⁷ although such form of words can not prevent personal liability from attaching where the contract shows on its face a clear intention to incur such liability.¹⁸

§ 2096. Liability assumed by public officers. An important difference between contracts of public agents and contracts of private agents is in the construction of liability intended to be assumed. We have seen that in contracts of private agents the mere addition of the official capacity to the signature does not prevent personal liability from being imposed on the agent, and it does not prevent the contract from being treated as his personally.¹ In contracts of public officers or agents there is an unfortunate lack of harmony upon the question of the nature of the liability assumed by such public officer or agent. In most jurisdictions there is a very strong tendency to hold that the contract of a public officer or agent does not impose a personal liability upon

¹³ *Armstrong v. Kirkpatrick*, 79 Ind. 527.

¹⁴ *Simpson v. Garland*, 72 Me. 40, 39 Am. Rep. 297.

¹⁵ *Towers v. Cattle Co.*, 83 Minn. 243, 86 N. W. 88.

¹⁶ *Healey v. Story*, 3 Exch. 3; *Trask v. Roberts*, 40 Ky. (1 B. Mon.) 201.

¹⁷ *Hitchcock v. Buchanan*, 105 U. S. 416, 26 L. ed. 1078; *Hager v. Rice*, 4 Colo. 90, 34 Am. Rep. 68.

¹⁸ *Slawson v. Loring*, 87 Mass. (5 All.) 340, 81 Am. Dec. 750. (Where the draft was signed "A, Agt." and accepted by "B, agent.")

¹ See §§ 2092 et seq.

him and that it binds the corporation if he has power to make such contract on its behalf, although the language which is used may be language which would have imposed a personal liability upon a private agent.² A lease made to a city, signed by the mayor individually and sealed with his seal, is the contract of the city and not of the mayor personally.³ So an appeal bond purporting to be the obligation of the city, but signed by the mayor and the clerk with their official titles added to their names, is valid as the obligation of the city.⁴ An order directed to a township clerk, directing him to make a specified payment out of township funds and signed "A, B, C, trustees," does not impose personal liability on A, B and C.⁵ A check which is signed by an officer with the addition of the letters "T. C.," is held not to be the personal check of the drawer, the words "T. C." being shown to mean tax collector.⁶ So a contract beginning, "We, trustees," and promising to repay "money borrowed to build" a certain schoolhouse, signed individually, imposes no personal liability.⁷ A contract which purports to be the contract of "A, B and C * * * members of the township committee * * * and their successors," and which is signed, "A, B and C," is held not to impose any personal liability upon A, B and C.⁸ A contract which purports to be the contract of "A, township trustee of X Township," does not impose a personal liability upon A.⁹ A contract which is signed, "A, collector," does not show conclusively that no personal liability was intended, but such contract is ambiguous and A's liability depends upon the real intention of the parties.¹⁰

In some jurisdictions, however, the principles of personal liability which are ordinarily applied to private agents are applied to public officers and agents.¹¹ A contract for work upon a school-

² **Indiana.** Sparta School Township v. Mendell, 138 Ind. 188, 37 N. E. 604.

Kansas. Hupe v. Sommer, 88 Kan. 561, 43 L. R. A. (N.S.) 565, 129 Pac. 136.

Kentucky. Mingo v. Colored School District, 113 Ky. 475, 68 S. W. 483.

New Jersey. Knight v. Clark, 48 N. J. L. 22, 57 Am. Rep. 534, 2 Atl. 780.

³ **Chicago v. Peck**, 196 Ill. 260, 63 N. E. 711 [affirming, 98 Ill. App. 434].

⁴ **Fon du Lac v. Atto**, 113 Wis. 39, 90 Am. St. Rep. 830, 88 N. W. 917.

⁵ **Willet v. Young**, 82 Ia. 292, 11 L. R. A. 115, 47 N. W. 990.

⁶ **State v. Jahraus**, 117 La. 286, 116 Am. St. Rep. 208, 41 So. 575.

⁷ **Warford v. Temple** (Ky.), 73 S. W. 1023.

⁸ **Knight v. Clark**, 48 N. J. L. 22, 57 Am. Rep. 534, 2 Atl. 780.

⁹ **Sparta School District v. Mendell**, 138 Ind. 188, 37 N. E. 604.

¹⁰ **Rogers v. French**, 214 Mass. 337, 101 N. E. 988.

¹¹ **Anderson v. Pearce**, 36 Ark. 293, 38 Am. Rep. 39; **Western Publishing House v. Murdick**, 4 S. D. 207, 21 L. R. A. 671, 56 N. W. 120.

house, which is signed, "A, B, committee," has been held to impose a personal liability upon A and B.¹² A reward offered by "A, B, C, selectmen of Milton," imposes personal liability on such signers.¹³ A contract which begins, "We, the undersigned members of the board of directors," and which contains a condition, "provided a majority of said board signs the agreement," has been held to impose a personal liability upon the members of the board who sign such contract.¹⁴ A contract for the purchase of school supplies, which contains the words, "for which we agree to pay," and which is signed by the officers of the school district without any designation of their official capacity, has been said to impose no liability upon such officers if they had power to issue the warrant for the goods thus purchased.¹⁵

¹² *Anderson v. Pearce*, 36 Ark. 293, 38 Am. Rep. 39.

¹³ *Brown v. Bradlee*, 156 Mass. 28, 32 Am. St. Rep. 430, 15 L. R. A. 509, 30 N. E. 85.

¹⁴ *Western Publishing House v. District Township*, 84 Ia. 101, 50 N. W. 551 (obiter, as the real point to the decision was that the contract was not

binding upon the township). *Western Publishing House v. Murdick*, 4 S. D. 207, 21 L. R. A. 671, 56 N. W. 120.

¹⁵ *State Bank v. Kienberger*, 140 Wis. 517, 122 N. W. 1132. (Personal liability existed in this case, however, as no authority to issue such warrant existed.)

CHAPTER LXVII

TIME

- § 2097. Construction of terms concerning time of performance.
- § 2098. Reasonable time intended if time not fixed.
- § 2099. Reasonable time—Whether question of law or fact.
- § 2100. Time of performance with reference to extrinsic fact.
- § 2101. Performance not due till end of stipulated time.
- § 2102. Premature tender.
- § 2103. Time of essence of contract—Meaning of term.
- § 2104. Time of essence at law.
- § 2105. Time not of essence in equity.
- § 2106. Tendency of modern law to regard them as not of essence.
- § 2107. Express provision making time of essence.
- § 2108. Implied provision making time of essence.
- § 2109. Nature of property contracted for.
- § 2110. Time of subsidiary provision not of essence.
- § 2111. Time of essence in subscriptions.
- § 2112. Time of essence in options.

§ 2097. Construction of terms concerning time of performance.

The time at which a contract is to be performed depends upon the intention of the parties as ascertained from the language which they have used as interpreted by the ordinary rules of construction together with such surrounding circumstances as may be considered in ascertaining such intention.¹ Accordingly, it is dangerous to attempt to lay down arbitrary rules for ascertaining such intention. A few illustrations of the results reached by the courts in specific cases may be given however. A contract to pay or deliver "by" a certain day gives the whole of such day for performance.² Thus a subscription conditioned on raising a certain

¹ **Colorado.** *Jennings v. Brotherhood Accident Co.*, 44 Colo. 68, 18 L. R. A. (N.S.) 109, 96 Pac. 982.

Illinois. *Merritt v. Crane Co.*, 225 Ill. 181, 80 N. E. 103.

Kentucky. *Moreland v. Citizens' National Bank*, 114 Ky. 577, 102 Am. St. Rep. 203, 61 L. R. A. 900, 71 S. W. 520.

Texas. *Aetna Life Insurance Co. v. Wimberly*, 102 Tex. 46, 23 L. R. A. (N.S.) 759, 112 S. W. 1038.

Utah. *Board of Education v. Wright-Osborn Co.*, 49 Utah 453, 164 Pac. 1033.

² *Preston v. Dunham*, 52 Ala. 217; *Massie v. Belford*, 68 Ill. 290; *Stevens v. Blunt*, 7 Mass. 240; *Coonley v. Anderson*, 1 Hill (N. Y.) 519.

sum "by" a certain day is enforceable where the requisite amount is subscribed at a meeting held on the night of such day.³ A contract to perform on or before a certain day gives to the promisor the whole of that day on which to perform.⁴ A promise to pay "on or before" a certain day is treated as a promise to pay on that day, with an option to pay before the time designated.⁵ A contract to reimburse one for loss sustained by reason of his purchase of stock "at or before the expiration of five years," means five years from the date of the contract, and not five years from the loss.⁶ A contract which, by its terms, is to be performed within certain specified dates, excludes the last of such dates.⁷ A contract which provides for completing certain work within a certain time and for a test and for remedying defects, if any are found upon such tests, is to be construed as authorizing such test and such remedying of defects within the time fixed for completion, at least if any other construction would defeat the right of materialmen to a mechanic's lien.⁸ A surety upon a contractor's bond, which limits liability to a certain space of time, is liable for defaults which occur within such space of time, although the exact amount of the liability is not ascertained, nor is the action brought within such period.⁹ A promise to perform within a certain time from a given event is to be construed by counting from the completion of the event. Thus a provision for furnishing proofs of loss sixty days after the fire causing loss, means sixty days after the fire has ended, if it lasts for more than one day.¹⁰ A provision for delivering certain bonds within six months after a

³ *Elizabeth City Cotton Mills v. Dunstan*, 121 N. Car. 12, 61 Am. St. Rep. 654, 27 S. E. 1001.

⁴ *Adams v. Dale*, 29 Ind. 273.

⁵ *Wilson v. Bicknell*, 170 Mass. 259, 49 N. E. 113; *Mattison v. Marks*, 31 Mich. 421, 18 Am. Rep. 197; *Helmer v. Krolick*, 36 Mich. 371.

⁶ *Wilson v. Bicknell*, 170 Mass. 259, 49 N. E. 113.

⁷ *Richardson v. Ford*, 14 Ill. 332.

⁸ *Merritt v. Crane Co.*, 225 Ill. 181, 80 N. E. 103.

⁹ *Board of Education v. Wright-Osborn Co.*, 49 Utah 453, 164 Pac. 1033.

¹⁰ *National Wall Paper Co. v. Ins. Corporation*, 175 N. Y. 226, 67 N. E. 440.

A provision for giving notice a certain time after physical disability has been said to date from the time that the insured learns that he is seriously ill, and not from the time that his sickness first began. *Jennings v. Brotherhood Accident Co.*, 44 Colo. 68, 18 L. R. A. (N.S.) 109, 96 Pac. 982.

It is also said to begin from the date at which an attending physician is called in, if the policy provides that there can be no recovery thereon unless a physician is called in. *Craig v. United States Health and Accident Ins. Co.*, 80 S. Car. 151, 18 L. R. A. (N.S.) 106, 61 S. E. 423.

foreclosure sale, means within six months after the sale is consummated by the delivery of the deed.¹¹ A contract to exchange realty when a certain loan is procured, or "within forty days at the most," means forty days from the time that the loan is procured.¹² A contract giving the purchaser of standing timber until the first day of June, 1898, to remove it, "with the privilege of another year if needed to remove" it, means a year from the first of June, 1898.¹³ In the absence of express statutory provision or of language in the contract which shows a contrary intention, performance on Monday is sufficient if by the terms of the contract the last day of performance falls on Sunday.¹⁴ Under a statute which defines the length of a month and makes specific provisions for counting days to determine the time of performance, if the contract is measured by months, and which contains no exception in case the last day of performance falls on Sunday, the courts can not add an exception in case the last day of performance falls on Sunday.¹⁵ If the day which falls on Sunday is not the last day of performance, but the day of performance from which certain specified days of grace are to be counted, the time for counting such days of grace begins with Sunday and not with the following Monday.¹⁶ A promise to pay or perform in a certain number of months *prima facie* means calendar months.¹⁷ An order, "one hundred and eighty days pay to the order of," is to be construed as if it were an order to pay one hundred and eighty days after date.¹⁸

Except in cases in which priority is dependent upon the exact moment of time at which rights vested or acts were done, the common law paid no attention to fractions of a day, but for legal

¹¹ *Houston, etc., Ry. v. Keller*, 90 Tex. 214, 37 S. W. 1062.

¹² *Te Poel v. Shutt*, 57 Neb. 592, 78 N. W. 288.

¹³ *Oconto Co. v. Lundquist*, 119 Mich. 264, 77 N. W. 950.

¹⁴ *The Harbinger*, 50 Fed. 941; *Ingram v. Wackernagel*, 83 Ia. 82, 48 N. W. 998.

An insurance policy which by its terms expires on a holiday does not include liability from an accident on the following day. *Upton v. Travelers' Insurance Co.*, — Cal. —, 2 A. L. R. 1597, 178 Pac. 851.

If a policy of insurance expires on Sunday, it does not protect the insured against injury sustained upon Monday. *Upton v. Travelers' Insurance Co.*, — Cal. —, 2 A. L. R. 1597, 178 Pac. 851.

¹⁵ *Ryer v. Prudential Ins. Co.*, 185 N. Y. 6, 77 N. E. 727.

¹⁶ *Aetna Life Insurance Co. v. Wimberly*, 102 Tex. 46, 23 L. R. A. (N.S.) 759, 112 S. W. 1038.

¹⁷ *Doyle v. Bank*, 131 Ala. 294, 90 Am. St. Rep. 41, 30 So. 880.

¹⁸ *Moreland v. Citizens' National Bank*, 114 Ky. 577, 102 Am. St. Rep. 293, 61 L. R. A. 900, 71 S. W. 520.

purposes it regarded a day as a unit.¹⁹ If a contract provided for performance which is to extend over a certain space of time measured by days and the like, the common law did not count both the first and the last days in determining such period of time, nor did it exclude both, unless provision was made excluding both by language which showed such intention,²⁰ such as by a provision for "clear days,"²¹ or by a provision for performance "between" certain dates.²² Whether the first day was included and the last day was excluded, or whether the first day was excluded and the last day was included, was a question which proved troublesome in the earlier cases which attempted to distinguish between different phrases to which the parties in all probability attached the same meaning. It was said in some cases that a provision for doing something within a certain time from an action or from the time of an act, showed an intention to include the first day and exclude the last day, even though a similar provision for performance after a given day required the exclusion of the first day and the inclusion of the last day.²³ It was said that a provision for performing an act within a certain period "from date," included the first day, while a similar provision for performing such an act within a certain time "from the day of" the date, excluded the first day.²⁴ It was said in words which were intended to pass a present interest, the words "from date" showed an intention to include the day of the date, while the same expression, if not intended to pass a present interest, excluded the day of the date.²⁵ The distinctions which were thus built up did not correspond to the actual use of words by the community at large, and it was finally said that no sound distinction could be drawn between these different phrases.²⁶

¹⁹ **England.** Clayton's Case, 5 Coke 1a; Combe v. Pitt, 3 Burr. 1423 (obiter); Lester v. Garland, 15 Ves. Jr. 248.

United States. M'Gill v. Bank of United States, 25 U. S. (12 Wheat.) 511, 6 L. ed. 711.

Connecticut. Ladany v. Assad, 91 Conn. 316, 99 Atl. 762.

Mississippi. Hattiesburg Grocery Co. v. Tompkins, 111 Miss. 592, 71 So. 866.

Utah. Tilton v. Sterling Coal & Coke Co., 28 Utah 173, 107 Am. St. Rep. 689, 77 Pac. 758.

²⁰ King v. Goodenough, 2 Ad. & El. 463; Sanders v. Norton, 20 Ky. (4 T.

B. Mon.) 464; Gillespie v. White, 16 Johns. (N. Y.) 117.

²¹ The India, 49 Fed. 76, 1 C. C. A. 174.

²² Cook v. Gray, 6 Ind. 335.

²³ Clayton's Case, 5 Coke 1a; Castle v. Burditt, 3 T. R. 623; Griffith v. Bogert, 59 U. S. (18 How.) 158, 15 L. ed. 307.

²⁴ Howard's Case, 2 Salk. 625; Leavenworth Coal Co. v. Barber, 47 Kan. 29.

²⁵ Hatter v. Ash, 1 Ld. Raym. 85.

²⁶ Seward v. Hayden, 150 Mass. 158, 5 L. R. A. 844, 22 N. E. 629.

The great weight of modern authority is to the effect that under a contract which provides for performance within a specified number of days and the like, time is to be computed by excluding the day of the date and including the last day of the performance.²⁷ A contract which calls for performance within a certain time "from date," requires the exclusion of the day of the date.²⁸ A contract which provides for performance until a certain date,²⁹ or by a certain date,³⁰ includes such date. A contract which does not expressly state within what time it is to be performed, may refer to another contract in such a way as to show that the time fixed in such other contract is the time intended by the parties.³¹ Thus a contract to give employment or to pay royalties during the "term" of a prior contract for the use of a patent for five years, with the option of five more, has been held to mean the ten-year term, even though the option as to the second period of five years was not in fact taken advantage of.³²

Clear and specific provisions in a contract for performance at a specified time, are not affected by equivocal provisions in other parts of such contract.³³ A provision for making a payment when certain tests are made satisfactorily, is not modified by another provision regulating the time for which such payment is to be made.³⁴ A provision that a contract should be in effect for a

²⁷ *England. Kennedy v. Thomas* [1894], 2 Q. B. 759.

United States. Sheets v. Selden's Lessee, 69 U. S. (2 Wall.) 177, 17 L. ed. 822.

Alabama. Doyle v. Bank, 131 Ala. 294, 90 Am. St. Rep. 41, 30 So. 880.

Connecticut. Blackman v. Nearing, 43 Conn. 56, 21 Am. Rep. 634.

Iowa. Teucher v. Hiatt, 23 Ia. 527. (So by statute.)

Kansas. Farmers' National Bank v. Salina Paper Mfg. Co., 58 Kan. 207, 48 Pac. 863.

Massachusetts. Walker v. John Hancock Mutual Life Ins. Co., 167 Mass. 188, 45 N. E. 80.

Nebraska. Crites v. Capitol Fire Ins. Co., 91 Neb. 771, 137 N. W. 847.

New York. Snyder v. Warren, 2 Cow. (N. Y.) 518, 14 Am. Dec. 519.

Utah. Tilton v. Sterling Coal & Coke Co., 28 Utah 173, 107 Am. St. Rep. 689, 77 Pac. 758.

Vermont. Beeman v. Cook, 48 Vt. 201, 21 Am. Rep. 123.

²⁸ *Oatman v. Walker*, 33 Me. 67; *Walker v. John Hancock Mutual Life Ins. Co.*, 167 Mass. 188, 45 N. E. 89.

²⁹ *Hatfield v. Clovis*, 219 Pa. St. 168, 68 Atl. 43 (obiter, as act was done on prior date).

³⁰ *Blalock v. Clark*, 133 N. Car. 306, 45 S. E. 642.

³¹ *Poole v. Plush Co.*, 171 Mass. 49, 50 N. E. 451; *Ryberg v. Goodnow*, 59 Minn. 413, 61 N. W. 455.

³² *Poole v. Plush Co.*, 171 Mass. 49, 50 N. E. 451.

³³ *In re Youngerman's Estate*, 136 Ia. 488, 114 N. W. 7; *Nicola Bros. v. Hurst* (Ky.), 28 Ky. Law Rep. 87, 88 S. W. 1081; *Mayo v. Philadelphia Textile Machinery Co.*, 105 Va. 486, 53 S. E. 967; *Green v. Ballard*, 51 Wash. 149, 98 Pac. 95.

³⁴ *Green v. Ballard*, 51 Wash. 149, 98 Pac. 95.

certain period from date and thereafter until another period shall elapse after written notice of the termination of such contract, does not prevent such notice from being given before the expiration of the period named in the contract; and, accordingly, by giving due notice such contract may terminate at the time fixed in the contract.³⁵ A promise to do all work which may be ordered in a certain period of time requires performance of all orders received in such time, although performance can not be had until after such period has elapsed.³⁶ A promise by A to pay for X's tuition, books and clothing "during the time he is in school aforesaid," is to be construed in connection with B's covenant to pay for X's board and lodging at school "for the next four years," and accordingly A is not bound to make such payments for more than four years, although X's preparation is such that he is unable to complete the course in four years.³⁷ Under a contract which provides for settlements under a theatrical contract at the end of each performance, or at such times as may be agreed upon mutually, either party may demand a settlement at the end of each performance.³⁸ A contract by which a corporation agrees to make certain payments as long as such corporation or its successors or assigns occupy certain realty, is not limited to the term of the original lease or to the duration of the charter of the corporation.³⁹ A provision in a building contract for extending time in case of certain delays, fixes the rights of the parties in case of such delays and prevents other redress.⁴⁰ If A makes an offer requiring performance by June first, with a penalty for delivery, and B refuses to consent to the payment of such penalty, the act of the parties in acquiescing in B's beginning performance under such contract is to be regarded as an acquiescence in June first, or at least within a reasonable time thereafter as the time for performance.⁴¹ A contract which provides for payment on the fifteenth and thirtieth of each month, the amount of such payment not to exceed a certain amount or certain quantity of product, does not require payment of such amount as soon as each quantity of

³⁵ *Mayo v. Philadelphia Textile Machinery Co.*, 105 Va. 486, 53 S. E. 967.

³⁶ *Robert Smith Printing Co. v. Board of State Auditors*, 148 Mich. 561, 112 N. W. 130.

³⁷ *In re Youngerman's Estate*, 136 Ia. 488, 114 N. W. 7.

³⁸ *Comstock Amusement Co. v. Opera Ball Co.*, 93 O. S. 46, 112 N. E. 150.

³⁹ *Arlington Hotel Co. v. Rector*, 124 Ark. 90, 186 S. W. 622.

⁴⁰ *Goss v. Northern Pacific Hospital Association*, 50 Wash. 236, 96 Pac. 1078.

⁴¹ *Kelley v. Hart-Parr Co.*, 137 Ia. 713, 115 N. W. 490.

product was prepared; but the reference to the amount or quantity of product was put in for determining the amount to be paid and not the time at which it is to be paid.⁴² A contract by which A agrees to act for B during B's life, and to act as executor of B's estate on B's death, is not a mere contract of agency,⁴³ and accordingly does not end at B's death.⁴⁴

§ 2098. Reasonable time intended if time not fixed. If the contract does not fix a time for performance and the obligation is something other than the payment of money which is due and owing when the contract is entered into, the presumption is that a reasonable time for performance is intended.¹ This rule is said by some authorities to be applicable to all contracts except to de-

⁴² *Nicola Bros. v. Hurst* (Ky.), 28 Ky. Law Rep. 87, 88 S. W. 1081.

⁴³ *In re McIntosh's Estate* (Ia.), 159 N. W. 223.

⁴⁴ *In re McIntosh's Estate* (Ia.), 159 N. W. 223.

¹ *United States*. *In re Hellams*, 223 Fed. 460; *Burpee v. Guggenheim*, 226 Fed. 214; *Guastavino Co. v. United States*, 50 Ct. Cl. 115.

Alabama. *Comer v. Way*, 107 Ala. 300, 54 Am. St. Rep. 93, 19 So. 966; *Griffin v. Ogletree*, 114 Ala. 343, 21 So. 488; *McFadden v. Henderson*, 128 Ala. 221, 29 So. 640; *Elliott v. Howison*, 146 Ala. 568, 40 So. 1018; *Equitable Manufacturing Co. v. Howard*, 148 Ala. 664 (memorandum opinion), 41 So. 628; *Pratt Consolidated Coal Co. v. Short*, 191 Ala. 378, 68 So. 63.

California. *Brookings Lumber & Box Co. v. Manufacturers' Automatic Sprinkler Co.*, 173 Cal. 679, 161 Pac. 266.

Connecticut. *Saraceno v. Carrano*, 92 Conn. 563, 103 Atl. 631.

Georgia. *Bryant v. Atlantic Coast Line Ry.*, 119 Ga. 607, 46 S. E. 829; *Bearden Mercantile Co. v. Madison Oil Co.*, 128 Ga. 695, 58 S. E. 200.

Illinois. *McKinnie v. Lane*, 230 Ill. 544, 120 Am. St. Rep. 338, 82 N. E. 878

Kansas. *Atchison, etc., R. R. v. Burlingame Township*, 36 Kan. 628, 59 Am. Rep. 578, 14 Pac. 271.

Kentucky. *Hildreth v. Ayer & Lord Tie Co.* (Ky.), 108 S. W. 255, 32 Ky. Law Rep. 1212.

Massachusetts. *Howe v. Taggart*, 133 Mass. 284; *Lewis v. Worrell*, 185 Mass. 572, 71 N. E. 73; *Clark v. Gulesian*, 197 Mass. 492, 84 N. E. 94.

Michigan. *Calkins v. Chandler*, 36 Mich. 320, 24 Am. Rep. 593.

Minnesota. *Tingue v. Patch*, 93 Minn. 437, 101 N. W. 792.

Mississippi. *Dutton v. Shaw* (Miss.), 38 So. 638.

North Carolina. *Winders v. Hill*, 141 N. Car. 604, 54 S. E. 440 (obiter); *Holden v. Royal*, 169 N. Car. 676, 86 S. E. 583.

Ohio. *Van Arsdale v. Brown*, 18 Ohio C. C. 52, 9 Ohio C. D. 488; *Stewart v. Herron*, 77 O. S. 130, 82 N. E. 956.

Pennsylvania. *Ehinger v. John Baizley Ironworks*, 248 Pa. St. 309, 93 Atl. 1074; *Markley v. Godfrey*, 254 Pa. St. 99, 98 Atl. 785.

Utah. *Gammon v. Bunnell*, 22 Utah 421, 64 Pac. 958.

Vermont. *Dennis v. Stoughton*, 55 Vt. 376.

Virginia. *Merriman v. Cover*, 104 Va. 428, 51 S. E. 817.

mands for the payment of money.² In some of the cases in which this question is decided, the contract was one of which time was not of the essence,³ and accordingly even if the contract had specified a time for performance, a performance after such time, but within a reasonable time, could not have been treated as a breach.⁴ If performance is made within such reasonable time, no default exists; nor can default exist until a reasonable time has elapsed.⁵ Refusal to perform for such time in the future as is not reasonable prevents the objection that the time within which performance was requested was not reasonable.⁶ On the other hand, failure to perform within a reasonable time constitutes a breach.⁷ Performance of such a contract after a reasonable time is unavailing if the adversary party has not consented to an extension of time.⁸ The principle that a reasonable time is implied if no time is fixed applies to contracts for the sale of land,⁹ or of personalty;¹⁰ as a contract to assign a patent;¹¹ to building contracts;¹² or to

Washington. *Andrews v. Uncle Joe Diamond Broker*, 44 Wash. 668, 87 Pac. 947.

West Virginia. *Poling v. Lumber Co.*, 55 W. Va. 529, 47 S. E. 279.

² *Poling v. Condon-Lane Boom & Lumber Co.*, 55 W. Va. 529, 47 S. E. 279.

³ See §§ 2103 et seq.

⁴ *Puls v. Casey*, 18 Okla. 142, 92 Pac. 388.

⁵ *Equitable Manufacturing Co. v. Howard*, 148 Ala. 664, 41 So. 628; *Bell v. Mendenhall*, 78 Minn. 57, 80 N. W. 843; *Holden v. Royal*, 160 N. Car. 676, 86 S. E. 583; *Markley v. Godfrey*, 254 Pa. St. 90, 98 Atl. 785.

⁶ *Reynolds v. Reynolds*, 74 Vt. 463, 52 Atl. 1036.

⁷ **United States.** *Guastavino Co. v. United States*, 50 Ct. Cl. 115.

Georgia. *Bryant v. Atlantic Coast Line R. Co.*, 119 Ga. 607, 46 S. E. 829.

Kentucky. *Hume v. Mullins (Ky.)*, 35 S. W. 551.

Michigan. *Gainor v. Boom Co.*, 86 Mich. 112, 48 N. W. 787.

Rhode Island. *Lynd v. Printing Co.*, 20 R. I. 344, 39 Atl. 188.

⁸ *Meador v. Allen*, 110 Ia. 588, 81 N. W. 799.

⁹ *Noyes v. Barnard*, 63 Fed. 782; *Michael v. Foil*, 100 N. Car. 178, 6 Am. St. Rep. 577, 6 S. E. 264; *Williamson v. Neeves*, 94 Wis. 656, 60 N. W. 806.

¹⁰ **Illinois.** *McKinnie v. Lane*, 230 Ill. 544, 120 Am. St. Rep. 338, 82 N. E. 878.

Iowa. *Boyce v. Timpe (Ia.)*, 89 N. W. 83.

Montana. *Watkins v. Morris*, 16 Mont. 309, 40 Pac. 600.

Oklahoma. *Puls v. Casey*, 18 Okla. 142, 92 Pac. 388.

South Carolina. *Smith v. Machine Co.*, 46 S. Car. 511, 24 S. E. 376.

¹¹ *Niles v. Graham*, 181 Mass. 41, 62 N. E. 986.

¹² **House.** *Lane v. Hardware Co.*, 121 Ala. 296, 25 So. 809; *Brodek v. Farnum*, 11 Wash. 565, 40 Pac. 189. *Steam plant.* *North v. Mallory*, 94 Md. 305, 51 Atl. 89. *Electric lighting plant.* *Florence, etc., Co. v. Hanby*, 101 Ala. 15, 13 So. 343. *Flouring mill.* *Van stone v. Mfg. Co.*, 142 U. S. 128, 35 L. ed. 961; *Clark v. Gulesian*, 197 Mass. 492, 84 N. E. 94.

contracts for work and labor,¹³ such as contracts for repairing machinery;¹⁴ or to contracts for installing a machine,¹⁵ such as an automatic sprinkler to prevent fire;¹⁶ or to contracts for hauling logs,¹⁷ or driving logs;¹⁸ or for mining all the coal in certain territory;¹⁹ or procuring a loan;²⁰ or effecting a sale of real estate;²¹ or purchasing property as agent on behalf of a principal;²² or to furnish a vessel and deliver lumber;²³ or to give notice of the quantity of goods which a carrier was willing to transport;²⁴ or to cut and remove timber;²⁵ or to forbear a legal right,²⁶ as enforcing a lien.²⁷ A contract by which an agent agrees that services or property furnished to his principal may be charged to him "for the present," implies an indefinite and reasonable time, provided notice is not given to terminate such liability.²⁸ So an option, the time for the exercise of which is not fixed, must be exercised in a reasonable time.²⁹ So a contract to repurchase stock at the end of a given time, if the vendee holds it then and wishes to sell it, has been held to give the vendee a reasonable time after the end of such period to make his election.³⁰ The purchaser of realty has

¹³ *Dutton v. Shaw* (Miss.), 38 So. 638.

¹⁴ *Dutton v. Shaw* (Miss.), 38 So. 638.

¹⁵ *Brookings Lumber & Box Co. v. Manufacturers' Automatic Sprinkler Co.*, 173 Cal. 679, 161 Pac. 266.

¹⁶ *Brookings Lumber & Box Co. v. Manufacturers' Automatic Sprinkler Co.*, 173 Cal. 679, 161 Pac. 266.

¹⁷ *Griffin v. Ogletree*, 114 Ala. 343, 21 So. 488; *Greenwood v. Davis*, 106 Mich. 230, 64 N. W. 26.

¹⁸ *Bonifay v. Hassell*, 100 Ala. 269, 14 So. 46; *Gainor v. Boom Co.*, 86 Mich. 112, 48 N. W. 787; *Day v. Gravel*, 72 Minn. 159, 75 N. W. 1.

¹⁹ *Pratt Consolidated Coal Co. v. Short*, 191 Ala. 378, 68 So. 63.

²⁰ *Collier v. Weyman*, 114 Ga. 944, 41 S. E. 50.

²¹ *Boyd v. Watson*, 101 Ia. 214, 70 N. W. 120.

Contra, that such a contract is revocable at the will of the owner of the realty. *Woods v. Hart*, 50 Neb. 497, 70 N. W. 53.

²² *Hildreth v. Ayer & Lord Tie Co.* (Ky.), 108 S. W. 255, 32 Ky. Law Rep. 1212.

²³ *Whiting v. Gray*, 27 Fla. 482, 11 L. R. A. 526, 8 So. 726.

²⁴ *Merriman v. Cover*, 104 Va. 428, 51 S. E. 817.

²⁵ *Ferguson v. Arthur*, 128 Mich. 297, 87 N. W. 259.

A grant of timber conveys the right to cut it at any time. *Lodwick Lumber Co. v. Taylor*, 100 Tex. 270, 123 Am. St. Rep. 803, 98 S. W. 238.

²⁶ *Moore v. McKenney*, 83 Me. 80, 21 Atl. 749.

²⁷ *Anderson v. Wainwright*, 67 Ark. 62, 53 S. W. 566. (An agreement to refrain from sale and collect the debt out of the rents.)

²⁸ *Lewis v. Worrell*, 185 Mass. 572, 71 N. E. 73.

²⁹ *Saraceno v. Carrano*, 92 Conn. 563, 103 Atl. 631; *Catlin v. Green*, 120 N. Y. 441, 24 N. E. 941.

³⁰ *Maurer v. King*, 127 Cal. 114, 59 Pac. 290; *La Dow v. Bement*, 119 Mich. 685, 45 L. R. A. 479, 70 N. W. 1048.

ordinarily a reasonable time to examine the abstract of title before paying the purchase price.³¹ So a contract to furnish capital as needed gives a reasonable time after notice that it is needed to furnish it.³² So a contract to submit a cause to the judge at the next term of court, a jury to be waived and no appeal or error to be taken, requires that the complaint should be filed in time to allow a reasonable time to file an answer.³³ A contract which provides for a test after delivery of the article sold, and before final acceptance, gives a reasonable time for making such test.³⁴ A contract by which the purchaser of goods which are to be manufactured is to give an adequate guaranty, requires him to give it in a reasonable time,³⁵ and under the circumstances of the case this is such a time before the time fixed for performance by the manufacturer, that the manufacturer will be able to perform the contract after the guaranty is furnished.³⁶ A contract by which a pawnbroker agrees that a pledge may be redeemed at a specified price within a certain time and at a greater price after such time, gives a reasonable time after the expiration of such period for redeeming the pledge at the higher rate.³⁷

Language which shows the intention of the parties to require prompt performance, but which does not provide for performance within a specified period of time or upon the happening of a specified event, has been treated as requiring performance within a reasonable time in view of all the circumstances of the case.³⁸ A contract that certain work should be done "with all possible dispatch,"³⁹ or "faithfully and continuously,"⁴⁰ has been held to contemplate performance within a reasonable time. Provisions which require performance "immediately,"⁴¹ or "at once,"⁴² or

³¹ *Pennsylvania Mining Co. v. Thomas*, 204 Pa. St. 325, 54 Atl. 101.

³² *Niles v. Graham*, 181 Mass. 41, 62 N. E. 986.

³³ *Pendleton v. Light Co.*, 121 N. Car. 20, 27 S. E. 1003. (The complaint was offered for filing in this case on the last day of the term when the judge was about to leave the bench.)

³⁴ *Edison, etc., Co. v. Navigation Co.*, 8 Wash. 370, 40 Am. St. Rep. 910, 24 L. R. A. 315, 36 Pac. 260.

See also, *Turner v. Foundry Co.*, 97 Mich. 166, 634, 56 N. W. 356, 57 N. W. 192.

³⁵ *Burpee v. Guggenheim*, 226 Fed. 274.

³⁶ *Burpee v. Guggenheim*, 226 Fed. 214.

³⁷ *Andrews v. Uncle Joe Diamond Broker*, 44 Wash. 668, 87 Pac. 947.

³⁸ *Rowan v. Sharps' Rifle Mfg. Co.*, 33 Conn. 1.

³⁹ *Rowan v. Sharps' Rifle Mfg. Co.*, 33 Conn. 1.

⁴⁰ *Hagerman v. Cowles*, 14 N. M. 422, 94 Pac. 946.

⁴¹ *Inman v. Barnum*, 115 Ga. 117, 41 S. E. 244.

⁴² *Oklahoma Vinegar Co. v. Hamilton*, 132 Ala. 593, 32 So. 306.

provisions for "prompt shipment,"⁴³ require performance in a time which is less than would be regarded as a reasonable time, if such provisions were not inserted in the contract. The provision that performance must be made "immediately," is regarded as requiring performance at once; and it is error to instruct the jury that it means "as soon as could practically be done."⁴⁴

If the obligation of the contract is to pay a sum of money which is due and owing when the contract is entered into, and no provision is made by the terms of the contract for the time at which such money is to be paid, such payment will be regarded as due at once or upon demand.⁴⁵ A contract which provides for "annual payments," without fixing the amount for each, implies payments of such amounts that the entire sum will be paid in a reasonable time.⁴⁶

Contracts which call for the performance of a continuous series of acts and which do not fix a time at which performance is to terminate, are often said to be subject to termination at the will of either party.⁴⁷ A contract of employment which contemplates continuous performance by either party and which does not fix the time at which such employment is to terminate, may be terminated at the will of either party.⁴⁸ A contract by which a brewing company agrees to furnish beer to a bottling company, which does not

⁴³ *Soper v. Creighton*, 93 Me. 564, 74 Am. St. Rep. 375, 45 Atl. 840; *Tobias v. Lisaberger*, 105 N. Y. 404, 59 Am. Rep. 509, 12 N. E. 13.

⁴⁴ *Streeter v. Streeter*, 43 Ill. 155.

⁴⁵ *United States. Jacoby v. Jacoby*, 103 Fed. 473.

Georgia. *Hotel Lanier Co. v. Johnson*, 103 Ga. 604, 30 S. E. 558.

Kansas. *First National Bank v. Lightner*, 74 Kan. 736, 118 Am. St. Rep. 353, 8 L. R. A. (N.S.) 231, 11 Am. & Eng. Ann. Cas. 596, 88 Pac. 59.

Ohio. *Jones v. Brown*, 11 O. S. 601.

Pennsylvania. *Rhone v. Keystone Coal Co.*, 250 Pa. St. 336, 95 Atl. 530; *Kann v. Kann*, 256 Pa. St. 103, 100 Atl. 582.

Wisconsin. *Westburg v. Chicago Lumber & Coal Co.*, 117 Wis. 589, 94 N. W. 572 (obiter).

⁴⁶ *Tingue v. Patch*, 93 Minn. 437, 101 N. W. 792.

⁴⁷ *Davis v. Fidelity Fire Ins. Co.*, 208 Ill. 375, 70 N. E. 359; *Joliet Bottling Co. v. Joliet Citizens' Brewing Co.*, 254 Ill. 215, 98 N. E. 263; *Arkansas Valley Town & Land Co. v. Atchison, T. & S. F. Ry. Co.*, 49 Okla. 282, 151 Pac. 1028; *Stonega Coal & Coke Co. v. Louisville & N. R. Co.*, 106 Va. 223, 9 L. R. A. (N.S.) 1184, 55 S. E. 551; *Resener v. Watts*, 73 W. Va. 342, 51 L. R. A. (N. S.) 629, 80 S. E. 839.

⁴⁸ **California.** *De Briar v. Minturn*, 1 Cal. 450.

Delaware. *Greer v. Mfg. Co.*, 1 Penn. (Del.) 581, 43 Atl. 609.

Kentucky. *Louisville & N. R. Co. v. Offutt*, 99 Ky. 427, 59 Am. St. Rep. 467, 36 S. W. 181.

Maryland. *McCullough Iron Co. v. Carpenter*, 67 Md. 554, 11 Atl. 176.

specify the time for performance, may be terminated by either party at will.⁴⁹ A contract by which it was agreed that A should build a branch railroad over his land and permit the B railway company to move cars over such branch road, the B railroad company would transport certain goods over such connecting line free of charge if they were destined to points of the main line of the B railway company, was held to be subject to termination by the railway company at its election if no time for performance was fixed.⁵⁰ A contract by which A agrees to furnish goods to B at fixed prices and which does not provide for its duration, has been said to be subject to termination by either at will upon notice,⁵¹ or at least to termination after a reasonable time and upon reasonable notice.⁵² This rule, however, is said not to apply to a case in which a water company has agreed to furnish water in consideration of an easement to build its line across certain realty.⁵³

If a contract provides for the payment of money for goods, services, and the like, such money is due and payable when such goods are furnished or such labor is performed,⁵⁴ unless the other terms of the contract show that payment was to be made at some other time.⁵⁵ This principle applies even if the compensation is

New York. *Copp v. Colorado Coal & I. Co.*, 46 N. Y. Supp. 542, 20 Misc. 702; *Martin v. New York L. Ins. Co.*, 148 N. Y. 117, 42 N. E. 416.

North Carolina. *Edwards v. Seaboard R. Co.*, 121 N. Car. 490, 28 S. E. 137.

Oregon. *Christensen v. Borax Co.*, 26 Or. 302, 38 Pac. 127.

Pennsylvania. *Kirk v. Hartman*, 63 Pa. St. 97.

Rhode Island. *Booth v. National India Rubber Co.*, 19 R. I. 696, 36 Atl. 714.

Wisconsin. *Prentiss v. Ledyard*, 28 Wis. 131.

A contract of employment upon a weekly, monthly or annual salary, but without any fixed period of employment, is prima facie a contract which may be terminated at the will of either party. *Resener v. Watts*, 73 W. Va. 342, 51 L. R. A. (N.S.) 629, 80 S. E. 839

⁴⁹ *Joliet Bottling Co. v. Brewing Co.*, 254 Ill. 215, 98 N. E. 263.

⁵⁰ *Stonega Coal & Coke Co. v. Louisville & N. R. Co.*, 106 Va. 223, 9 L. R. A. (N.S.) 1184, 55 S. E. 551.

⁵¹ *Victor Talking Machine Co. v. Lucker*, 128 Minn. 171, 150 N. W. 790; *Irish v. Dean*, 39 Wis. 562.

⁵² *Electric Ry. v. Tennessee Coal & Iron Ry. Co.*, 98 Ga. 189, 26 S. E. 741; *McCullough-Dalzell Crucible Co. v. Philadelphia Co.*, 223 Pa. St. 336, 72 Atl. 633.

⁵³ *Southern Pacific Co. v. Spring Valley Water Co.*, 173 Cal. 291, L. R. A. 1917E, 680, 159 Pac. 865.

⁵⁴ *In re Hellams*, 223 Fed. 460; *Stewart v. Newbury*, 220 N. Y. 379, 115 N. E. 984.

⁵⁵ *Lord v. Miller*, 86 Wash. 436, 150 Pac. 631. For performance as a covenant precedent to a covenant to pay for such performance, see Ch. LXXXVIII.

fixed at a certain sum per year.⁵⁶ However, a contract by A to employ B as long as A is engaged in the saw-mill business on the Ohio River, does not give to A the right to discharge B at will.⁵⁷ If a building contract provides that a contractor is to give bond and does not specify at what time the bond is to be given, such bond is to be given as soon as the contract is entered into.⁵⁸ If a seller agrees to give a bond for the purchase price, such bond must be given at least within a reasonable time after the contract was made.⁵⁹ If A agrees to sell corporate stock to B, and A is to retain the dividends upon the stock and apply such dividends to the payment of four per cent. interest upon the purchase price, and the balance upon the purchase price, and the stock is to belong to the buyer when it is paid for by dividends or otherwise, a reasonable time for performance on both sides will be implied.⁶⁰

§ 2099. Reasonable time—Whether question of law or fact. What is a reasonable time for performance is a question of fact to be determined as a fact, in view of the circumstances of the case.¹ Accordingly, if an action is brought on an agreement to accept a conveyance and in consideration thereof to execute a written contract to pay a certain mortgage, and to reconvey on payment of the amount of such mortgage, and the defense is that plaintiff delayed an unreasonable time before performing the conditions precedent on his part to be performed, it is not error for the court to refuse to charge that a delay of four months would be

⁵⁶ Greer v. Mfg. Co., 1 Penn. (Del.) 581, 43 Atl. 609.

⁵⁷ Yellow Poplar Lumber Co. v. Rule, 106 Ky. 455, 50 S. W. 685. So under a contract whereby A agrees to employ B as long as A shall make use of B's patents. Raymond v. White, 119 Mich. 438, 78 N. W. 469.

⁵⁸ Clark v. Gülesian, 197 Mass. 492, 84 N. E. 94.

⁵⁹ Equitable Mfg. Co. v. Howard, 148 Ala. 664 (memorandum opinion), 41 So. 628.

⁶⁰ Stewart v. Herron, 77 O. S. 130, 82 N. E. 956.

¹ United States. In re Hellams, 223 Fed. 460.

Alabama. Watts v. Sheppard, 2 Ala. 425; Drake v. Goree, 22 Ala. 409.

California. Campbell v. Heney, 128 Cal. 109, 60 Pac. 532.

Florida. Jenkins v. Lykes, 19 Fla. 148, 45 Am. Rep. 19.

Georgia. Bearden Mercantile Co. v. Madison Oil Co., 128 Ga. 695, 58 S. E. 200.

Kansas. Morrison v. Wells, 48 Kan. 494, 20 Pac. 601.

New Mexico. Hagerman v. Cowles, 14 N. M. 422, 94 Pac. 946.

Oregon. Elder v. Rourke, 27 Or. 363, 41 Pac. 6.

South Carolina. Hays v. Hays, 10 Rich. L. (S. Car.) 419.

Wisconsin. Boyington v. Sweeney, 77 Wis. 55, 45 N. W. 938.

unreasonable.² On the other hand, a notice for performance in eighty days, given to the vendor, followed by demand for performance in five days, followed by a delay of six weeks before bringing a suit for specific performance, has been held as a fact to give to the vendor a reasonable time for performance.³ Under a contract which provides for performance to begin at a certain time and to progress "faithfully and continuously," the question of what was a reasonable time for the performance of such contract was said to be a question for the jury.⁴ In many cases it has been said that this question is one of law,⁵ where the essential facts are not in dispute.⁶ This, however, means nothing more than that if this fact, like any other fact, is either conceded by the parties to exist or is established by uncontradicted evidence, it can not be said to be a fact in issue, to be decided as the facts in issue are decided.

§ 2100. Time of performance with reference to extrinsic fact.

The time of performance is sometimes made to depend upon the doing of some specified act other than that which the parties to the contract agree to do or it is made to depend upon the happening of some event which the parties to the contract do not covenant to cause to happen.¹ The tendency of the courts is to hold that unless the contract shows clearly that such an action is an express condition,² the provision with reference to such act is inserted in order to fix the time of performance, but not to make

² *Peabody v. Fellows*, 181 Mass. 26, 62 N. E. 1053.

³ *Harding v. Olson*, 177 Ill. 298, 52 N. E. 482 [affirming, 76 Ill. App. 475].

⁴ *Hagerman v. Cowles*, 14 N. M. 422, 94 Pac. 946.

⁵ *Luckhart v. Ogden*, 30 Cal. 547; *Attwood v. Clark*, 2 Me. 249; *Echols v. Railroad Co.*, 52 Miss. 610.

⁶ *Cotton v. Cotton*, 75 Ala. 345; *Hill v. Hobart*, 16 Me. 164; *Hedges v. R. R.*, 49 N. Y. 223.

¹ *California*. *Remy v. Olds*, 88 Cal. 537, 26 Pac. 355.

Kansas. *Greenstreet v. Cheatum*, 99 Kan. 290, 161 Pac. 596.

Kentucky. *Collins v. Park*, 93 Ky. 6, 18 S. W. 1013, *Fox v. Commercial*

Press Co. (Ky.), 88 S. W. 1063, 28 Ky. Law Rep. 44.

Massachusetts. *Magnolia Metal Co. v. Gale*, 189 Mass. 124, 75 N. E. 219.

Michigan. *McKinnon Mfg. Co. v. Fish Co.*, 102 Mich. 221, 60 N. W. 472.

Minnesota. *Yanish v. J. Neils Lumber Co.*, 101 Minn. 78, 11 L. R. A. (N.S.) 92, 111 N. W. 921.

Ohio. *Wright v. Hull*, 83 O. S. 385, 94 N. E. 813.

Oklahoma. *Leeper Bros. Lumber Co. v. Gunter*, — Okla. —, 160 Pac. 606.

Utah. *White v. Century Gold Min. & Mill. Co.*, 28 Utah 331, 78 Pac. 868.

² See §§ 2564 et seq.

the doing of such act or the happening of such event a condition precedent. If this is the intention of the parties, the fact that such act is not performed or that such event does not happen, does not discharge the contract, and the act which the parties agree to do upon the performance of such act or upon the happening of such event, is to be performed in at least a reasonable time.³ This principle has been applied to a promise to pay when the maker has finished a church then building;⁴ or to pay when a certain dispute is settled;⁵ or "as soon as the crop can be sold or the money raised from any other source;"⁶ or when the promisor shall sell the place he lives in;⁷ or to pay in twelve months, "or as soon as I can sell the above amount of Allen's Vegetable Tonic";⁸ or to credit the amount of the debtor's cigars sold by the creditor, upon the debt and thus extinguish it;⁹ or when other specified property is sold at a specified price;¹⁰ or to pay in four months or as soon as the promisor shall collect a certain note;¹¹ or to pay by a certain date, "on the condition that the banks of Tennessee have resumed specie payment at that time; if not, as soon thereafter as they do resume specie payment";¹² or to pay by a certain day,

³ *United States. Nunez v. Dautel*, 86 U. S. (19 Wall.) 560, 22 L. ed. 161; *Jacoby v. Jacoby*, 103 Fed. 473.

Alabama. Crass v. Scruggs, 115 Ala. 258, 22 So. 81.

California. Poirier v. Gravel, 88 Cal. 79, 25 Pac. 962.

Florida. Whiting v. Gray, 27 Fla. 482, 11 L. R. A. 526, 8 So. 726.

Georgia. Eaton v. Yarborough, 19 Ga. 82; *Bryant v. Atlantic Coast Line Ry.*, 119 Ga. 607, 46 S. E. 829.

Illinois. Harlow v. Boswell, 15 Ill. 56; *McCarty v. Howell*, 24 Ill. 341.

Kansas. Greenstreet v. Cheatum, 99 Kan. 290, 161 Pac. 596.

Maine. Crooker v. Holmes, 65 Me. 195, 20 Am. Rep. 687.

Massachusetts. Alvord v. Cook, 174 Mass. 120, 75 Am. St. Rep. 288, 54 N. E. 499.

Mississippi. Randall v. Johnson, 59 Miss. 317, 42 Am. Rep. 365.

Ohio. Wright v. Hull, 83 O. S. 385, 94 N. E. 813.

Oregon. Noland v. Bull, 24 Or. 479, 33 Pac. 983.

Tennessee. Walters v. McBee, 69 Tenn. (1 Lea) 364.

Utah. White v. Century Gold Min. & Mill. Co., 28 Utah 331, 78 Pac. 868.

⁴ *Eaton v. Yarborough*, 19 Ga. 82.

⁵ *Bryant v. Atlantic Coast Line Ry.*, 119 Ga. 607, 46 S. E. 829.

⁶ *Nunez v. Dautel*, 86 U. S. (19 Wall.) 560, 22 L. ed. 161.

⁷ *Crooker v. Holmes*, 65 Me. 195, 20 Am. Rep. 687. (Hence judgment and levy on such property does not relieve the promisor from liability to pay in a reasonable time.)

⁸ *Harlow v. Boswell*, 15 Ill. 56.

⁹ *Jacoby v. Jacoby*, 103 Fed. 473.

¹⁰ *Noland v. Bull*, 24 Or. 479, 33 Pac. 983. As to pay a commission by conveying realty when other realty is exchanged. *Alvord v. Cook*, 174 Mass. 120, 75 Am. St. Rep. 288, 54 N. E. 499.

¹¹ *McCarty v. Howell*, 24 Ill. 341.

¹² *Walters v. McBee*, 69 Tenn. (1 Lea) 364.

"or as soon thereafter as said railroad company" shall make certain payments to the promisor,¹³ and to a contract to deliver lumber at a certain time, "or as soon thereafter as vessel can be got ready."¹⁴ If A agrees for value to pay a certain amount to B when A's residence can be sold for a certain price, A's promise is not discharged by the fact that the house is burned and if A collects insurance thereon such debt becomes due and payable within a reasonable time after A has collected such insurance.¹⁵ A promise to pay a certain amount "out of the first receipts from coal lands," after the promisor was reimbursed for a certain amount which he had invested, imposes a duty to pay in at least a reasonable time.¹⁶ If a mining company makes a promise for value to pay an amount out of the proceeds of ore sales and compromises, it is bound absolutely, if the amount received from ore sales and compromises is not sufficient, to pay such debt within a reasonable time.¹⁷ A note, payable ninety days after the return of a specified ship, is payable in case such ship is lost, ninety days after the time usually required for such a trip.¹⁸ If a promise is made to pay a certain sum when it is realized from the sale of the products of certain lands, such sum is due at once as soon as the promisor has made literal performance impossible by selling such land.¹⁹ An agreement to pay the consideration for a conveyance to the grantor's grandson when he reaches the age of twenty-one, is not discharged by his death before reaching such age, but his legal representatives may recover the amount when such grandson would have been twenty-one had he lived.²⁰

A promise to pay when able is held in some jurisdictions to imply a promise to pay in at least a reasonable time. This principle has been applied to contracts to pay "when I can make it convenient,"²¹ "as fast as I can spare the same from my salary,"²² as fast as the promisor was financially able without sacrificing his

¹³ *Crass v. Scruggs*, 115 Ala. 258, 22 So. 81.

¹⁴ *Whiting, v. Gray*, 27 Fla. 482, 11 L. R. A. 526, 8 So. 726.

¹⁵ *Greenstreet v. Cheatum*, 99 Kan. 290, 161 Pac. 596.

¹⁶ *Wright v. Hull*, 83 O. S. 385, 94 N. E. 813. (In such a case a reasonable time would expire, at least at the end of ten years.)

¹⁷ *White v. Century Gold Min. & Mill. Co.*, 28 Utah 331, 78 Pac. 868.

¹⁸ *Randall v. Johnson*, 59 Miss. 317, 42 Am. Rep. 365.

¹⁹ *Poirier v. Gravel*, 88 Cal. 79, 25 Pac. 962.

²⁰ *Haines v. Weirick*, 155 Ind. 548, 58 N. E. 712.

²¹ *Lewis v. Tipton*, 10 O. S. 88, 75 Am. Dec. 498.

²² *Culver v. Caldwell*, 137 Ala. 125, 34 So. 13.

interests in a given corporation, for stock in which the contract in question was made,²³ or "when payor and payee mutually agree."²⁴ In other jurisdictions a promise to pay as the debtor "might feel able to pay," is held to leave the time of payment in the bona fide and honest judgment of the debtor, though a legal liability is created by such contract.²⁵ If the debtor is in fact financially able to pay, he is bound to make the payment stipulated under such contract.²⁶ An express provision that payment shall not be made until a certain event occurs, leaves no room for construction and is given full force and effect.²⁷

If a provision is inserted in a contract that a party who saws logs into lumber is not to be paid until the adversary party has sold the lumber, payment is not due until such sale.²⁸

If the contract shows that the parties intended to make such act or event a condition precedent to the payment of the money, full effect must be given to such intention and such payment can not be enforced until such act or event occurs.²⁹ A promise which is made for value by which A agrees to pay to B a deposit which B has made with the United States Government, when the government should permit such deposit to be applied to the payment of a contract between B and the United States Government, which contract B has assigned to A, requires A to pay to B such parts of such deposits as the government by a change in rule permits to be applied to the payment under such contract.³⁰ If the contract of a subcontractor does not contain an express provision with reference to the time of performance, it will be construed as requiring performance so as to enable the principal contractor to perform his contract,³¹ at least if the subcontractor knows of the provisions of the principal contract.³²

²³ *Chadwick v. Hopkins*, 4 Wyom. 379, 62 Am. St. Rep. 38, 34 Pac. 899. (A delay of four years was held more than a reasonable time.)

²⁴ *Page v. Cook*, 164 Mass. 116, 49 Am. St. Rep. 449, 28 L. R. A. 759, 41 N. E. 115.

²⁵ *Pistel v. Ins. Co.*, 88 Md. 552, 43 L. R. A. 219, 42 Atl. 210.

²⁶ *Flather v. Machine Co.*, 71 N. H. 398, 52 Atl. 454.

²⁷ *Gardner v. Edwards*, 119 N. Car. 566, 26 S. E. 155. See §§ 2564 et seq.

²⁸ *Gardner v. Edwards*, 119 N. Car. 566, 26 S. E. 155.

²⁹ *Fox v. Commercial Press Co.* (Ky.), 88 S. W. 1063, 28 Ky. Law Rep. 44; *Pfantz v. Humburg*, 82 O. S. 1, 91 N. E. 863; *Leeper Bros. Lumber Co. v. Gunter*, — Okla. —, 160 Pac. 606. See §§ 2564 et seq. and Ch. LXXXIV.

³⁰ *Yanish v. J. Neils Lumber Co.*, 101 Minn. 78, 11 L. R. A. (N.S.) 92, 111 N. W. 921.

³¹ *Noyes v. Noullet*, 118 La. 888, 43 So. 539.

³² *Noyes v. Noullet*, 118 La. 888, 43 So. 539.

§ 2101. Performance not due till end of stipulated time. If a certain time is fixed within which performance may be made, the party owing performance has the entire time thus fixed, within which to perform. Thus under an option to be exercised within a certain time, by which the vendor is required to convey land on seven days' notice, such notice may be given at any time before the expiration of the option, irrespective of whether the period of seven days will end after such time or not.¹ If A agrees to secure a certain bid for B's stock within a year, A has the whole of such year, and an offer mailed so as to reach B on the last day of such year is held to be sufficient.² So a contract of subscription conditioned on raising a certain sum by a certain day is binding if the sum is raised at a meeting held on the night of such day.³ So a contract to complete a boat by a certain time is not broken until such time has elapsed.⁴ So a contract to remove timber in certain designated years gives the whole of such years in which to remove it.⁵ Performance of a contract to sell land during A's lifetime can not be compelled in any shorter time.⁶ So in a contract of sale, if the vendor has the whole of a season in which to deliver, the vendee can not fix a time within the season for delivery.⁷ If a son agrees to pay interest to his father during the latter's life, on an amount advanced, and to settle with the father's estate, such amount, even if a debt, is not due before the father's death.⁸

§ 2102. Premature tender. If the contract fixes a certain time for performance, the party from whom performance is due has no right to perform before that time. Hence, premature tender is ineffectual.¹ It does not discharge a mortgage given to secure the debt, payment whereof is thus tendered.² So if payment is to be made in part in money and in part in an interest-bearing note, pre-

¹ Guyer v. Warren, 175 Ill. 328, 51 N. E. 580.

² Duchemin v. Kendall, 149 Mass. 171, 3 L. R. A. 784, 21 N. E. 242.

³ Elizabeth City Cotton Mills v. Dunstan, 121 N. Car. 12, 61 Am. St. Rep. 654, 27 S. E. 1001.

⁴ Vandegrift v. Engineering Co., 161 N. Y. 435, 55 N. E. 941, 48 L. R. A. 685.

⁵ Larson v. Cook, 85 Wis. 564, 55 N. W. 703.

⁶ Michael v. Foil, 100 N. Car. 178, 6 Am. St. Rep. 577, 6 S. E. 264.

⁷ Dingley v. Oler, 117 U. S. 490, 29 L. ed. 984.

⁸ Hammett v. Brown, 44 S. Car. 397, 22 S. E. 482.

¹ Bowen v. Julius, 141 Ind. 310, 40 N. E. 700.

² Bowen v. Julius, 141 Ind. 310, 40 N. E. 700; Moore v. Kime, 43 Neb. 517, 61 N. W. 736.

mature tender of the entire debt in money is ineffectual.³ So it has been held that if a vendee of stock has the right to rescind at the end of one year, tender of the stock before the end of the year is premature and ineffectual.⁴

§ 2103. Time of essence of contract—Meaning of term. When it is said that time is of the essence of a contract, it means that the provision in the contract which fixes the time of performance is to be regarded as a vital term of the contract, the breach of which may operate, at the election of the party not in default, as a discharge of the entire contract.¹ Accordingly, if time is of the essence of the contract, failure to perform at the time which is specified gives to the adversary party who is not in default the right to treat the contract as discharged.² If time is not of the essence of the contract, failure to perform at the time specified does not justify the adversary party in treating the contract as discharged. It is sufficient if the contract is performed within a reasonable time after the time which is specified in the contract.³

³ *Barbour v. Hickey*, 2 D. C. App. 207, 24 L. R. A. 763.

⁴ *Schultz v. O'Rourke*, 18 Mont. 418, 45 Pac. 634.

¹ *Elliott v. Howison*, 146 Ala. 568, 40 So. 1018; *Blish Milling Co. v. Detherage*, 155 Ky. 319, 159 S. W. 816; *Sunshine Cloak & Suit Co. v. Roquette*, 30 N. D. 143, L. R. A. 1916E, 932, 152 N. W. 359.

² *United States v. Slater v. Emerson*, 60 U. S. (19 How.) 224, 15 L. ed. 626.

Alabama. *McFadden v. Henderson*, 128 Ala. 221, 29 So. 640; *Elliott v. Howison*, 146 Ala. 568, 40 So. 1018.

California. *Vorwerk v. Nolte* (Cal.), 24 Pac. 840.

Kansas. *Garden City, Gulf & Northern Ry. Co. v. Scott County*, 82 Kan. 795, 109 Pac. 684.

Kentucky. *Monarch v. Owensboro City Ry.*, 119 Ky. 939, 85 S. W. 193.

Maryland. *Staley v. Thomas*, 68 Md. 439, 13 Atl. 53.

Montana. *Talbott v. Heinze*, 25 Mont. 4, 63 Pac. 624.

Texas. *Sanborn v. Murphy*, 86 Tex. 437, 25 S. W. 610.

Washington. *Owen v. Henderson*, 16 Wash. 39, 58 Am. St. Rep. 17, 47 Pac. 215; *Jordan v. Coulter*, 30 Wash. 116, 70 Pac. 257; *Virtue v. Stanley*, 87 Wash. 167, 151 Pac. 270.

West Virginia. *Lewis v. West Virginia Pulp Co.*, 76 W. Va. 103, 84 S. E. 1063.

³ **England.** *Hearne v. Tenant*, 13 Ves. Jr. 287.

Arkansas. *Butler v. Colson*, 99 Ark. 340, 138 S. W. 467.

Iowa. *University of Des Moines v. Trust Co.*, 87 Ia. 36, 53 N. W. 1080; *Armstrong v. Breen*, 101 Ia. 9, 69 N. W. 1125.

Kansas. *Usher v. Hollister*, 58 Kan. 431, 49 Pac. 525.

Michigan. *Solomon v. Shewitz*, 185 Mich. 620, 3 A. L. R. 557, 152 N. W. 196.

Wisconsin. *Maltby v. Austin*, 65 Wis. 527, 27 N. W. 162.

Whether or not time is of the essence of the contract is a question of construction.⁴ Time is of the essence of the contract if it appears that the provision as to time is of such importance that the parties would not have entered into the contract without such a provision.⁵ When it has been determined by the ordinary rules of construction that time is of the essence of the contract, the effect of the failure of the party in default to perform at the time stipulated is a question of breach. The question whether time is of the essence of the contract, therefore, might be treated under either or both of the headings of construction or discharge.

§ 2104. Time of essence at law. At law the general rule is that time is of the essence of the contract unless a contrary intent appears from the face of the contract.¹ A contract for the sale of chattels, especially those of fluctuating value, is a contract of which time is of the essence.² Time is usually of the essence of mercantile contracts,³ such as wholesale contracts of sale of

⁴ *Lenon v. Mutual Life Ins. Co.*, 80 Ark. 563, 8 L. R. A. (N.S.) 193, 10 Am. & Eng. Ann. Cas. 467, 98 S. W. 117; *Reynor v. Mackrill*, 181 Ia. 210, 1 A. L. R. 523, 164 N. W. 335; *Watson v. Feibel*, 139 La. 375, 71 So. 585; *Sunshine Cloak & Suit Co. v. Roquette*, 30 N. D. 143, L. R. A. 1916E, 932, 152 N. W. 359.

⁵ *Watson v. Feibel*, 139 La. 375, 71 So. 585.

¹ *United States. Slater v. Emerson*, 60 U. S. (19 How.) 224, 15 L. ed. 626; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 30 L. ed. 920; *Hull, etc., v. Coke Co.*, 113 Fed. 256.

Georgia. Savannah Ice Delivery Co. v. Transit Co., 110 Ga. 142, 35 S. E. 290.

Illinois. Underwood v. Wolf, 131 Ill. 425, 19 Am. St. Rep. 40, 23 N. E. 596.

Maryland. McGrath v. Gegner, 77 Md. 331, 39 Am. St. Rep. 415, 26 Atl. 502; *Merritt v. Construction Co.*, 91 Md. 453, 46 Atl. 1013.

Oklahoma. Kansas City Life Ins. Co. v. Leedy, — Okla. —, L. R. A. 1917C, 917, 162 Pac. 769.

Texas. Garrison v. Cooke, 96 Tex. 228, 97 Am. St. Rep. 906, 61 L. R. A. 342, 72 S. W. 54; *Bounds v. Hickerson*, 26 Tex. Civ. App. 608, 63 S. W. 887.

² *Bowes v. Shand*, 2 App. Cas. 455; *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366; *Sunshine Cloak & Suit Co. v. Roquette*, 30 N. D. 143, L. R. A. 1916E, 932, 152 N. W. 359.

³ *England. Ashmore v. Cox* [1899], 1 Q. B. 436; *Bowes v. Shand*, 2 App. Cas. 455.

United States. Norrington v. Wright, 115 U. S. 188, 29 L. ed. 366; *Filley v. Pope*, 115 U. S. 213, 29 L. ed. 372; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 30 L. ed. 920.

Alabama. Lowy v. Rosengrant, 196 Ala. 337, 71 So. 439.

Iowa. Bamberger Bros. v. Burrows, 145 Ia. 441, 124 N. W. 333.

Massachusetts. Rommel v. Wingate, 103 Mass. 327; *Lefferts v. Weld*, 167 Mass. 531, 46 N. E. 107.

New York. Pope v. Porter, 102 N. Y. 366, 7 N. E. 304.

North Dakota. Sunshine Cloak & Suit Co. v. Roquette, 30 N. D. 143, L. R. A. 1916E, 932, 152 N. W. 359.

clothing,⁴ uniform-cloth,⁵ or iron,⁶ food in wholesale quantities,⁷ coal for the winter trade,⁸ or machines.⁹ A contract for the sale of a cargo of hemp to be shipped from Manila by a sailing vessel direct to New York, or via Hong Kong, during the month of April or May, is not performed by shipping it at Manila by a steamer arriving at Hong Kong on the third of June, and transshipping it by sailing vessel leaving Hong Kong on June fifth.¹⁰ Contracts to pay insurance premiums at a given time as a condition of keeping the policy alive, must be performed strictly at the time specified.¹¹ Time is not, however, of the essence of a contract to surrender a policy within six months after lapse.¹² A charter-party,¹³ which stipulates for performance at a given time, must be performed strictly at the time specified. If a charter-party pro-

Oklahoma. *Green Duck Co. v. Patterson*, 36 Okla. 392, 128 Pac. 703.

South Dakota. *Fountain City Drill Co. v. Lindquist*, 22 S. D. 7, 114 N. W. 1098.

Washington. *Nelson v. Imperial Trading Co.*, 69 Wash. 442, 125 Pac. 777. "In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods or of fulfilling contracts with third persons. A statement descriptive of the subject-matter or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent upon the failure or non-performance of which the party aggrieved may repudiate the whole contract." *Norrington v. Wright*, 115 U. S. 188, 203. 29 L. ed. 366 [quoted in *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 262, 30 L. ed. 920].

⁴ *White v. Wolf*, 185 Pa. St. 369, 39 Atl. 1011. (Delay would prevent the vendee from cataloguing and advertising the clothing.)

⁵ *Jones v. United States*, 96 U. S. 24, 24 L. ed. 644.

⁶ *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 30 L. ed. 920; *Tobias v. Lissberger*, 105 N. Y. 404, 59 Am. Rep. 509, 12 N. E. 13.

⁷ *Nelson v. Imperial Trading Co.*, 69 Wash. 442, 125 Pac. 777.

⁸ *McGinnis v. R. K. Johnson Co.*, 74 Neb. 356, 104 N. W. 869.

⁹ *Fountain City Drill Co. v. Lindquist*, 22 S. D. 7, 114 N. W. 1098.

¹⁰ *Lefferts v. Weld*, 167 Mass. 531, 46 N. E. 107.

¹¹ *New York Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. ed. 789; *Klein v. Ins. Co.*, 104 U. S. 88, 26 L. ed. 662; *Kansas City Life Ins. Co. v. Leedy*, — Okla. —, L. R. A. 1917C, 917, 162 Pac. 760.

Under a contract which provides that the insured may secure paid-up insurance if he returns his policy within a certain time after default, such time is of the essence of the contract. *Collman v. Equitable L. Assur. Soc.*, 133 Ia. 177, 8 L. R. A. (N.S.) 1019, 110 N. W. 444.

¹² *Manhattan Life Ins. Co. v. Patterson*, 109 Ky. 624, 53 L. R. A. 378, 60 S. W. 383.

¹³ *The Alert*, 61 Fed. 504.

vides that a vessel shall proceed from Melbourne to Calcutta "with all possible despatch," the fact that the vessel proceeds from Melbourne to Manila and so arrives at Calcutta three months later than she would had she gone direct from Calcutta, discharges the contract, even if she arrives at Manila before the charterer has secured another vessel.¹⁴ Time is of the essence of building contracts in which a definite time for completing the work is stipulated for,¹⁵ or of a contract to build a gas-holder,¹⁶ or to complete a railroad bridge by a certain day,¹⁷ or to remove a building by a certain day.¹⁸ Time is of the essence of a contract giving a license to enter and remove timber during a certain time.¹⁹ Contracts to cut timber in a given time other than licenses, such as a contract of employment with the owner, the employe to remove the timber in a certain time,²⁰ or a contract conveying an interest in standing timber, to be removed in a certain time,²¹ are contracts of which time is not of the essence.

§ 2105. Time not of essence in equity. In equity, on the other hand, the general rule may be said to be that time is not of the essence of the contract.¹ "It must affirmatively appear that the parties regarded time or place as an essential element in their

¹⁴ *Lowber v. Bangs*, 69 U. S. (2 Wall.) 723, 17 L. ed. 768.

¹⁵ *Phillips, etc., Co. v. Seymour*, 91 U. S. 646, 23 L. ed. 341; *Morrison v. Wells*, 48 Kan. 494, 29 Pac. 601; *Allen v. Cooper*, 22 Me. 133; *Johnson v. Slaymaker*, 18 Ohio C. C. 104, 9 Ohio C. D. 500.

¹⁶ *Wood v. Gaslight Co.*, 111 Fed. 463, 49 C. C. A. 427.

¹⁷ *Slater v. Emerson*, 60 U. S. (19 How.) 224, 15 L. ed. 626.

¹⁸ *Osgood v. Boston*, 165 Mass. 281, 43 N. E. 108.

¹⁹ *Utley v. Lumber Co.*, 59 Mich. 263, 26 N. W. 488. It has been said that the legal title to the standing timber passes to the grantee, and that accordingly, he may cut it and take it away after the time limit has expired, but that if he does so after the time limit has expired, he is liable in tort to the

grantor for the damage which he has done to the possession. *Zimmerman Manufacturing Co. v. Daffin*, 149 Ala. 380, 123 Am. St. Rep. 58, 9 L. R. A. (N.S.) 663, 42 So. 858.

²⁰ *Thacker, etc., Co. v. Mallory*, 27 Wash. 670, 68 Pac. 199.

²¹ *Halstead v. Jessup*, 150 Ind. 85, 49 N. E. 821.

¹ *England. Hearne v. Tenant*, 13 Ves. Jr. 287.

United States. Hepburn v. Auld, 9 U. S. (5 Cranch) 262, 3 L. ed. 96; *Brown v. Deposit Co.*, 128 U. S. 403, 32 L. ed. 468.

Arkansas. Vance v. Newman, 72 Ark. 359, 105 Am. St. Rep. 42, 80 S. W. 574; *Butler v. Colson*, 99 Ark. 340, 138 S. W. 467.

Florida. Chabot v. Park Co., 34 Fla. 258, 43 Am. St. Rep. 192, 15 So. 756; *Tate v. Development Co.*, 37 Fla. 433, 53 Am. St. Rep. 251, 20 So. 542.

agreement or a court of equity will not so regard it."² In order to make time of the essence of the contract in equity, there must be either an express provision, making time of the essence,³ or the nature of the subject-matter must be such as to require prompt performance at the time stipulated. The reason for this difference between law and equity is, that in law the promisee acquires, as a rule, no interest in the property under an executory contract until he either performs or tenders performance. In equity, on the other hand, the vendee acquires an interest in the property contracted for when the contract of sale is made, and the assignment of a particular day for the payment of the purchase money is looked upon as merely formal, to secure payment in a reasonable time.⁴ A contract for the payment of money at a given time is ordinarily a contract of which time is not of the essence;⁵ and so is a contract to release a mortgage,⁶ or a contract for the adjustment of an existing mortgage indebtedness.⁷

Idaho. *Buster v. Fletcher*, 22 Ida. 172, 125 Pac. 226.

Indiana. *Boldt v. Early*, 33 Ind. App. 434, 104 Am. St. Rep. 255, 70 N. E. 371.

Kansas. *Sanford v. Weeks*, 38 Kan. 319, 5 Am. St. Rep. 748, 16 Pac. 465; *Reid v. Mix*, 63 Kan. 745, 55 L. R. A. 706, 66 Pac. 1021.

Kentucky. *Kemper v. Walker* (Ky.), 32 S. W. 1093.

North Carolina. *Porter v. White*, 128 N. Car. 42, 38 S. E. 24.

Washington. *Virtue v. Stanley*, 87 Wash. 167, 151 Pac. 270.

West Virginia. *Jarvis v. Cowger*, 41 W. Va. 268, 23 S. E. 522.

² *Secombe v. Steele*, 61 U. S. (20 How.) 94, 104, 15 L. ed. 833.

³ *Brown v. Deposit Co.*, 128 U. S. 403, 32 L. ed. 468; *Chabot v. Park Co.*, 34 Fla. 258, 43 Am. St. Rep. 192, 15 So. 756; *Tate v. Development Co.*, 37 Fla. 439, 53 Am. St. Rep. 251, 20 So. 542; *Frink v. Thomas*, 20 Or. 265, 12 L. R. A. 230, 25 Pac. 717.

⁴ *Secombe v. Steele*, 61 U. S. (20 How.) 94, 15 L. ed. 833; *Solomon v. Shewitz*, 185 Mich. 620, 3 A. L. R. 557, 152 N. W. 106.

⁵ **Arkansas.** *Vance v. Newman*, 72 Ark. 350, 105 Am. St. Rep. 42, 80 S. W. 574.

Florida. *Tate v. Development Co.*, 37 Fla. 439, 53 Am. St. Rep. 251, 20 So. 542.

Indiana. *Boldt v. Early*, 33 Ind. App. 434, 104 Am. St. Rep. 255, 70 N. E. 371.

Massachusetts. *Barnard v. Lee*, 97 Mass. 92.

North Carolina. *Allred v. Burns*, 106 N. Car. 247, 10 S. E. 1034.

Oregon. *Frink v. Thomas*, 20 Or. 265, 12 L. R. A. 230, 25 Pac. 717.

Pennsylvania. *Sylvester v. Born*, 132 Pa. St. 467, 19 Atl. 337.

West Virginia. *Jarvis v. Cowger*, 41 W. Va. 268, 23 S. E. 522.

⁶ *Reid v. Mix*, 63 Kan. 745, 55 L. R. A. 706, 66 Pac. 1021.

⁷ *Virtue v. Stanley*, 87 Wash. 167, 151 Pac. 270.

§ 2106. Tendency of modern law to regard time as not of essence. The tendency of modern law is to hold that the question whether or not time is of the essence of the contract, is to be regarded as a question of construction,¹ and to assume that in the absence of an expression of intention to the contrary, either express or implied, time is not of the essence of a contract, either at law or in equity.² Time is not of the essence of a contract to deliver bonds,³ and accordingly a contract for the sale of bonds can not be avoided by reason of the fact that a prior mortgage which prevented such bonds from being secured by a first mortgage, in accordance with the terms of the contract, had not been released at the time fixed for delivery.⁴ Time is not of the essence of a building contract,⁵ especially if there is a valid provision for liquidated damages for delay.⁶

The tendency of modern law to hold that time is not of the essence of a contract in the absence of clear intention of the parties that it should be of the essence of the contract, has been expressed in a group of statutes which provided that time is not of the essence of a contract, unless it is expressly so provided in the contract.⁷ While language has occasionally been used which seems to apply the statute literally and to require that an express provision that time should be of the essence of the contract in

¹ See § 2103.

² **Alabama.** Elliott v. Howison, 146 Ala. 568, 40 So. 1018.

Arkansas. Lenon v. Mutual Life Ins. Co., 80 Ark. 563, 8 L. R. A. (N.S.) 193, 10 Am. & Eng. Ann. Cas. 467, 98 S. W. 117.

Maryland. Nes v. Union Trust Co., 104 Md. 15, 64 Atl. 310.

North Dakota. Sunshine Cloak & Suit Co. v. Roquette, 30 N. D. 143, L. R. A. 1916E, 932, 152 N. W. 359 (obiter).

South Dakota. Phillis v. Gross, 32 S. D. 438, 143 N. W. 373.

West Virginia. Crosby v. Honaker, 57 W. Va. 512, 50 S. E. 610; Lewis v. West Virginia Pulp & Paper Co., 76 W. Va. 103, 84 S. E. 1063. Time is not of the essence of a contract unless by its terms, or unless performance at a specified time is made a

condition precedent. Lewis v. West Virginia Pulp & Paper Co., 76 W. Va. 103, 84 S. E. 1063.

If time is of the essence of the contract, the party not in default may waive a delay in performance. Reynor v. Mackrill, 181 Ia. 210, 1 A. L. R. 523, 164 N. W. 335.

³ Nes v. Union Trust Co., 104 Md. 15, 64 Atl. 310.

⁴ Nes v. Union Trust Co., 104 Md. 15, 64 Atl. 310.

⁵ Hunn v. Pennsylvania Institution, 221 Pa. St. 403, 18 L. R. A. (N.S.) 1248, 70 Atl. 812.

⁶ Hunn v. Pennsylvania Institution, 221 Pa. St. 403, 18 L. R. A. (N.S.) 1248, 70 Atl. 812.

⁷ Sunshine Cloak & Suit Co. v. Roquette, 30 N. D. 143, L. R. A. 1916E, 932, 152 N. W. 359; Puls v. Casey, 18 Okla. 142, 92 Pac. 388; Snyder v.

order to make it such,⁸ and while it has been said that such a statute not only abolishes the common-law rule that time is to be regarded as of the essence of the contract, but that it also abolishes the equity rule that time is to be regarded as of the essence of the contract if such intention is necessarily implied from the contract and from the surrounding circumstances,⁹ it is generally held by the later authorities that it is not necessary to insert the language of the statute into the contract to produce this effect,¹⁰ but that time may be of the essence of the contract if it appears clearly from the terms of the contract that the parties so intended it.¹¹

§ 2107. Express provision making time of essence. If there is an express provision making time of the essence of the contract, full effect must be given to it.¹ Effect will be given to such a provision in equity as well as in law.² Thus a provision and express condition that in case of failure of the vendee to perform, the vendor should have the right to declare the contract void, makes time of the essence.³ So if time is not originally of the

Stribling, 18 Okla. 168, 89 Pac. 222 [affirmed on other grounds in *Snyder v. Rosenbaum*, 215 U. S. 261, 54 L. ed. 186]; *Wiebener v. Peoples*, 44 Okla. 32, Ann. Cas. 1916E, 748, 142 Pac. 1036; *Mitchell v. Probst*, 52 Okla. 10, 152 Pac. 597; *Western Town Site Co. v. Lamro Town Site Co.*, 31 S. D. 47, 130 N. W. 777.

⁸ *Puls v. Casey*, 18 Okla. 142, 92 Pac. 388.

⁹ *Snyder v. Stribling*, 18 Okla. 168, 89 Pac. 222.

¹⁰ *Standard Lumber Co. v. Miller & Vidor Lumber Co.*, 21 Okla. 617, 96 Pac. 761.

¹¹ *Sunshine Cloak & Suit Co. v. Roquette*, 30 N. D. 143, L. R. A. 1916E, 932, 152 N. W. 359; *Standard Lumber Co. v. Miller & Vidor Lumber Co.*, 21 Okla. 617, 96 Pac. 761; *Shenners v. Adams*, 46 Okla. 368, 148 Pac. 1023; *Mitchell v. Probst*, 52 Okla. 10, 152 Pac. 597.

¹ *United States. Cheney v. Libby*, 134 U. S. 68, 33 L. ed. 818.

California. Martin v. Morgan, 87

Cal. 203, 22 Am. St. Rep. 240, 25 Pac. 350; *Glock v. Colony Co.*, 123 Cal. 1, 69 Am. St. Rep. 17, 55 Pac. 713, 43 L. R. A. 199.

Florida. Chabot v. Park Co., 34 Fla. 258, 43 Am. St. Rep. 192, 15 So. 756.

Illinois. Miller v. Rice, 133 Ill. 315, 24 N. E. 543.

Maine. Telegraphone Corporation v. Canadian Telegraphone Co., 103 Me. 444, 69 Atl. 767.

Oregon. Clarno v. Grayson, 30 Or. 111, 46 Pac. 426.

Pennsylvania. Axford v. Thomas, 160 Pa. St. 8, 28 Atl. 443.

Washington. Reddish v. Smith, 10 Wash. 178, 45 Am. St. Rep. 781, 38 Pac. 1003.

West Virginia. Adams v. Guyandotte Valley Ry. Co., 64 W. Va. 181, 61 S. E. 341.

² *Telegraphone Corp. v. Canadian Telegraphone Co.*, 103 Me. 444, 69 Atl. 767.

³ *Stinson v. Dousman*, 61 U. S. (20 How.) 461, 15 L. ed. 966; *Martin v. Morgan*, 87 Cal. 203, 22 Am. St. Rep.

essence of the contract, but after default the promisee gives notice fixing a reasonable time for performance, and insisting upon performance within that time, time may become of the essence of the contract.⁴ However, if time is not originally of the essence of the contract, a notice given by one party before performance is due can not make it of the essence.⁵

§ 2108. Implied provision making time of essence. Although there is no express provision in a contract which makes time of the essence, the contract taken as a whole and construed in connection with the surrounding facts and circumstances, may show that the parties intended that time should be of the essence of the contract, and if such intention appears, full effect will be given to it.¹ If the provision with reference to time is not a covenant for the breach of which an action will lie, if it deals with nothing other than the payment of money, and if the parties apparently intend that the contract shall not be in effect if compliance is not had with such provision, time is to be regarded as of the essence of such a contract.² A provision in a contract of partition for paying for any excess of land, if shown by a survey within a specified time, makes such time of the essence of the contract,³ at least

240, 25 Pac. 350; *Woodruff v. Water Co.*, 87 Cal. 275, 25 Pac. 354; *Bennett v. Hyde*, 92 Cal. 131, 28 Pac. 104.

⁴*Florida*. *Chabot v. Park Co.*, 34 Fla. 258, 43 Am. St. Rep. 192, 15 So. 756; *Asia v. Hiser*, 38 Fla. 71, 20 So. 796.

Illinois. *Miller v. Rice*, 133 Ill. 315, 24 N. E. 543; *Burnap v. Sharpsteen*, 149 Ill. 225, 36 N. E. 1008.

Indiana. *Boldt v. Early*, 33 Ind. App. 434, 104 Am. St. Rep. 255, 70 N. E. 371.

Massachusetts. *Barnard v. Lee*, 97 Mass. 92.

Nebraska. *Foster v. Ley*, 32 Neb. 404, 15 L. R. A. 737, 49 N. W. 450.

New Jersey. *King v. Ruckman*, 20 N. J. Eq. 316.

New York. *Hatch v. Cobb*, 4 Johns. Ch. (N. Y.) 559.

Ohio. *Kirby v. Harrison*, 2 Ohio St. 326, 59 Am. Dec. 677.

Oregon. *Frink v. Thomas*, 20 Or. 265, 12 L. R. A. 239, 25 Pac. 717.

⁵*The Lucile Manor*, 70 Fed. 233.

¹*United States*. *Owen v. Giles*, 157 Fed. 825, 85 C. C. A. 189; *Meier Dental Manufacturing Co. v. Smith*, 237 Fed. 563, 150 C. C. A. 445.

Kentucky. *Monarch v. Owensboro City Ry.*, 119 Ky. 939, 85 S. W. 193.

New Jersey. *Roche v. Hiss*, 84 N. J. Eq. 242, 93 Atl. 804.

South Carolina. *Jennings v. Bowman*, 106 S. Car. 455, 91 S. E. 731.

West Virginia. *Adams v. Guyandotte Valley Ry. Co.*, 64 W. Va. 181, 61 S. E. 341.

²*Adams v. Guyandotte Valley Ry. Co.*, 64 W. Va. 181, 61 S. E. 341. A provision to the effect that in case of default in receiving installments the entire principal shall become due, makes the time of paying such installments of the essence of the contract. *Roche v. Hiss*, 84 N. J. Eq. 242, 93 Atl. 804.

³*Jennings v. Bowman*, 106 S. Car. 455, 91 S. E. 731.

if the contract provides that in case of the failure to make such survey the area as provided in the contract shall be taken as conclusive.⁴ The nature of the property with which the parties are dealing,⁵ is to be considered in determining whether the parties intend to make them of the essence of the contract. For like reasons, and as special applications of the general principle, time is regarded as of the essence of subscriptions,⁶ and of options;⁷ while it is regarded as not of the essence of subsidiary provisions. The fact that the vendee under a contract of sale has gone into possession of the realty and that the use which he is making thereof is such as to depreciate the value of the realty permanently, as by taking and carrying away the part of the realty which gives it its substantial value, tends to show that the time which is fixed for the payment of the purchase price is of the essence of the contract.⁸

§ 2109. Nature of property contracted for. The nature of the property concerning which the contract is made may show that time was of the essence of the contract. If the property is one of fluctuating values, time is ordinarily looked upon as of the essence,¹ such as a contract for the sale of mineral land,² or a contract for the sale of realty during a "boom" for purposes of speculation,³ or stock in a corporation.⁴ If, on the other hand, the value is not fluctuating, time is ordinarily supposed to be not of the essence of the contract in equity. A contract for the sale of realty is ordinarily a contract of which time is not of the essence,⁵ such as a contract to take up certain mortgages on realty, sell it and apply the proceeds to a

⁴ *Jennings v. Bowman*, 106 S. Car. 455, 91 S. E. 731.

⁵ See § 2109.

⁶ See § 2111.

⁷ See § 2112.

⁸ *Jennison v. Leonard*, 88 U. S. (21 Wall.) 302, 22 L. ed. 539.

¹ *Waterman v. Banks*, 144 U. S. 394, 36 L. ed. 479; *Hardy v. Ward*, 150 N. Car. 385, 64 S. E. 171; *Axford v. Thomas*, 160 Pa. St. 8, 28 Atl. 443.

² *Waterman v. Banks*, 144 U. S. 394, 36 L. ed. 479; *Olympia Mining & Milling Co. v. Kerns*, 24 Ida. 481, 135 Pac. 255.

³ *Myers v. League*, 62 Fed. 654, 10 C. C. A. 571.

Contra, *Tapp v. Nock*, 89 Ky. 414, 12 S. W. 713.

⁴ *Umfrid v. Brooks*, 14 Wash. 675, 45 Pac. 310.

⁵ *United States*. *Secombe v. Steele*, 61 U. S. (20 How.) 94, 15 L. ed. 833; *Ahl v. Johnson*, 61 U. S. (20 How.) 511, 15 L. ed. 1005.

California. *Beverly v. Blackwood*, 102 Cal. 83, 36 Pac. 378.

Oregon. *Frink v. Thomas*, 20 Or. 265, 12 L. R. A. 239, 25 Pac. 717.

Pennsylvania. *Hoffman v. Ry.*, 157 Pa. St. 174, 27 Atl. 564.

West Virginia. *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249.

certain debt,⁶ or a contract to release a right of way to a railway company.⁷ However, time was held to be of the essence of a contract by which A agreed to convey to B, by a certain time, a right of way for a street railway across A's land, and a franchise therefor, in consideration of which B agreed to construct such street railway.⁸

A party to a contract who has delayed performance to speculate upon the change in value of the property contracted for, and tenders performance after the value is so changed as to make performance especially advantageous to himself, can not have specific performance.⁹ Thus delay till the title is cleared and the land has risen in value from twenty-two dollars an acre to eighty dollars an acre, prevents specific performance.¹⁰ Conversely, delay which does not result in a change in value does not of itself defeat specific performance. So if the depreciation in the value of the land occurs before the time fixed for delivering the deed, delay does not prevent the vendor from obtaining specific performance.¹¹

Time is not of the essence of a contract to print and deliver certain books by a specified time;¹² nor is it of the essence of the right of the insured under his policy to demand a paid-up policy in case of lapse.¹³

§ 2110. Time of subsidiary provision not of essence. Time is not regarded as of the essence of a contract where it concerns a provision, a breach of which does not constitute a total failure of consideration.¹ Thus where the two upper stories were leased, and were ready for occupancy where agreed upon, the lessee can not avoid the lease because the rest of the building was not completed at the time agreed upon.² Even under a contract of subscription of which time is usually the essence,³ failure of a university to erect a

⁶ *Beverly v. Blackwood*, 102 Cal. 83, 36 Pac. 378.

⁷ *Hoffman v. Ry.*, 157 Pa. St. 174, 27 Atl. 564.

⁸ *Monarch v. Owensboro City Ry.*, 119 Ky. 939, 85 S. W. 193.

⁹ *Rogers v. Sauders*, 16 Me. 92, 33 Am. Dec. 635.

¹⁰ *Brashier v. Gratz*, 19 U. S. (6 Wheat.) 528, 5 L. ed. 322.

¹¹ *Garber v. Sutton*, 96 Va. 469, 31 S. E. 894.

¹² *Pacific, etc., Co. v. Loofbourow*, 129 Cal. 24, 61 Pac. 944.

¹³ *Manhattan Life Ins. Co. v. Patterson*, 109 Ky. 624, 95 Am. St. Rep. 393, 60 S. W. 383.

¹ *University v. Trust Co.*, 87 Ia. 36, 53 N. W. 1080; *Lynch v. Bechtel*, 19 Mont. 548, 48 Pac. 1112; *Coos Bay, etc., Co. v. Dixon*, 30 Or. 594, 48 Pac. 360.

² *Lynch v. Bechtel*, 19 Mont. 548, 48 Pac. 1112.

³ See § 2111.

second building at the time agreed upon, after erecting the first building on time and opening for work, is not breach of an essential term.

§ 2111. Time of essence in subscriptions. Contracts of subscription, whereby the promisor agrees to pay money if a certain work is completed by a specified time, such as a subscription to aid a railway;¹ or an agreement to grant a right of way;² or a subscription to induce the removal of a factory to a given city by a given time,³ are contracts of which time is of the essence.

§ 2112. Time of essence in options. The contract has thus far been considered in determining whether time is of the essence or not. When we turn from contracts to options, we find that both at law and equity an option which is in the nature of an offer outstanding for a certain period of time, must be accepted within the time limited, or it lapses. Accordingly, time is held to be of the essence of options both at law and in equity.¹ "Where, as in this case, the contract invests the one party with no title whatever, imposes no obligation upon him, leaves it optional with him to do a certain thing at a specified time, in such case time in the broadest sense of the rule, is of the essence of the contract, and the failure of such party to comply with its terms deprives him of the right to demand the enforcement of the contract."² This rule applies

⁴ *University v. Trust Co.*, 87 Ia. 36, 53 N. W. 1080.

¹ *Cincinnati, etc., R. R. v. Bensley*, 51 Fed. 738, 19 L. R. A. 796, 2 C. C. A. 480; *Jordan v. Newton*, 116 Mich. 674, 75 N. W. 130; *Port Huron, etc., Ry. v. Richards*, 90 Mich. 577, 51 N. W. 680; *Garrison v. Cooke*, 96 Tex. 228, 97 Am. St. Rep. 906, 61 L. R. A. 342, 72 S. W. 54.

Contra, Witmer Bros. Co. v. Weid, 108 Cal. 560, 41 Pac. 491.

² *Thornton v. Ry.*, 84 Ala. 109, 5 Am. St. Rep. 337, 4 So. 197. (Suit in equity.)

³ *Bohn Mfg. Co. v. Lewis*, 45 Minn. 164, 47 N. W. 652.

¹ *California. Upton v. Travelers' Insurance Co.*, — Cal. —, 2 A. L. R. 1597, 178 Pac. 851.

Connecticut. Saraceno v. Carrano, 92 Conn. 563, 103 Atl. 631.

Kentucky. Stembridge v. Stembridge, 87 Ky. 91, 7 S. W. 611; *Smith v. Howard (Ky.)*, 105 S. W. 411, 32 Ky. Law Rep. 211.

Michigan. Edmonds v. Evarts, 146 Mich. 485, 109 N. W. 844.

Oklahoma. Mitchell v. Probst, 52 Okla. 10, 152 Pac. 597.

West Virginia. Dyer v. Duffy, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339. See § 141.

² *Stembridge v. Stembridge*, 87 Ky. 91, 94, 7 S. W. 611.

to options for the sale of realty,³ of a railway,⁴ or of personalty, such as corporate stock,⁵ or a horse,⁶ or to the right given to the maker of a note to have it canceled if he performs a specified act at a given time.⁷ So the right of a debtor to elect to pay a debt in something other than money is a right of which time is of the essence.⁸ The fact that negotiations are prolonged under an option up to the evening of the last day of its duration does not extend it beyond the time fixed by it.⁹ So a contract whereby a mortgagee agrees to accept on foreclosure a sum less than the amount due him, part of the amount bid to go to a junior mortgagee, if payment is made by a specified time, is a contract of which time is of the essence.¹⁰ An option to renew an insurance policy must be exercised within the time limited therefor.¹¹

³ California. *Martin v. Morgan*, 87 Cal. 203, 22 Am. St. Rep. 240, 25 Pac. 350.

Kentucky. *Stembridge v. Stembridge*, 87 Ky. 91, 7 S. W. 611.

Maryland. *Coleman v. Applegarth*, 68 Md. 21, 6 Am. St. Rep. 417, 11 Atl. 284.

Texas. *Johnson v. Portwood*, 89 Tex. 235, 34 S. W. 596, 787.

Wisconsin. *Cummings v. Realty Co.*, 86 Wis. 382, 57 N. W. 43.

⁴ *Columbian Equipment Co. v. Ry.*, 74 Fed. 920.

⁵ *Stevens v. Hertzler*, 109 Ala. 423,

19 So. 838; *Chaffee v. Ry.*, 146 Mass. 224, 16 N. E. 34; *Edmonds v. Evarts*, 146 Mich. 485, 109 N. W. 844.

⁶ *Roberts v. Norton*, 66 Conn. 1, 33 Atl. 532.

⁷ *Stout v. Watson*, 45 Minn. 454, 48 N. W. 195.

⁸ See ch. LXXX.

⁹ *Cummings v. Realty Co.*, 88 Wis. 382, 57 N. W. 43.

¹⁰ *Eargle v. Lorick*, 55 S. Car. 431, 33 S. E. 490.

¹¹ *Upton v. Travelers' Insurance Co.*, — Cal. —, 2 A. L. R. 1597, 178 Pac. 851.

CHAPTER LXVIII

PENALTIES AND LIQUIDATED DAMAGES

- § 2113. Nature of penalty and liquidated damages.
- § 2114. Alternative contracts—General nature.
- § 2115. Effect of alternative covenant.
- § 2116. Penalty in form of alternative covenant.
- § 2117. History of penalty in contract law.
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- § 2119. Liquidated damages.
- § 2120. Effect of name employed.
- § 2121. Intention of parties controls.
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- § 2123. Difficulty of proving actual damages.
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- § 2125. One penalty for breaches of different covenants.
- § 2126. Breach of single covenant.
- § 2127. Forfeiture of deposits and part payments.
- § 2128. Default in payment of money—Larger sum due.
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- § 2131. Application of general principles—Building contracts.
- § 2132. Sale of personalty.
- § 2133. Sale of good will—Reasonable restraint of trade.
- § 2134. Sale of realty.
- § 2135. Lease of realty or personalty.
- § 2136. Contracts for royalties.

§ 2113. Nature of penalty and liquidated damages. A contract for a penalty is an agreement to pay a stipulated sum in case of default, intended to coerce performance, to punish default, or to secure payment of the actual damages.¹ A contract for liquidated damages is a contract by which the parties in advance of breach fix the amount of damages which will result therefrom, and agree

¹ *United States v. Cutajar*, 67 Fed. 530; *Gillilan v. Rollins*, 41 Neb. 540, 59 N. W. 893.

On the subject of penalties and liquidated damages generally, see *Penalties and Forfeitures*, by William H.

Loyd, 29 *Harvard Law Review*, 117; *Liquidated Damages and Estoppel by Contract*, by Joseph H. Drake, 9 *Michigan Law Review*, 588; *Relief from Forfeiture*, by Will C. Smith, 5 *Juridical Review*, 125; *Liquidated Damages*

upon its payment.² If the covenant is for liquidated damages the parties are seeking compensation and not gain.³

The place of this topic in the law of contracts is open to question. Contracts for penalties, as we shall see later, are unenforceable, and may without any impropriety be said to be void. Such contracts might therefore be discussed under the head of void contracts. On the other hand, it is so well settled that if a contract is for a penalty it is void, that questions are rarely raised upon this branch of the topic. The question which is commonly presented for decision is whether the contract is one for penalty or liquidated damages, and this is primarily a question of construction. Accordingly, this subject is discussed in connection with construction. This topic might also be considered in connection with breach and damages. Questions thereunder can necessarily arise only when a breach exists or is alleged. The determination of this question is also decisive of the question whether the parties are limited by and entitled to the amount stipulated for by the contract, or whether they are driven to the proof of actual damages and are governed by the rules which control the measure of damages.

§ 2114. Alternative contracts—General nature. An alternative contract is one which gives to one of the parties the choice of doing one of two or more different acts as performance of the contract.¹ If one of the alternatives is the payment of money, a contract of this type has some resemblance to a contract for a penalty or for liquidated damages, but it must be distinguished from both of them. The essential difference is that both penalties and liquidated damages are payable on breach of one or more covenants of a contract,² whereas the payment provided for in the alternative contract is a

and Penalty, by R. Scott Brown, 10 *Juridical Review*, 78; Penalties for Failure to Perform Within a Limited Time Under a Substituted Contract, by A. Inglis Clark, 16 *Law Quarterly Review*, 117, and Liquidated Damages, by John Proffatt, 12 *American Law Review*, 286.

²*Morris v. United States*, 50 Ct. Cl. 154; *Monmouth Park Association v. Iron Works*, 55 N. J. L. 132, 39 Am. St. Rep. 626 [sub nomine, *Wallis Iron Works v. Park Association*, 19 L. R. A. 456, 26 Atl. 140]; *Sheffield-King Milling*

Co. v. Domestic Science Baking Co., 95 O. S. 180, 115 N. E. 1014.

³*Joeckel v. Johnson*, 178 Ia. 231, 159 N. W. 672.

¹*Crouch v. Leake*, 108 Ark. 322, 50 L. R. A. (N.S.) 774, 157 S. W. 390; *Fred W. Wolf Co. v. Monarch Refrigerating Co.*, 252 Ill. 491, 50 L. R. A. (N.S.) 808, 96 N. E. 1063; *Smith v. Bergengren*, 153 Mass. 236, 10 L. R. A. 768, 26 N. E. 690.

²*Grasselli v. Lowden*, 11 O. S. 349; *Dillon v. Ringleman*, 55 Okla. 331, 155 Pac. 563.

performance of the contract—not a compensation for breach. The alternative contract is enforceable according to its terms, and if the contingencies have occurred on which the money is to be paid, such payment can be enforced.³ Thus under a contract for the sale of a medical practice, the vendor to have the right to resume practice after five years, on payment to the vendee of two thousand dollars, such payment was neither a penalty nor liquidated damages, but a covenant giving the vendor the right to make such election; and if he elects to resume the practice, he must pay such sum.⁴ If a contract for the sale of fruit trees provides that the seller will replace any trees which are not the kind specified in the contract or return the purchase price thereof, such provision does not prevent the buyer from recovering damages for loss and expense in case such trees are not of the kind specified.⁵ If machinery is sold under a warranty that it should be of good material and capable of doing good work, and certain parts of such machinery are found not to be of the material required by the terms of such contract, the promise of the vendors to supply suitable parts, together with their act in sending parts which they claim to be suitable, prevents them from claiming that the sole right of the purchaser was to return such machinery within the time specified by the contract.⁶

§ 2115. Effect of alternative covenant. If the contract is in the alternative, an action can not be brought for breach of one of the covenants if the promisor is ready and willing to perform the alternative covenant,¹ or if performance thereof has been accepted.² If a contract for the sale of a machine provides that if it does not satisfy the requirements of the contract, the seller may enter the buyer's land and remove such machine, upon repaying to the buyer the purchase price which the buyer has paid to the seller, such provision prevents the buyer from recovering damages for the failure of such machine to satisfy the provisions of the con-

³ *Smith v. Bergengren*, 153 Mass. 236, 10 L. R. A. 768, 26 N. E. 690; *Curnan v. Ry.*, 138 N. Y. 480, 34 N. E. 201.

⁴ *Smith v. Bergengren*, 153 Mass. 236, 10 L. R. A. 768, 26 N. E. 690.

⁵ *Sanford v. Brown Brothers Co.*, 208 N. Y. 90, 50 L. R. A. (N.S.) 778, 101 N. E. 797.

⁶ *Detwiler v. Downes*, 119 Minn. 44, 50 L. R. A. (N.S.) 753, 137 N. W. 422.

¹ *Crouch v. Leake*, 108 Ark. 322, 50 L. R. A. (N.S.) 774, 157 S. W. 390.

² *Fred W. Wolf Co. v. Monarch Refrigerating Co.*, 252 Ill. 491, 50 L. R. A. (N.S.) 808, 96 N. E. 1063.

tract.³ If A warrants a horse to B, but provides that in case the horse does not comply with the terms of the warranty, B may return such horse to A within a specified time, B's sole remedy, if no fraud is shown, is to return such horse within such specified time.⁴ An alternative provision is not regarded as preventing a right of action for breach unless such intention appears clearly.⁵ The conduct of the parties in attempting to perform the contract may aid the court in determining that the contract was not intended to prevent a right of action to recover damages for breach.⁶

§ 2116. Penalty in form of alternative covenant. The outward form of the contract is not, of course, decisive of the question. If it were, an easy method of evading the rules as to penalties would be presented. If the whole contract shows that the stipulation for payment is inserted, not to give one party an election, but to coerce performance of the alternative covenant, such stipulation is treated as a penalty.¹ Since a provision giving the promisee the option between performing his principal contract and paying a stipulated sum of money, gives an unfair advantage to such party, the courts tend to construe the contract as not in the alternative, but as a promise to perform the principal covenant with a subsidiary covenant for a penalty or for liquidated damages,² even if such construction requires the court to treat the subsidiary covenant as one for the payment of a penalty.³ A covenant which provides for the performance of a specified act and for paying a certain sum of money in case non-performance has been treated as a covenant for a penalty or for liquidated damages, as the case may be, rather than as an alternative contract.⁴ A provision in a contract for the sale of machinery for a test and for the return of the machinery within a specified time after the test if it proves unsatisfactory, or for payment of the purchase price in case of failure to return it in such time, has been said to impose a penalty.⁵

³ *Fred W. Wolf Co. v. Monarch Refrigerating Co.*, 252 Ill. 491, 50 L. R. A. (N.S.) 808, 96 N. E. 1063.

⁴ *Crouch v. Leake*, 108 Ark. 322, 50 L. R. A. (N.S.) 774, 157 S. W. 390.

⁵ *Sanford v. Brown Brothers Co.*, 208 N. Y. 90, 50 L. R. A. (N.S.) 778, 101 N. E. 797.

⁶ *Detwiler v. Downes*, 119 Minn. 44, 50 L. R. A. (N.S.) 753, 137 N. W. 422.

¹ *Condon v. Kemper*, 47 Kan. 126, 13 L. R. A. 671, 27 Pac. 829.

² *Dillon v. Ringleman*, 55 Okla. 331, 155 Pac. 563.

³ *Dillon v. Ringleman*, 55 Okla. 331, 155 Pac. 563.

⁴ *Liquidated damages. Grasselli v. Lowden*, 11 O. S. 349.

⁵ *Walshe Mfg. Co. v. W. T. Smith Lumber Co.*, 196 Ala. 371, 72 So. 73.

The question of who can exercise the right of election is discussed elsewhere.⁶

§ 2117. History of penalty in contract law. At common law, a contract to pay a specified sum of money upon the happening of a certain event, was enforced according to its terms. The fact that the sum of money designated was agreed upon to punish breach or to coerce performance, did not have any effect in making such a contract unenforceable. If the contract was a simple one, a valuable consideration was, of course, necessary; and if the consideration for the promise was itself money, questions of adequacy of consideration might arise. If the contract was under seal, questions of this sort were not presented.¹ Equity, however, looked at the intent and not the outward form of the contract, and relieved against penalties and forfeitures.² The doctrine that equity relieved against forfeitures originally referred to cases of mistake, surprise, imposition, and the like; but this restriction was abandoned at a comparatively early time, and it became settled that equity could relieve against a penalty or a forfeiture for the non-payment of money, since the damages caused by the delay could be estimated exactly in the form of interest.³ It has been said that equity will not relieve against penalty or forfeiture, where the breach is anything other than the non-payment of money.⁴ In the majority of cases this distinction is practically sufficient, and further discussion of the accuracy of this statement will be omitted. The other principle, namely, that equity looked at the intent of the parties rather than the outward form, operated to give relief against penalties in many cases which would fall without the limits of the mere doctrine of relief against penalties as such. If, upon applying the ordinary rules of construction to a given contract, it appeared that the stipulation for the payment of the specified sum of money was intended as a security for the actual damages, caused by the breach, or to coerce performance, equity would relieve against the enforcement of the contract in its outward form and restrict the injured party to the recovery of his actual damages.⁵ By a statute in England, the injured party

(Decided by a divided court. For prior opinion, see *Walshe Mfg. Co. v. W. T. Smith Lumber Co.*, 178 Ala. 472, 59

⁶ See ch. LXXX.

¹ *Watts v. Camors*, 115 U. S. 353, 29

L. ed. 406; *Sun, etc., Association v. Moore*, 183 U. S. 642, 46 L. ed. 366.

² *Lowe v. Peers*, 4 Burr. 2225.

³ *Wallis v. Smith*, 21 Ch. D. 243.

⁴ *Wallis v. Smith*, 21 Ch. D. 243.

⁵ *Lowe v. Peers*, 4 Burr. 2225.

in an action for a penalty given by a contract, was restricted to the collection of the actual damages.⁶ In the United States, partly by the adoption of this English statute as a part of our common law, and partly by our own statutes, this power is very generally exercised by the courts of common law. The doctrine of equity as to what is a penalty and what is a stipulation for liquidated damages has been to this extent adopted into our common law.

§ 2118. Legal effect of each compared—Penalty. The importance of the distinction between liquidated damages and penalty consists in the effect which the courts give to the two kinds of stipulation. At modern law a contract for a penalty in favor of a private individual is unenforceable, and void in legal effect.¹ The actual damage, and that alone, may be recovered.² This may be, on the one hand, less than the amount of the penalty,³

⁶ 8 and 9 William III, c. 11.

¹ *United States. Illinois Surety Co. v. United States*, 229 Fed. 527, 143 C. C. A. 595.

Kansas. Kuter v. State Bank, 96 Kan. 485, 152 Pac. 662 [order modified, *Kuter v. State Bank*, 97 Kan. 375, 154 Pac. 1009]; *Metz v. Clay*, 101 Kan. 45, 165 Pac. 809.

Massachusetts. Makletzova v. Diaghileff, 227 Mass. 100, 116 N. E. 231.

Michigan. Decker v. Pierce, 191 Mich. 64, 157 N. W. 384.

Utah. Western Macaroni Mfg. Co. v. Fiore, 47 Utah 108, 151 Pac. 984.

So by statute, *Dillon v. Ringleman*, 55 Okla. 331, 155 Pac. 563.

² *Sheffield-King Milling Co. v. Domestic Science Baking Co.*, 95 O. S. 180, 115 N. E. 1014; *Western Macaroni Mfg. Co. v. Fiore*, 47 Utah 108, 151 Pac. 984.

³ *United States. Van Buren v. Digges*, 52 U. S. (11 How.) 461, 13 L. ed. 771; *Watts v. Camors*, 115 U. S. 353, 29 L. ed. 406; *Chicago House-Wrecking Co. v. United States*, 106 Fed. 385, 53 L. R. A. 122, 45 C. C. A. 343.

Alabama. Henry v. Ry., 91 Ala. 585, 8 So. 343.

Illinois. Low v. Nolte, 16 Ill. 475; *Hennessey v. Metzger*, 152 Ill. 506, 43 Am. St. Rep. 267, 38 N. E. 1058.

Iowa. Foley v. McKeegan, 4 Ia. 1, 66 Am. Dec. 107; *Lord v. Gaddis*, 9 Ia. 285.

Kentucky. Hahn v. Horstman, 12 Bush. (Ky.) 249.

Massachusetts. Perkins v. Lyman, 11 Mass. 76, 6 Am. Dec. 158.

Missouri. Hamaker v. Schroers, 49 Mo. 406.

North Carolina. Lindsay v. Anesley, 28 N. Car. 186.

Oklahoma. Kelley v. Seay, 3 Okla. 527, 41 Pac. 615.

Pennsylvania. Bigouy v. Tyson, 75 Pa. 157.

South Carolina. Bearden v. Smith, 11 Rich. L. (S. Car.) 554.

Washington. Johnson v. Cook, 24 Wash. 474, 64 Pac. 720.

In obiter it is said that no recovery of actual damages can be had in excess of the penalty, although only actual damages can be recovered if less than the penalty. "The bars, thrown down to the other party, are kept up as to him." *Grand Union Laundry Co. v. Carney*, 88 Wash. 327, 153 Pac. 5.

and on the other it may exceed it.⁴ The actual damages sustained must be shown,⁵ otherwise only nominal damages can be recovered.⁶ There is some authority for treating a provision for a penalty as prima facie evidence of the amount of damage suffered, in the absence of evidence to the contrary.⁷ While a covenant for a penalty is void, it is not illegal, and such a covenant does not render invalid the remaining covenants of the contract if they are valid in themselves.⁸

A penalty in a bond payable to the government or to some branch thereof, is valid and enforceable.⁹

§ 2119. Liquidated damages. If a stipulation is one for liquidated damages, the amount contracted for may be recovered.¹ Proof of actual damage is unnecessary,² since the object of such a

⁴United States. *Watts v. Camors*, 115 U. S. 353, 29 L. ed. 406.

⁵Minnesota. *Williston v. Mathews*, 55 Minn. 422, 56 N. W. 1112.

⁶New Hampshire. *Morrill v. Weeks*, 70 N. H. 178, 46 Atl. 32.

⁷New Jersey. *Gloucester City v. Eschbach*, 54 N. J. L. 150, 23 Atl. 360.

⁸Pennsylvania. *Moore v. Colt*, 127 Pa. St. 289, 14 Am. St. Rep. 845, 18 Atl. 8.

⁹Texas. *Commerce, etc., Co. v. Morris*, 27 Tex. Civ. App. 553, 65 S. W. 1118.

¹Wilson v. Dean, 10 Ia. 432; *Johnson v. Cook*, 24 Wash. 474, 64 Pac. 729.

²Eva v. McMahon, 77 Cal. 467, 19 Pac. 872; *O'Keefe v. Dyer*, 20 Mont. 477, 52 Pac. 196; *Johnson v. Cook*, 24 Wash. 474, 64 Pac. 729.

³Elston v. Roop, 133 Ala. 331, 32 So. 129. (It was not clear whether this provision was for a penalty or for liquidated damages.)

⁴Kuter v. State Bank, 96 Kan. 485, 152 Pac. 662 [order modified, *Kuter v. State Bank*, 97 Kan. 375, 154 Pac. 1009]. See §§ 1035 et seq.

⁵Illinois Surety Co. v. United States, 229 Fed. 527, 143 C. C. A. 595.

¹United States. *Sun, etc., Association v. Moore*, 183 U. S. 642, 46 L. ed. 366 [affirming, *Moore v. Publishing Association*, 101 Fed. 591, 41 C. C. A. 506]; *Illinois Surety Co. v. United States*, 229 Fed. 527 (obiter); *Pacific Hardware & Steel Co. v. United States*, 49 Ct. Cl. 327; *Morris v. United States*, 50 Ct. Cl. 154 (obiter).

²Connecticut. *Rabinowitz v. Apter*, 90 Conn. 1, 96 Atl. 157.

³Minnesota. *Nostdal v. Morehart*, 132 Minn. 351, 157 N. W. 584.

⁴New Jersey. *Ferber Construction Co. v. Board of Education*, 90 N. J. L. 193, 100 Atl. 329.

⁵Ohio. *Van Tuyl v. Young*, 23 Ohio C. C. 15; *Sheffield-King Milling Co. v. Domestic Science Baking Co.*, 95 O. S. 180, 115 N. E. 1014.

⁶Pennsylvania. *Pittsburgh, etc., Co. v. Tube Works Co.*, 184 Pa. St. 251, 39 Atl. 76.

⁷Washington. *Drumheller v. Surety Co.*, 30 Wash. 530, 71 Pac. 25.

⁸United States. *Clark v. Barnard*, 108 U. S. 436, 27 L. ed. 780.

⁹Indiana. *Jacqua v. Headington*, 114 Ind. 309, 16 N. E. 527.

¹⁰Ohio. *Sheffield-King Milling Co. v. Domestic Science Baking Co.*, 95 O. S. 180, 115 N. E. 1014.

provision is to prevent controversy over the amount of damages.³ A party who is in default can not show as a defense to an action to recover liquidated damages, the fact that the adversary party did not suffer actual damage.⁴ It has been said that there must, nowever, be at least more than nominal damages.⁵

Furthermore, if the actual damages exceed those contracted for, the injured party is bound by the stipulation of the contract, and can not recover the actual amount of damages.⁶ If a construction contract contains a provision for avoiding it and recovering liquidated damages in case the contractor fails to commence work at a certain time, and advantage is taken of such provision, no recovery can be had thereafter for the difference between the contract price and the price at which such contract was relet.⁷ If a provision for forfeiting payments as liquidated damages, is treated as a covenant for liquidated damages, the vendor who has retained such payments can not recover damages for the failure of the purchaser to perform other covenants requiring him to do certain work upon the property which was sold to him.⁸ A covenant for liquidated damages in case of breach of a specified kind, does not prevent recovery for damages for a breach of a different kind.⁹ A provision for paying a certain amount per day as liquidated damages for delay in the performance of a building or construction contract, does not apply to a case in which the contractor abandons the contract altogether.¹⁰ In such case the contractor can not be compelled to pay the stipulated rate per day

Oregon. *Salem v. Anson*, 40 Or. 339, 56 L. R. A. 169, 67 Pac. 190.

Pennsylvania. *Kelso v. Reid*, 145 Pa. St. 606, 27 Am. St. Rep. 716, 23 Atl. 323.

Washington. *American, etc., Works v. Malting Co.*, 30 Wash. 178, 70 Pac. 236.

³*Cowan v. Meyer*, 125 Md. 450, 94 Atl. 18.

⁴*Cowan v. Meyer*, 125 Md. 450, 94 Atl. 18.

⁵*Hathaway v. Lynn*, 75 Wis. 186, 6 L. R. A. 551, 43 N. W. 956.

⁶*United States. Stone, Sand & Gravel Co. v. United States*, 234 U. S. 270, 58 L. ed. 1308.

Illinois. *Hennessy v. Metzger*, 152

Ill. 505, 43 Am. St. Rep. 267, 38 N. E. 1058.

Montana. *O'Keefe v. Dyer*, 20 Mont. 477, 52 Pac. 196.

Vermont. *Jackson v. Hunt*, 76 Vt. 284, 56 Atl. 1010.

Utah. *K. P. Mining Co. v. Jacobson*, 30 Utah 115, 4 L. R. A. (N.S.) 755, 83 Pac. 728.

⁷*Stone, Sand & Gravel Co. v. United States*, 234 U. S. 270, 58 L. ed. 1308.

⁸*K. P. Mining Co. v. Jacobson*, 30 Utah 115, 4 L. R. A. (N.S.) 755, 83 Pac. 728.

⁹*Rainier v. Masters*, 79 Or. 534, L. R. A. 1916E, 1175, 154 Pac. 426.

¹⁰*Rainier v. Masters*, 79 Or. 534, L. R. A. 1916E, 1175, 154 Pac. 426.

indefinitely.¹¹ It is therefore held that a stipulation for liquidated damages applies to cases in which there has been a bona fide attempt to perform the contract, but does not apply to wilful and deliberate injury, if the damages arising therefrom exceed those stipulated for.¹² Such a provision in case of failure of water supply does not apply where such failure is due to defendant's failure to make repairs stipulated for.¹³ To prevent recovery of actual damages, the provision claimed to be for liquidated damages must furthermore be exclusive. If the party not in default is merely given an election on default to be exercised at his option, he is not thereby precluded from recovering damages.¹⁴ Thus in a subcontract for building an ore dock, it was provided that if a materialman did not furnish timber according to contract, the contractor might buy it in open market and charge the necessary expense to the subcontractor's account. This provision was held to be merely optional with the contractor, and not a stipulation for an exclusive measure of damages.¹⁵ A provision for a deposit as security is not a contract for liquidated damages so as to prevent the recovery of actual damages.¹⁶ So a provision in a lease for the deposit by the lessee with the lessor of a certain sum as security for performance and in case the tenancy is not sooner terminated, that it is to be applied on the rent for the last three months of the term, is not intended as liquidated damages if the lessee makes default before the end of the term.¹⁷

If a contract contains two or more covenants for liquidated damages, they will be construed so as to prevent the recovery of damages under each covenant for a single breach.¹⁸ If a contract contains a provision for the payment of liquidated damages in case of delay in performing the first half of the contract, and also a provision for liquidated damages in case of delay in performing the entire contract, the contractor is not liable under the second covenant for a delay, all of which occurred in the performance of the first half of the task.¹⁹

¹¹ *Rainier v. Masters*, 79 Or. 534, L. R. A. 1916E, 1175, 154 Pac. 426.

¹² *West Chicago, etc., Ry. Co. v. Morrison, etc., Co.*, 160 Ill. 288, 43 N. E. 393.

¹³ *Pengra v. Wheeler*, 24 Or. 532, 21 L. R. A. 726, 34 Pac. 354.

¹⁴ *Williston v. Mathews*, 55 Minn. 422, 56 N. W. 1112.

¹⁵ *Williston v. Mathews*, 55 Minn. 422, 56 N. W. 1112.

¹⁶ *Chaude v. Shepard*, 122 N. Y. 397, 25 N. E. 358.

¹⁷ *Chaude v. Shepard*, 122 N. Y. 397, 25 N. E. 358.

¹⁸ *Cowan v. Meyer*, 125 Md. 450, 94 Atl. 18.

¹⁹ *Cowan v. Meyer*, 125 Md. 450, 94 Atl. 18.

If a contract has been broken and the right of recovering liquidated damages has attached, such right can not be defeated by a subsequent tender of performance.²⁰

§ 2120. Effect of name employed. The use of the term "penalty," or "liquidated damages," is not conclusive.¹ On the one hand, a provision for "liquidated damages" may appear from the context of the contract to be really a provision for a penalty, and will accordingly be so treated.² "There is no charm in the words 'liquidated damages.'"³ A provision that "said damages are stipulated at" a certain amount, or for paying "stipulated damages," may be held from the context to be a covenant for a penalty.⁴ A like result has been reached where a liability imposed by statute, penal in its nature, is spoken of by statute as "liquidated damages." It is, notwithstanding, treated as a penalty.⁵ On the other hand, a contract for a "penalty" may appear from the context to be a contract for liquidated damages, and will be so treated.⁶ So a provision for a "penalty"—"named

²⁰ *Rabinowitz v. Apter*, 90 Conn. 1, 96 Atl. 157.

¹ *United States. Northwestern Terra Cotta Co. v. Caldwell*, 234 Fed. 491, 148 C. C. A. 257.

Alabama. McCurry v. Gibson, 108 Ala. 451, 54 Am. St. Rep. 177, 18 So. 806.

Arkansas. Boston Store v. Schleuter, 88 Ark. 213, 114 S. W. 242.

Illinois. Hennessey v. Metzger, 152 Ill. 505, 43 Am. St. Rep. 267, 38 N. E. 1058.

Iowa. Elzey v. Winterset, 172 Ia. 643, 154 N. W. 901.

Maryland. Willson v. Baltimore, 83 Md. 203, 55 Am. St. Rep. 339, 34 Atl. 774.

Michigan. Decker v. Pierce, 191 Mich. 64, 157 N. W. 384.

Missouri. May v. Crawford, 142 Mo. 390, 44 S. W. 260.

North Carolina. Bradshaw v. Millikin, 173 N. Car. 432, 92 S. E. 161.

Ohio. Lange v. Werke, 2 O. S. 519.

² *England. Kemble v. Farren*, 6 Bing. 141.

United States. Tilley v. Loan Association, 52 Fed. 618; *Chicago House-Wrecking Co. v. United States*, 106 Fed. 385, 53 L. R. A. 122, 45 C. C. A. 343; *Northwestern Terra Cotta Co. v. Caldwell*, 234 Fed. 491, 148 C. C. A. 257.

Iowa. Elzey v. Winterset, 172 Ia. 643, 154 N. W. 901.

North Carolina. Disosway v. Edwards, 134 N. Car. 254, 46 S. E. 501.

Wisconsin. Fitzpatrick v. Cottingham, 14 Wis. 219.

³ *Elzey v. Winterset*, 172 Ia. 643, 154 N. W. 901.

⁴ *Decker v. Pierce*, 191 Mich. 64, 157 N. W. 384.

⁵ *Anderson v. Byrnes*, 122 Cal. 272, 54 Pac. 821.

⁶ *United States v. Bethlehem Steel Company*, 205 U. S. 105, 51 L. ed. 731; *Robinson v. Aid Society*, 68 N. J. L. 723, 54 Atl. 416; *Illinois Central Ry. v. Cabinet Co.*, 104 Tenn. 568, 78 Am. St. Rep. 933, 50 L. R. A. 729, 58 S. W. 303.

as stipulated damages,"⁷ or for paying "the penal sum of six hundred dollars" for breach of a logging contract,⁸ or for a "fine,"⁹ or "as a forfeiture,"¹⁰ or as a "forfeiture" of a certain amount "as liquidated damages,"¹¹ or as a "guarantee or forfeiture,"¹² or "as forfeit,"¹³ have each been held to be provisions for liquidated damages where such appeared to be their real nature.

Prima facie the term used by the parties is the correct one.¹⁴ If the entire contract leaves it fairly doubtful whether the amount named is a penalty or liquidated damages, the fact that the parties have called it liquidated damages will be conclusive.¹⁵ The presumption of the accuracy of the term used by the parties is possibly somewhat stronger when the term employed is "penalty" than when it is "liquidated damages."¹⁶ Under a contract which provided for an advance payment of three thousand dollars, and for the "forfeiture" of such advance payment in case of breach of such contract by the buyer, such provision is for a penalty and not for liquidated damages.¹⁷ "The parties themselves denominate it a penalty, and it would require very strong evidence to author-

⁷ *Tode v. Gross*, 127 N. Y. 480, 24 Am. St. Rep. 475, 13 L. R. A. 652, 28 N. E. 469.

⁸ *Montague v. Robinson*, 122 Ark. 163, 182 S. W. 558 (obiter).

⁹ *Manistee Iron Works Co. v. Lumber Co.*, 92 Wis. 21, 65 N. W. 863.

¹⁰ *McCurry v. Gibson*, 108 Ala. 451, 54 Am. St. Rep. 177, 18 So. 806.

¹¹ *Lange v. Werke*, 2 O. S. 519.

¹² *Sanders v. Carter*, 91 Ga. 450, 17 S. E. 345.

¹³ *Hardie, etc., Co. v. Oil Mill*, 84 Miss. 259, 36 So. 262.

See also, *Boston Store v. Schleuter*, 88 Ark. 213, 114 S. W. 242.

¹⁴ "Liquidated damages," prima facie correct. *Stegman v. O'Connor*, 80 L. T. (N.S.) 234; *United States v. Rubin*, 233 Fed. 125; *Kelly v. Fejervary*, 111 Ia. 693, 83 N. W. 791; *Selby v. Matson*, 137 Ia. 97, 14 L. R. A. (N.S.) 1210, 114 N. W. 609; *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174.

"Penalty," prima facie correct. *Smith*

v. Brown, 164 Mass. 584, 42 N. E. 101; *Wilkinson v. Colley*, 164 Pa. St. 35, 26 L. R. A. 114, 30 Atl. 286.

Held penalties. "In the penal sum of estimated amount of freight." *Watts v. Camors*, 115 U. S. 353, 29 L. ed. 406.

"Forfeiture." *Van Buren v. Digges*, 52 U. S. (11 How.) 461, 13 L. ed. 771.

¹⁵ *United States v. Rubin*, 233 Fed. 125.

¹⁶ *Arkansas. Montague v. Robinson*, 122 Ark. 163, 182 S. W. 558.

Iowa. Foley v. McKeegan, 4 Ia. 1, 66 Am. Dec. 107.

Kansas. Evans v. Moseley, 84 Kan. 322, 50 L. R. A. (N.S.) 889, 114 Pac. 374.

Massachusetts. Smith v. Brown, 164 Mass. 584, 42 N. E. 101.

Vermont. Smith v. Wainwright, 24 Vt. 97.

¹⁷ *Evans v. Moseley*, 84 Kan. 322, 50 L. R. A. (N.S.) 889, 114 Pac. 374.

ize the court to say that their own words do not express their own intention." ¹⁸

Since written words prevail over printed words,¹⁹ a contract which provides in printing for a penalty, but in which the words "as liquidated damages" are interlined in handwriting, will be treated as if the parties had intended to insert only the provision for liquidated damages.²⁰ The fact that provision is made for a bond or a certified check, "as surety for the making and execution of a contract," does not show that the parties have agreed upon such deposit, in case a deposit is made in place of a bond, as liquidated damages.²¹

It has been said that there is a strong tendency to treat covenants for payment on breach as covenants for liquidated damages; and this has been said even where the contract referred to the amount as a "penal sum." ²²

§ 2121. Intention of parties controls. The intention of the parties is said to be paramount and controlling.¹ The fact that the provision for so-called liquidated damages was inserted by the

¹⁸ *Taylor v. Sandiford*, 20 U. S. (7 Wheat.) 13, 17, 5 L. ed. 384.

¹⁹ See § 2403.

²⁰ *Board of Commerce v. Security Trust Co.*, 225 Fed. 454, 140 C. C. A. 486.

²¹ *Barber Asphalt Paving Co. v. St. Paul*, 136 Minn. 396, L. R. A. 1917E, 370, 162 N. W. 470.

²² *Montague v. Robinson*, 122 Ark. 163, 182 S. W. 558.

¹ *Connecticut. Rabinowitz v. Apter*, 90 Conn. 1, 96 Atl. 157.

Illinois. Advance Amusement Co. v. Franke, 268 Ill. 579, 109 N. E. 471.

Iowa. Kelly v. Fejervary, 111 Ia. 693, 83 N. W. 791; *Joeckel v. Johnson*, 178 Ia. 231, 159 N. W. 672.

Kansas. Heatwole v. Gorrell, 35 Kan. 692, 12 Pac. 135.

Massachusetts. Perkins v. Lyman, 11 Mass. 76, 6 Am. Dec. 158.

Minnesota. Taylor v. Newspaper Co., 83 Minn. 523, 86 N. W. 760.

New York. Cotheal v. Talmage, 9 N. Y. 551, 61 Am. Dec. 716.

Ohio. Sheffield-King Milling Co. v. Domestic Science Baking Co., 95 O. S. 180, 115 N. E. 1014.

North Carolina. Bradshaw v. Millikin, 173 N. Car. 432, 92 S. E. 161.

"The courts at one time seemed to be quite strong in their views and would scarcely admit that there ever was a valid contract providing for liquidated damages. Their tendency was to construe the language as a penalty, so that nothing but the actual damages sustained by the party aggrieved could be recovered. Subsequently the courts became more tolerant of such provisions, and have now become strongly inclined to allow parties to make their own contracts, and to carry out their intentions, even when it would result in the recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained." *United States v. Bethlehem Steel Company*, 205 U. S. 105, 51 L. ed. 731.

purchaser after the contract was prepared for execution, is said to impose upon him the burden of showing that the parties intended such provision as one for liquidated damages.²

This means, however, not what they have agreed to call it, nor even what they may in good faith think it is, for this involves their opinion upon the law.³ When their intent is said to be paramount, what is meant is that if from the surrounding facts and circumstances it appears that they are in good faith contracting for the actual amount of the loss as estimated in advance, the contract is one for liquidated damages; while, if they are contracting for an arbitrary sum, intended to coerce performance or punish default, they are contracting for a penalty.⁴

In determining whether the parties are stipulating for a penalty or for liquidated damages, the surrounding circumstances,⁵ including the prior negotiations of the parties,⁶ and the circumstances which surround the execution of the contract,⁷ may be considered. The fact that the government seeks for bids on time as well as on price, and that it accepted the bid which was highest in price and shortest in time, may be considered in determining that a provision for deducting a certain amount for each day of delay is intended as liquidated damages.⁸

In case of doubt, the courts prefer to treat the stipulation as one for a penalty, since this construction makes the actual amount of the damages the amount of recovery.⁹ The opposite view, however, has been expressed and it has been said that effect should be given to the intention of the parties unless it appears that the

² *Mount Airy Milling & Grain Co. v. Runkles*, 118 Md. 371, L. R. A. 1915E, 373, 84 Atl. 533.

³ *Willson v. Mayor of Baltimore*, 83 Md. 203, 55 Am. St. Rep. 330, 34 Atl. 774.

⁴ *Iowa. Sanford v. National Bank*, 94 Ia. 680, 63 N. W. 459; *Elzey v. Winterset*, 172 Ia. 643, 154 N. W. 901.

Massachusetts. Cushing v. Drew, 97 Mass. 445.

Missouri. May v. Crawford, 142 Mo. 390, 44 S. W. 260.

North Carolina. Bradshaw v. Millikin, 173 N. Car. 432, 92 S. E. 161.

Pennsylvania. Streeper v. Williams, 48 Pa. St. 450.

West Virginia. Wilkes v. Bierne, 68 W. Va. 82, 31 L. R. A. (N.S.) 937, 69 S. E. 366.

⁵ *United States v. Bethlehem Steel Company*, 205 U. S. 105, 51 L. ed. 731.

⁶ *United States v. Bethlehem Steel Company*, 205 U. S. 105, 51 L. ed. 731; *Mount Airy Milling & Grain Co. v. Runkles*, 118 Md. 371, L. R. A. 1915E, 373, 84 Atl. 533.

⁷ *Mount Airy Milling & Grain Co. v. Runkles*, 118 Md. 371, L. R. A. 1915E, 373, 84 Atl. 533.

⁸ *United States v. Bethlehem Steel Company*, 205 U. S. 105, 51 L. ed. 731.

⁹ *Colorado. Amanda, etc., Co. v. Mill Co.*, 28 Colo. 251, 64 P. 218.

stipulation is for a penalty.¹⁰ In view of the difficulty in ascertaining the damages which arise from a breach of a valid covenant not to compete in business, it is said that a provision for the payment of money in case of breach of such a covenant will be regarded as a covenant for liquidated damages rather than as a covenant for a penalty.¹¹ Whether a provision for the payment of a certain amount in case of default is a penalty or a stipulation for liquidated damages, is a question for the court.¹²

§ 2122. "Artificial rules" for determining question. To lay down a general test, or set of tests, for determining whether a stipulation is for a penalty or liquidated damages, is even more difficult than the general attempt to lay down an arbitrary rule for determining in advance what the parties to a contract mean by the use of certain language. These "artificial rules"¹ are liable to fail of application in any particular contract by reason of the context and subject-matter which may show an intent different from that which the rule indicates. The difficulty is intensified in this case by the fact that on many elementary questions as to the application of specific tests, the courts are absolutely at variance. A summary of the English cases on this subject is given in *Wallis v. Smith*,² in which the following classes are enumerated: "Where a sum of money is stated to be payable either by way of liquidated damages or by way of penalty for breach of stipulations, all or some of which are, or one of which is, for the payment of a sum of money of less amount, that is really as penalty, and you can only recover the actual damage, and the court will not sever the stipulations."³ Cases "in which the amount of damages is not ascertainable per se, but in which the amount of damages for a

Illinois. *Hennessey v. Metzger*, 152 Ill. 505, 43 Am. St. Rep. 267, 38 N. E. 1058; *Advance Amusement Co. v. Franke*, 268 Ill. 579, 109 N. E. 471.

Kansas. *Evans v. Moseley*, 84 Kan. 322, 50 L. R. A. (N.S.) 889, 114 Pac. 374.

Kentucky. *Day Bros. Lumber Co. v. Ison* (Ky.), 62 S. W. 516.

Massachusetts. *Wallis v. Carpenter*, 95 Mass. (13 All.) 19.

Minnesota. *Schommer v. Flour City Ornamental Iron Works*, 129 Minn. 244, 152 N. W. 535.

Montana. *O'Keefe v. Dyer*, 20 Mont. 477, 52 Pac. 196.

Tennessee. *Baird v. Tolliver*, 25 Tenn. (6 Humph.) 186, 44 Am. Dec. 298.

¹⁰ *Grand Union Laundry Co. v. Carney*, 88 Wash. 327, 153 Pac. 5.

¹¹ *Bradshaw v. Millikin*, 173 N. Car. 432, L. R. A. 1917E, 880, 92 S. E. 161.

¹² *Martin v. Lott*, 144 Ga. 660, 87 S. E. 902.

¹ *Bagley v. Peddie*, 16 N. Y. 469, 471. 69 Am. Dec. 713 [quoted, *Sun*, etc., *Co. v. Moore*, 183 U. S. 642, 46 L. ed. 366].

² 21 Ch. D. 243.

³ *Wallis v. Smith*, 21 Ch. D. 243, 256.

breach of one or more of the stipulations, either must be small, or will, in all human probability, be small—that is, where it is not absolutely necessary that they should be small, but it is so near to a necessity, having regard to the probabilities of the case, that the court will presume it to be so.”⁴ This class of cases the court says is in part open for discussion and in part included in another class, that is, the one following. “The class of cases to which I refer is that in which the damages for the breach of each stipulation are unascertainable, or not readily ascertainable, but the stipulations may be of greater or less importance, or they may be of equal importance. There are dicta there which seem to say that if they vary much in importance, the principle of which I have been speaking applies, but there is no decision. On the contrary, all the reported cases are decisions the other way; although the stipulations have varied in importance, the sum has always been treated as liquidated damages.”⁵ “A class of cases relating to deposits. Where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling, some of which may be for the payment of money on a given day, in all those cases the judges have held that this rule does apply and that the bargain of the parties is to be carried out. I think that exhausts the substance of the cases.”⁶ This classification is apparently approved by the supreme court of the United States,⁷ and in the same case more of these “artificial rules” are suggested.

§ 2123. Difficulty of proving actual damages. One test which has been suggested is whether it is easy or difficult to prove the actual damages. Where this test is recognized it is held that if the actual damages can be proved with reasonable certainty, a stipulation in advance, fixing the amount thereof, is a penalty.¹ This is in some states a statutory rule.²

⁴ Wallis v. Smith, 21 Ch. D. 243, 257.

⁵ Wallis v. Smith, 21 Ch. D. 243, 258.

⁶ Wallis v. Smith, 21 Ch. D. 243, 258.

⁷ Sun, etc., Association v. Moore, 183 U. S. 642, 46 L. ed. 366.

¹ Arkansas. Montague v. Robinson, 122 Ark. 163, 182 S. W. 558.

Kansas. Evans v. Moseley, 84 Kan. 322, 50 L. R. A. (N.S.) 889, 114 Pac. 374.

Massachusetts. Hall v. Crowley, 87 Mass. (5 All.) 304, 81 Am. Dec. 745; Makletzova v. Diaghileff, 227 Mass. 100, 116 N. E. 231.

Minnesota. Fasler v. Beard, 39 Minn. 32, 38 N. W. 755.

Nebraska. Brennan v. Clark, 29 Neb. 385, 45 N. W. 472.

New Jersey. Lansing v. Dodd, 45 N. J. L. 525.

New York. Caesar v. Robinson, 174 N. Y. 492, 67 N. E. 58.

Oregon. Rainier v. Masters, 79 Or. 534, 154 Pac. 426 (obiter).

Washington. Krutz v. Robbins, 12 Wash. 7, 50 Am. St. Rep. 871, 28 L. R. A. 676, 40 Pac. 415.

² Home, etc., Co. v. McNamara, 111 Fed. 822, 49 C. C. A. 642; Drew v. Pedlar, 87 Cal. 443, 22 Am. St. Rep.

In some jurisdictions, however, this test is not to be resorted to in the first instance, and it is to be used only as a means of solving doubts which are raised by the remaining provisions of the contract.³ The party who claims that it is difficult to prove the amount of damages and who is seeking to uphold the provision for the payment of money as an agreement for liquidated damages, has the burden of showing that such damages are difficult to ascertain;⁴ and the recital in the contract that such damages are difficult to prove is ineffectual.⁵ In other jurisdictions it has been said that there is no presumption that the damages were certain in amount or readily susceptible of proof,⁶ and accordingly in the absence of evidence as to the amount of damages, a contract by which a contractor agrees to pay ten dollars per day for delay in the construction of a sewer, is to be regarded as a covenant for liquidated damages.⁷

Where this test is recognized a provision for paying ten dollars a day for delay in completing a house;⁸ or for forfeiting twenty per cent. of the invoice price on countermanding an order for personality;⁹ or for paying a fixed sum per head in case of shortage in the number of cattle contracted for;¹⁰ or for returning the amount paid as rent in case of failure to furnish the amount of water agreed upon,¹¹ is in each case held a penalty.

If the actual damages are not easy to prove, a stipulation in advance as to the amount of damages is to be treated *prima facie* as a stipulation for liquidated damages,¹² and it is only when the amount which is fixed in such stipulation is evidently excessive

257, 25 Pac. 749; *Pacific Factor Co. v. Adler*, 90 Cal. 110, 25 Am. St. Rep. 102, 27 Pac. 36; *Mansur, etc., Implement Co. v. Willet*, 10 Okla. 383, 61 Pac. 1066; *Home Pattern Co. v. Mascho*, 46 Okla. 55, 148 Pac. 131; *Childs v. Moore*, 57 Okla. 638, 157 Pac. 333; *Seim v. Krause*, 13 S. D. 530, 83 N. W. 583.

³ *Grand Union Laundry Co. v. Carney*, 88 Wash. 327, 153 Pac. 5.

⁴ *Deuninck v. Irrigation Co.*, 28 Mont. 255, 72 Pac. 618.

⁵ *Pacific Factor Co. v. Adler*, 90 Cal. 110, 25 Am. St. Rep. 102, 27 Pac. 36.

⁶ *Wood v. Ocean City*, 85 N. J. Eq. 328, 96 Atl. 489.

⁷ *Wood v. Ocean City*, 85 N. J. Eq. 328, 96 Atl. 489.

⁸ *Seim v. Krause*, 13 S. D. 530, 83 N. W. 583.

⁹ *Mansur, etc., Implement Co. v. Willet*, 10 Okla. 383, 61 Pac. 1066. For similar case see *Mansur, etc., Co. v. Hardware Co.*, 136 Ala. 597, 33 So. 818.

¹⁰ *Home, etc., Co. v. McNamara*, 111 Fed. 822, 49 C. C. A. 642.

¹¹ *Deuninck v. Irrigation Co.*, 28 Mont. 255, 72 Pac. 618.

¹² *United States. Board of Commerce v. Security Trust Co.*, 225 Fed. 454, 140 C. C. A. 486; *United States v. Rubin*, 227 Fed. 938.

and unreasonable that the amount agreed upon is to be regarded as a penalty.¹³

On this theory a contract to furnish public utilities, such as electric lights,¹⁴ or a public bridge,¹⁵ or a contract whereby a telephone company is to pay a fixed sum if it merges with a competitor,¹⁶ is one for breach of which it is not easy to estimate damages; and hence, covenants to pay fixed sums on breach are covenants for liquidated damages. Other examples of such covenants are agreements to pay money on breach of a contract not to publish libelous articles;¹⁷ to refund money if a dike should be destroyed, exposing the promisee's land to high tides;¹⁸ an agree-

Arkansas. *Scott v. McCraw, Perkins & Webber Co.*, 119 Ark. 133, 177 S. W. 901.

Colorado. *Bilz v. Powell*, 50 Colo. 482, 38 L. R. A. (N.S.) 847, 117 Pac. 344.

New Jersey. *Summit v. Morris County Traction Co.*, 85 N. J. L. 193, L. R. A. 1915E, 385, 88 Atl. 1048; *Wood v. Ocean City*, 85 N. J. Eq. 328, 96 Atl. 489.

North Carolina. *Bradshaw v. Millikin*, 173 N. Car. 432, L. R. A. 1917E, 880, 92 S. E. 161.

North Dakota. *Gile v. Interstate Motor Car Co.*, 27 N. D. 108, L. R. A. 1915B, 109, 145 N. W. 732.

Oklahoma. *Dillon v. Ringleman*, 55 Okla. 331, 155 Pac. 563. (So by statute.)

Rhode Island. *Darcey v. Darcey*, 29 R. I. 384, 23 L. R. A. (N.S.) 886, 71 Atl. 595.

Washington. *Madler v. Silverstone*, 55 Wash. 159, 34 L. R. A. (N.S.) 1, 104 Pac. 165; *Grand Union Laundry Co. v. Carney*, 88 Wash. 327, 153 Pac. 5.

¹³ **England.** *Green v. Price*, 13 M. & W. 695.

United States. *Pressed Steel Car Co. v. Ry.*, 121 Fed. 609, 57 C. C. A. 635.

Connecticut. *Rabinowitz v. Apter*, 90 Conn. 1, 96 Atl. 157.

Florida. *Southern Menhaden Co. v. How*, 71 Fla. 128, 70 So. 1000.

Georgia. *Sanders v. Carter*, 91 Ga. 450, 17 S. E. 345.

Illinois. *Hennessey v. Metzger*, 152 Ill. 505, 43 Am. St. Rep. 267, 38 N. E. 1058.

Iowa. *Joeckel v. Johnson*, 178 Ia. 231, 159 N. W. 672.

Massachusetts. *Chase v. Allen*, 79 Mass. (13 Gray) 42; *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174.

Nebraska. *Brennan v. Clark*, 29 Neb. 385, 45 N. W. 472.

New Jersey. *Ferber Construction Co. v. Board of Education*, 90 N. J. L. 193, 100 Atl. 329; *Wood v. Ocean City*, 85 N. J. Eq. 328, 96 Atl. 489.

New York. *Ward v. Building Co.*, 125 N. Y. 230, 26 N. E. 256.

North Carolina. *Bradshaw v. Millikin*, 173 N. Car. 432, 92 S. E. 161.

Ohio. *Grasselli v. Lowden*, 11 O. S. 349.

Washington. *Everett Land Co. v. Maney*, 16 Wash. 552, 48 Pac. 243.

¹⁴ *Brooks v. Wichita*, 114 Fed. 297, 52 C. C. A. 209.

¹⁵ *Malone v. Philadelphia*, 147 Pa. St. 416, 23 Atl. 628.

¹⁶ *New Britain v. Telephone Co.*, 74 Conn. 326, 50 Atl. 881, 1015. For a similar contract by a railroad, see *Grand Trunk Ry. v. Halton County*, 21 Can. S. C. 716.

¹⁷ *Emery v. Boyle*, 200 Pa. St. 249, 49 Atl. 779.

¹⁸ *Jennings v. McCormick*, 25 Wash. 427, 65 Pac. 764.

ment to pay a certain sum as liquidated damages in case of a sublessee's being ousted by lessee;¹⁹ a provision that if a partner shall violate his promise to abstain from intoxicating liquors he shall forfeit all his interest in the business and receive a monthly salary;²⁰ an agreement to pay a certain sum of money on breach of a contract to form a partnership;²¹ an agreement that the principal shall be authorized to retain a certain amount out of the agent's commissions in case of breach of contract by the agent;²² an agreement by one to whom exclusive territory was given for selling a certain product to give up his interest in a deposit in case he did not purchase a certain amount of such product;²³ a contract to pay an agent, who is to sell upon commission, the amount of commissions upon the entire property which the principal agrees to forward to him for selling, whether it is forwarded or not;²⁴ a contract to furnish a certain amount of laundry work and to pay for such amount, even if a less amount were actually furnished;²⁵ or a contract to convey realty;²⁶ or a contract to exchange property;²⁷ or a contract to give two weeks' notice before quitting work,²⁸ the work in other departments being dependent on the work in the department in which this employe was working; or a contract to deduct a fixed amount from the price of logs not delivered on time, and thus exposed to the weather;²⁹ or a provision for deducting a certain amount in case of breach of a building contract,³⁰ or a contract to pay one thousand dollars in

¹⁹ *Guerin v. Stacy*, 175 Mass. 595, 56 N. E. 892.

²⁰ *Henderson v. Murphree*, 109 Ala. 556, 20 So. 45.

²¹ *Sanford v. National Bank*, 94 Ia. 680, 63 N. W. 459; *Doan v. Rogan*, 79 O. S. 372, 87 N. E. 263.

²² *Bilz v. Powell*, 50 Colo. 482, 38 L. R. A. (N.S.) 847, 117 Pac. 344.

²³ *Gile v. Interstate Motor Car Co.*, 27 N. D. 108, L. R. A. 1915B, 109, 145 N. W. 732.

²⁴ *Scott v. McCraw, Perkins & Webber Co.*, 119 Ark. 133, 177 S. W. 901.

²⁵ *Grand Union Laundry Co. v. Carney*, 88 Wash. 327, 153 Pac. 5.

²⁶ *Martin v. Lott*, 144 Ga. 660, 87 S. E. 902; *Selby v. Matson*, 137 Ia. 97, 14 L. R. A. (N.S.) 1210, 114 N. W. 609; *Nostrand v. Morehart*, 132 Minn.

351, 157 N. W. 584; *Sanders v. Carter*, 91 Ga. 450, 17 S. E. 345; *Talkin v. Anderson (Tex.)*, 19 S. W. 852. A contract to pay about seven per cent. of the contract value of realty in case of the refusal of the purchaser to take such land is not so unreasonable as to amount to a penalty. *Martin v. Lott*, 144 Ga. 660, 87 S. E. 902.

²⁷ *Rabinowitz v. Apter*, 90 Conn. 1. 96 Atl. 157; *Madler v. Silverstone*, 55 Wash. 159, 34 L. R. A. (N.S.) 1, 104 Pac. 165.

²⁸ *Tennessee Mfg. Co. v. James*, 91 Tenn. 154, 30 Am. St. Rep. 865, 15 L. R. A. 211, 18 S. W. 262.

²⁹ *Kilbourne v. Lumber Co.*, 111 Ky. 693, 64 S. W. 631.

³⁰ *Southern Menhaden Co. v. How*, 71 Fla. 128, 70 So. 1000. See § 2131.

case of a breach by an employe of his covenant not to drink intoxicating liquor.³¹ Under a contract by which a board of commerce agrees to spend a certain amount of money in securing a site for a manufacturing company, and the manufacturing company agrees to maintain a certain payroll for a certain period of time, a provision to the effect that the manufacturing company shall pay to the chamber of commerce a sum which is substantially that which the chamber of commerce has expended for the site for the manufacturing company in case the manufacturing company fails to maintain such payroll, is a stipulation for liquidated damages.³² A contract by which a married woman, who has instituted divorce proceedings against her husband, agrees to dismiss such proceedings and to resume marital relations with him, and he agrees to cease his illegal relations with his mistress and to convey a certain amount of realty to his wife in case he fails to comply with such covenant, provides for liquidated damages.³³ The actual damage which is sustained by reason of violation of a contract to keep an alien in custody while awaiting deportation, is so difficult to estimate, that a provision for paying a specified sum in the event of the breach of such contract, is held to be a provision for liquidated damages.³⁴ A covenant in a contract of agency by which the principal is authorized to retain a certain amount out of the agent's commissions in the event of the agent's default, is not rendered a provision for a penalty by reason of the fact that under the provisions of the contract the amount to be retained will increase in proportion to the time that the performance of the contract has lasted, if from the circumstances it appears that the maximum amount to be retained would accrue early in the performance of the contract.³⁵

This test, however, has been repudiated by the supreme court of the United States,³⁶ and it has been held by them that even though the actual damages can be readily ascertained with certainty, a stipulation for damages in advance is not necessarily a penalty.

³¹ Keeble v. Keeble, 85 Ala. 552, 5 So. 149.

³² Board of Commerce v. Security Trust Co., 225 Fed. 454, 140 C. C. A. 486.

³³ Darcey v. Darcey, 29 R. I. 384, 23 L. R. A. (N.S.) 886, 71 Atl. 595.

³⁴ United States v. Rubin, 233 Fed. 125.

³⁵ Bilz v. Powell, 50 Colo. 482, 38 L. R. A. (N.S.) 847, 117 Pac. 344.

³⁶ Sun, etc., Association v. Moore, 183 U. S. 642, 46 L. ed. 366.

§ 2124. **Relation of stipulated amount to actual damage.** Another test which has been suggested is whether the amount stipulated for is greatly in excess of the actual damages or not. Where this test is applied, it is held that if the amount stipulated for is no greater than the actual damages,¹ or if the amount which is stipulated for is greater than the actual damages, but such excess is comparatively slight,² the stipulation will be treated as one for liquidated damages.³ Thus an agreement to pay for the use of a button-sewing machine at a certain rate per thousand buttons, and if the lessee does not keep account of the number of buttons sewed, the lessor to have the option to charge five dollars a day for its use, is held to be a rough estimate of the value of the machine and not a penalty.⁴ A contract for the payment of a certain sum per day for delay in delivering gun carriages is to be regarded as a covenant for liquidated damages if it is shown that the United States accepted the bid which was for the greatest amount, because of the fact that it provided for the minimum time of performance.⁵

If the amount stipulated for is excessive, the stipulation is for a penalty.⁶ Thus a provision for paying in case of breach of a contract for work and labor a sum greatly in excess of the cost of

¹ *United States. United States v. Rubin*, 233 Fed. 125.

Illinois. Bartholomae & Roesing Brewing & Malting Co. v. Modzelewski, 260 Ill. 539, 109 N. E. 1058.

Iowa. Joeckel v. Johnson, 178 Ia. 231, 159 N. W. 672.

Massachusetts. Standard Button-Fastening Co. v. Breed, 163 Mass. 10, 39 N. E. 346.

New Jersey. Whitfield v. Levy, 35 N. J. L. 149; *Hoagland v. Segur*, 38 N. J. L. 230; *Lansing v. Dodd*, 45 N. J. L. 525; *Monmouth Park Association v. Iron Works*, 55 N. J. L. 132, 39 Am. St. Rep. 626, 19 L. R. A. 456, 26 Atl. 140.

Tennessee. Illinois Central Ry. v. Cabinet Co., 104 Tenn. 568, 78 Am. St. Rep. 933, 50 L. R. A. 729, 58 S. W. 303.

² *United States v. Bethlehem Steel Company*, 205 U. S. 105, 51 L. ed. 731; *Summit v. Morris County Traction Co.*,

85 N. J. L. 193, L. R. A. 1915E, 385, 88 Atl. 1048 (obiter).

³ *Board of Commerce v. Security Trust Co.*, 225 Fed. 454, 140 C. C. A. 486; *Southern Menhaden Co. v. How*, 71 Fla. 128, 70 So. 1000; *Joeckel v. Johnson*, 178 Ia. 231, 159 N. W. 672; *Doan v. Rogan*, 79 O. S. 372, 87 N. E. 263.

⁴ *Standard Button-Fastening Co. v. Breed*, 163 Mass. 10, 39 N. E. 346.

⁵ *United States v. Bethlehem Steel Company*, 205 U. S. 105, 51 L. ed. 731.

⁶ *United States. Gay Mfg. Co. v. Camp*, 65 Fed. 794, 13 C. C. A. 137.

Arkansas. Glasscock v. Rosengrant, 55 Ark. 376, 18 S. W. 379.

Illinois. Heisen v. Westfall, 86 Ill. App. 576.

Iowa. Elzey v. Winterset, 172 Ia. 643, 154 N. W. 901; *Joeckel v. Johnson*, 178 Ia. 231, 159 N. W. 672.

Kansas. Condon v. Kemper, 47 Kan. 126, 13 L. R. A. 671, 27 Pac. 829;

completing the contract;⁷ or for paying a fine for wrongful use of electrotypes "equal to tenfold the price of the wrongfully used electrotypes";⁸ or for paying in case of breach "five hundred dollars besides all damages,"⁹ have each been held to be agreements for penalties. A provision for the forfeiture of an advance payment in addition to liability for damages caused by a failure to perform, shows that the provision for forfeiture is a provision for a penalty.¹⁰ A provision by which an employer is to retain one dollar a week from his employes' wages, which is not to be repaid to the employe in case he fails to perform his contract for the entire period of employment, is not an attempt to provide for actual compensation, since the longer the employe works the less will be his employer's damages and the greater will be the amount which the employe is to pay in case of breach.¹¹

Where this test is applied, it is the facts as they exist when the contract is made, and not those in existence when the contract was broken, which determine whether the amount stipulated for is reasonable or unreasonable.¹² If the provision which is inserted as liquidated damages is an amount which would appear to be reasonable when the contract was made, it will not be turned into a penalty by the fact that it may subsequently prove to be in excess

Evans v. Moseley, 84 Kan. 322, 50 L. R. A. (N.S.) 889, 114 Pac. 374.

Massachusetts. Meyer v. Estes, 164 Mass. 457, 32 L. R. A. 283, 41 N. E. 683.

Michigan. Decker v. Pierce, 191 Mich. 64, 157 N. W. 384.

Minnesota. Carter v. Strom, 41 Minn. 522, 43 N. W. 394; *Schommer v. Flour City Ornamental Iron Works*, 129 Minn. 244, 152 N. W. 535.

North Carolina. Wheeldon v. Trust Co., 128 N. Car. 69, 38 S. E. 255.

Ohio. Sheffield-King Milling Co. v. Domestic Science Baking Co., 95 O. S. 180, 115 N. E. 1014.

Pennsylvania. Clements v. Ry., 132 Pa. St. 445, 19 Atl. 274, 276.

Tennessee. Baird v. Tolliver, 25 Tenn. (6 Humph.) 186, 44 Am. Dec. 298.

Utah. McIntosh v. Johnson, 8 Utah 359, 31 Pac. 450.

Wisconsin. Gates v. Parmly, 93 Wis. 294, 66 N. W. 253 [affirmed on rehearing, 93 Wis. 321, 67 N. W. 739]; *J. G. Wagner Co. v. Cawker*, 112 Wis. 532, 88 N. W. 599.

⁷ *Heisen v. Westfall*, 86 Ill. App. 576; *Condon v. Kemper*, 47 Kan. 126, 13 L. R. A. 671, 27 Pac. 829. (Cost of work \$100; amount to be paid \$500.)

⁸ *Meyer v. Estes*, 164 Mass. 457, 32 L. R. A. 283, 41 N. E. 683.

⁹ *Foote & Davies Co. v. Malony*, 115 Ga. 985, 42 S. E. 413.

¹⁰ *Evans v. Moseley*, 84 Kan. 322, 50 L. R. A. (N.S.) 889, 114 Pac. 374.

¹¹ *Schommer v. Flour City Ornamental Iron Works*, 129 Minn. 244, 152 N. W. 535.

¹² *United States v. Bethlehem Steel Company*, 205 U. S. 105, 51 L. ed. 731; *Rabinowitz v. Apter*, 90 Conn. 1, 96 Atl. 157; *Cowan v. Meyer*, 125 Md. 450, 94 Atl. 18; *Gibson v. Oliver*, 158 Pa. St. 277, 27 Atl. 961.

of the amount of actual damages.¹³ The question is as to the amount of damage which reasonably might have followed a breach as compared with the amount for the payment of which provision is made, and not the amount of actual damage as compared with the amount thus provided for.¹⁴ A covenant for liquidated damages for failure to deliver material necessary for military purposes during a war, does not become a covenant for a penalty because of the fact that the war terminated soon after the contract was entered into.¹⁵ A provision for a deposit of rent for two months in advance and for loss of such deposit in case of default by the lessee as liquidated damages, is not turned into a provision for a penalty by reason of the fact that the lessor acts as soon as the lessee makes default, and accordingly the amount of such deposit is in excess of the amount of rent which is not paid.¹⁶ In some cases, however, it seems to be assumed that the actual damage which is sustained and not the damage which might have been sustained is the test for determining whether a provision is a penalty or a covenant for liquidated damages; and accordingly where performance has progressed so far that the actual damage is much less than the amount for which provision is made, such provision will be treated as a penalty.¹⁷ A provision for repaying one-half of the purchase price which was paid for property, a business and a covenant not to compete, in case of a breach of the covenant not to compete, was treated as a penalty where such breach took place shortly before the expiration of the period during which the promisor had agreed not to compete.¹⁸ A result of this sort may be justified where, as in some of these cases, the covenant is to pay the same penalty for breaches of a number of different covenants of different degrees of importance.¹⁹ In some cases it may be justified under a fair construction of contract by regarding the covenant to make such payment as a covenant to make such payment in case of a total breach, and not in case of a comparatively minor breach.²⁰ Apart from cases of this sort, how-

¹³ *Cowan v. Meyer*, 125 Md. 450, 94 Atl. 18.

¹⁴ *Rabinowitz v. Apter*, 90 Conn. 1, 96 Atl. 157.

¹⁵ *United States v. Bethlehem Steel Company*, 205 U. S. 105, 51 L. ed. 731.

¹⁶ *Barrett v. Monro*, 69 Wash. 229, 40 L. R. A. (N.S.) 763, 124 Pac. 369.

¹⁷ *Mount Airy Milling & Grain Co. v.*

Runkles, 118 Md. 371, L. R. A. 1915E, 373, 84 Atl. 533; *Shute v. Taylor*, 46 Mass. (5 Met.) 61; *Caesar v. Robinson*, 174 N. Y. 492, 67 N. E. 58.

¹⁸ *Mount Airy Milling & Grain Co. v. Runkles*, 118 Md. 371, L. R. A. 1915E, 373, 84 Atl. 533.

¹⁹ See § 2125.

²⁰ See § 2126.

ever, the validity of the covenant should depend upon the facts as they exist when the contract is made and not upon the facts as they exist when the contract is performed.

§ 2125. One penalty for breaches of different covenants. Another test which has met with general favor is the following: If provision is made for breach of several different covenants of a contract, and a gross sum is fixed which is to be paid in case of the breach of any one of such covenants, and the covenants are of different degrees of importance so that the damage resulting from the breach of one would be much greater than those resulting from the breach of another, the stipulation is held to be a penalty.¹

A promise to pay a fixed sum for failure to build a house or to pay off all liens thereon;² or to pay a certain additional amount per ton for every ton of hay or straw sold off the premises, where the value of manure from hay is different from that from straw;³ or a promise to pay a certain sum in case of any default in a contract to sell and deliver a certain number of sheep;⁴ or a promise

¹ England. *Willson v. Love* [1896], 1 Q. B. 626; *Kemble v. Farren*, 6 Bing 141.

United States. *Home, etc., Co. v. McNamara*, 111 Fed. 822, 49 C. C. A. 642.

Arkansas. *Montague v. Robinson*, 122 Ark. 163, 182 S. W. 558.

Florida. *Smith v. Newell*, 37 Fla. 147, 20 So. 249.

Georgia. *George W. Muller Bank Fixture Co. v. Georgia Ry. & Electric Co.*, 145 Ga. 484, 89 S. E. 615.

Iowa. *Elzey v. Winterset*, 172 Ia. 643, 154 N. W. 901.

Kansas. *Evans v. Moseley*, 84 Kan. 322, 50 L. R. A. (N.S.) 889, 114 Pac. 374; *Metz v. Clay*, 101 Kan. 45, 165 Pac. 809.

Maryland. *Mount Airy Milling & Grain Co. v. Runkles*, 118 Md. 371, L. R. A. 1915E, 373, 84 Atl. 533.

Minnesota. *Carter v. Strom*, 41 Minn. 522, 43 N. W. 394; *State v. Larson*, 83 Minn. 124, 54 L. R. A. 487, 86 N. W. 3; *Johnson v. Dittes*, 137 Minn. 175, 162 N. W. 1078.

Nebraska. *Squires v. Elwood*, 33 Neb. 126, 49 N. W. 939.

New Jersey. *Summit v. Morris County Traction Co.*, 85 N. J. L. 193, L. R. A. 1915E, 385, 88 Atl. 1048.

Ohio. *Berry v. Wisdom*, 3 O. S. 241.

Oklahoma. *El Reno v. Cullinane*, 4 Okla. 457, 46 Pac. 510; *City National Bank v. Kelly*, 51 Okla. 445, 151 Pac. 1172.

Oregon. *Wilhelm v. Eaves*, 21 Or. 194, 14 L. R. A. 297, 27 Pac. 1053.

Pennsylvania. *Keck v. Bieber*, 148 Pa. St. 645, 33 Am. St. Rep. 846, 24 Atl. 170.

Washington. *Johnson v. Cook*, 24 Wash. 474, 64 Pac. 729.

Wisconsin. *Kerslake v. McInnis*, 113 Wis. 659, 89 N. W. 895; *Madison v. Engineering Co.*, 118 Wis. 480, 95 N. W. 1097.

² *Johnson v. Cook*, 24 Wash. 474, 64 Pac. 729. (Amount agreed on \$3,000—value of house \$2,000.)

³ *Willson v. Love* [1896], 1 Q. B. 626.

⁴ *Squires v. Elwood*, 33 Neb. 126, 49 N. W. 939. See for a similar contract

to pay a fixed sum for breach of any one of a number of covenants, ranging from the payment of royalty to keeping gates closed;⁵ or a bond in the sum of ten thousand dollars, conditioned on the release of a number of debts varying in amount from eight thousand dollars to ten thousand dollars,⁶ have each been held to be provisions for penalties. A covenant by which an employe agrees to give his entire time to the business for a certain period, to treat business communications as confidential, to use his best exertions and abilities for his employer, to attempt to benefit by his employer's instructions as an apprentice, and to pay a fixed sum of money on proof of any breach, is a covenant for a penalty.⁷ A contract to sell an undivided interest in a business and a stock in trade and an automobile, to act as employe for the purchaser, and not to compete in business for a period of time, contains covenants of varying degrees of importance, and a stipulation for fifteen hundred dollars in case of breach of any of such covenants is a stipulation for a penalty.⁸ A contract for the exchange of a stock of hardware for certain land, which contains an agreement by one to lend money to the other, together with a guarantee that the stock of hardware shall invoice for a certain amount, contains covenants of such varying importance that a covenant to pay twenty-five hundred dollars in case of any default is a covenant for a penalty.⁹ However, covenants by which one who undertakes an automobile agency agrees to act in a sober and gentleman-like manner, to use his best efforts to make sales, and to give his whole time and energy to the business, are not of varying degrees of importance, and a provision for the employer's retaining a specified sum of money in case of any breach may be a covenant for liquidated damages.¹⁰

This test has proved so satisfactory in its operation that it is a matter of regret that so many cases present facts which do not admit of determination by it. Even this test, however, is not unanimously adopted. It has been repudiated in several courts, though often in obiter, as a decisive test;¹¹ and it has been said that this

of a less marked type, *Home, etc., Co. v. McNamara*, 111 Fed. 822, 49 C. C. A. 642.

⁵ *Keck v. Bieber*, 148 Pa. St. 645, 33 Am. St. Rep. 846, 24 Atl. 170.

⁶ *Bignall v. Gould*, 119 U. S. 495, 30 L. ed. 491.

⁷ *Berry v. Wisdom*, 3 O. S. 241.

⁸ *City National Bank v. Kelly*, 51 Okla. 445, 151 Pac. 1172.

⁹ *Johnson v. Dittes*, 137 Minn. 175, 162 N. W. 1078.

¹⁰ *Bilz v. Powell*, 50 Colo. 482, 38 L. R. A. (N.S.) 847, 117 Pac. 344.

¹¹ *Wallis v. Smith*, 21 Ch. D. 243; *Sun, etc., Co. v. Moore*, 183 U. S. 642,

principle has no application to cases where the damage from each breach, though not the same in each, is in each uncertain,¹² but that it applies only where the damages are readily ascertainable, either on some,¹³ or all,¹⁴ of the breaches, as where one of the covenants is to pay money.¹⁵ Under a contract for constructing two buildings, a provision for paying two hundred dollars for each day of delay in performance, was held not to be a penalty, although such amount was to be paid whether the delay was in the construction of both buildings or of one.¹⁶

A provision for paying a large sum in case of a breach of a minor covenant, but making no provision for payment in case of a total breach, is regarded as a provision for a penalty.¹⁷

§ 2126. Breach of single covenant. If the amount fixed is to be paid in case of breach of a single covenant, it is, if fair and reasonable, to be treated *prima facie* as a covenant for liquidated damages.¹ "Where payment is conditioned on one event, the payment is in the nature of liquidated damages."² Though there are several covenants in a given contract, still if the amount to be paid in case of breach is apportioned to the different covenants, and is fair and reasonable for each, the stipulation is *prima facie* for liquidated damages.³ Thus a provision in a contract for transporting cattle, that the steamer should sail on the day named, "or pay expenses of keep of animals at the rate of fifty cents per

46 L. ed. 366; *Wise v. United States*, 249 U. S. 361, — L. ed. — [affirming, 52 Ct. Cl. 400]; *May v. Crawford*, 142 Mo. 390, 44 S. W. 260.

¹² *Wallis v. Smith*, 21 Ch. D. 243; *Cothel v. Talmage*, 9 N. Y. 551, 61 Am. Dec. 716.

¹³ *Kemble v. Farren*, 6 Bing. 141.

¹⁴ *Pierce v. Jung*, 10 Wis. 30.

¹⁵ *Clement v. Cash*, 21 N. Y. 253 [quoted with approval in *Sun, etc., Association v. Moore*, 183 U. S. 642, 673, 46 L. ed. 366].

¹⁶ *Wise v. United States*, 249 U. S. 361, — L. ed. — [affirming, 52 Ct. Cl. 400].

¹⁷ *Schommer v. Flour City Ornamental Iron Works*, 129 Minn. 244, 152 N. W. 535.

¹ *Law v. Redditch Local Board* [1892], 1 Q. B. 127; *Sun, etc., Association v. Moore*, 183 U. S. 642, 46 L. ed. 366; *Duffy v. Shockey*, 11 Ind. 70, 71 Am. Dec. 348; *Camden Iron Works v. Sewerage and Water Board*, 141 La. 453, 75 So. 204; *Cushing v. Drew*, 97 Mass. 445.

² *Strickland v. Williams* [1899], 1 Q. B. 392, 394 [quoted in *Sun, etc., Association v. Moore*, 183 U. S. 642, 667, 46 L. ed. 366, with the warning that it must be understood that the event is "not the mere non-performance of an ordinary agreement for the payment of money."]

³ *Boys v. Ancell*, 5 Bing. (N. Car.) 390; *Morris v. Wilson*, 114 Fed. 74, 52 C. C. A. 22.

head per day in full," is a stipulation for liquidated damages.⁴ This principle finds application in agreements in building contracts to pay a certain sum per day for delay in completing the work.⁵ If each of two separate contracts contains a provision for liquidated damages, the fact that the contractor attempts to perform both together does not prevent the operation of such covenants.⁶

§ 2127. Forfeiture of deposits and part payments. Agreements are frequently made that one or both parties to a contract shall deposit a certain sum of money which is to be the property of the other if the contract is not performed. Such agreements are, if fair and reasonable, treated as stipulations for liquidated damages and enforced.¹ Thus under a contract for the sale of realty, a deposit of money,² or a certified check,³ may be retained by the party not in default. If the check is lost, equity will give affirmative relief.⁴ So under a contract for the sale of personalty, a deposit of a certified check may be retained by the party not in default.⁵ A provision for the forfeiture of the first payment for stock in case the subscriber does not perform his contract, is treated as a covenant for liquidated damages.⁶ Under this theory a provision in a contract of employment whereby the employer was to retain six days' wages until the end of the term of employment to secure performance, was treated as a covenant for liquidated damages.⁷ A contract by which an automobile manufacturer gives exclusive rights in certain territory to a so-called agent, and

⁴ *Morris v. Wilson*, 114 Fed. 74, 52 C. C. A. 22.

⁵ See § 2131.

⁶ *Camden Iron Works v. Sewerage and Water Board*, 141 La. 453, 75 So. 204.

¹ *Georgia. Sanders v. Carter*, 91 Ga. 450, 17 S. E. 345; *Allison v. Dunwody*, 100 Ga. 51, 28 S. E. 651.

Kentucky. Woodbury v. Mfg. Co., 96 Ky. 459, 20 S. W. 295.

Iowa. Sanford v. Bank, 94 Ia. 680, 63 N. W. 459.

North Dakota. Gile v. Interstate Motor Car Co., 27 N. D. 108, L. R. A. 1915B, 109, 145 N. W. 732.

Wyoming. Edwards v. Johnston, 23 Wyom. 384, 152 Pac. 273.

See also, *Riley v. Aetna Insurance*

Co., 80 W. Va. 236, L. R. A. 1917E, 983, 92 S. E. 417.

See for a forfeiture of all interest in a policy of life insurance, *Collman v. Equitable Life Assurance Society*, 133 Ia. 177, 8 L. R. A. (N.S.) 1019, 110 N. W. 444.

² *Womack v. Coleman*, 89 Minn. 17, 93 N. W. 663.

³ *Moore v. Durnam*, 63 N. J. Eq. 96, 51 Atl. 449.

⁴ *Moore v. Durnam*, 63 N. J. Eq. 96, 51 Atl. 449.

⁵ *Millar v. Smith*, 28 Tex. Civ. App. 386, 67 S. W. 429.

⁶ *Edwards v. Johnston*, 23 Wyom. 384, 152 Pac. 273.

⁷ *Wilson v. Godkin*, 136 Mich. 106, 98 N. W. 985.

the agent deposits a certain amount of money for each of the total number of automobiles which the so-called agent agrees to accept and pay for, and by which the seller is to retain the amount deposited for the cars which the purchaser does not take, is regarded as a contract for liquidated damages.⁸ A provision by which an employer is to retain a certain amount of money in case his agent violates his covenants, to behave in a sober and gentleman-like manner, to use his best efforts to make sales and to give his entire time and energy to the business, has been treated as a covenant for liquidated damages.⁹

If unreasonable, and intended merely to coerce performance, they are treated as penalties.¹⁰ Thus a provision in a contract for the sale of lumber, whereby the vendee was to retain fifty cents per thousand to insure performance, is treated as a penalty.¹¹ Thus under a building contract, the retention of a certain percentage of the contract price to secure performance, and to be the property of the owner in case of breach by the contractor, is a penalty.¹² So if one thousand dollars is deposited by the lessee to become the property of the lessor in case of breach of the covenants of the lease, this is held to be a penalty if all the covenants of the lease have been performed except the payment of forty-five dollars of rent.¹³ A provision for a deposit of five hundred dollars which the lessor is to retain in case the lessee fails to comply with the covenants of his lease, is a provision for a penalty.¹⁴ On the other

⁸ *Gile v. Interstate Motor Car Co.*, 27 N. D. 108, L. R. A. 1915B, 109, 145 N. W. 732.

⁹ *Bilz v. Powell*, 50 Colo. 482, 38 L. R. A. (N.S.) 847, 117 Pac. 344.

¹⁰ *United States. Sherburne v. Hirst*, 121 Fed. 998; *Kennedy v. United States*, 24 Ct. Cl. 122.

Colorado. Carson v. Arvantes, 10 Colo. App. 382, 50 Pac. 1080.

Illinois. Advance Amusement Co. v. Franke, 268 Ill. 579, 109 N. E. 471.

Maryland. Willson v. Baltimore, 83 Md. 203, 55 Am. St. Rep. 339, 34 Atl. 774.

Missouri. Tinkham v. Satori, 44 Mo. App. 659.

New Jersey. Monmouth Park Association v. Warren, 55 N. J. L. 598, 27 Atl. 932.

New York. Chaudé v. Shepard, 122 N. Y. 397, 25 N. E. 358.

Oklahoma. Hargrove v. Bourne, 47 Okla. 484, 150 Pac. 121.

Texas. Lindsey v. Rockwall County, 10 Tex. Civ. App. 225, 30 S. W. 380.

¹¹ *Stony Creek Lumber Co. v. Fields*, 102 Va. 1, 45 S. E. 797. So under a logging contract. *Kerslake v. McInnis*, 113 Wis. 659, 89 N. W. 895.

¹² *Gleason v. United States*, 33 Ct. Cl. 65; *Satterlee v. United States*, 30 Ct. Cl. 31; *Kennedy v. United States*, 24 Ct. Cl. 122.

¹³ *Caesar v. Robinson*, 174 N. Y. 492, 67 N. E. 58.

¹⁴ *Hargrove v. Bourne*, 47 Okla. 484, 150 Pac. 121.

hand, a provision for retaining a deposit of two months' rent in case of breach by the lessee, has been treated as a provision for liquidated damages.¹⁵ Deposits made by a bidder to secure his making a formal contract in accordance with the terms under which he bids, if his bid is accepted, have been held to be penalties.¹⁶ A provision that a bidder must deposit a bond or a certified check "as surety for the making and execution of a contract," does not show that such bond or check was intended by the parties as liquidated damages.¹⁷

A similar conflict of view exists where contracts are involved by the terms of which payments made thereunder are in case of default on the part of the one who makes them to become the property of the adversary party. In some cases such provisions are treated as valid, on the theory that they are for liquidated damages,¹⁸ while in others they are treated as agreements for penalties.¹⁹ Under statutory provisions forbidding contracts for liquidated damages unless it is impracticable to show actual damages, such provisions can not be enforced.²⁰ As in case of deposits, most of these cases can be reconciled on the theory that some of the contracts are for amount reasonably apportioned to the amount of actual damage, while others are for excessive and unreasonable amounts.

§ 2128. Default in payment of money—Larger sum due. If the default which is to make a specified sum due and payable is itself the non-payment of a smaller sum of money, the question whether the contract is for a penalty or for liquidated damages depends on which sum the original debt was. If the original debt was the smaller sum, the promise to pay the larger sum in case of default is a penalty.¹ The outward form of the contract does not

¹⁵ *Barrett v. Monro*, 69 Wash. 229, 40 L. R. A. (N.S.) 763, 124 Pac. 369.

¹⁶ *Willson v. Baltimore*, 83 Md. 203, 55 Am. St. Rep. 339, 34 Atl. 774; *Lindsey v. Rockwall County*, 10 Tex. Civ. App. 225, 30 S. W. 380.

¹⁷ *Barber Asphalt Paving Co. v. St. Paul*, 136 Minn. 396, L. R. A. 1917E, 370, 162 N. W. 470.

¹⁸ *Wallis v. Smith*, 21 Ch. D. 243; *Glock v. Colony Co.*, 123 Cal. 1, 69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713; *Havens v. Patterson*, 43 N. Y.

218; *Reddish v. Smith*, 10 Wash. 178, 45 Am. St. Rep. 781, 38 Pac. 1003.

¹⁹ *In re Dagenham Dock Co.*, L. R. 8 Ch. 1022.

²⁰ Contract to forfeit payments for realty if vendee does not perform. *Clearly v. Folger*, 84 Cal. 316, 18 Am. St. Rep. 187, 24 Pac. 280; *Phelps v. Brown*, 95 Cal. 572, 30 Pac. 774; *Barnes v. Clement*, 12 S. D. 270, 81 N. W. 301.

¹ *United States. Gay Mfg. Co. v. Camp*, 65 Fed. 794, 13 C. C. A. 137

prevent the application of this principle. The parties may stipulate that the larger sum is the real debt due, and that it is to be discharged by the payment of the smaller sum. This, however, is a penalty if the smaller sum is the real debt.² Thus an agreement to pay rent for machines, due on the first of each month, payable by the first of the next month, with a discount of fifty per cent. if paid by the fifteenth day of the first month,³ or an agreement for the sale of realty which in legal effect is a sale at eight hundred dollars, with a provision for paying ten installments of a hundred dollars each with interest, but if each payment is made punctually when due, "eight hundred dollars and its yearly interest will be accepted in full payment,"⁴ are each agreements for a penalty for delay. If, however, the larger sum is the real debt, and the creditor has agreed to discharge it on payment of the smaller sum in the manner stipulated in the contract, the agreement that in case of default the larger sum shall be due and payable, is not a stipulation for a penalty.⁵ Thus A had a life interest in an undivided third of B's property. The parties estimated the value of this at eight hundred dollars, and A released her estate in consideration of B's promise, secured by mortgage, to pay to A eight hundred dollars on a specified date, provided if B paid twenty dollars semi-annually to A on specified dates, "it shall discharge the whole debt." This was held not to be a penalty.⁶ If a contract for the sale of realty provides for the payment of the purchase price in installments with interest, and it also provides that in case all installments are paid on or before maturity all interest will be remitted, does not provide for a penalty, since the

Florida. *Smith v. Newell*, 37 Fla. 147, 20 So. 249.

Illinois. *Goodyear, etc., Co. v. Selz*, 157 Ill. 186, 41 N. E. 625.

Massachusetts. *Fisk v. Gray*, 93 Mass. (11 All.) 132.

New Hampshire. *Morrill v. Weeks*, 70 N. H. 178, 46 Atl. 32.

Ohio. *Longworth v. Askren*, 15 O. S. 370; *Cairnes v. Knight*, 17 O. S. 68.

Wisconsin. *Fitzpatrick v. Cottingham*, 14 Wis. 219.

² *Chaffee v. Landers*, 46 Ark. 364; *Moore v. Hylton*, 1 Dev. Eq. (N. Car.)

429; *Longworth v. Askren*, 15 O. S. 370.

³ *Goodyear, etc., Co. v. Selz*, 157 Ill. 186, 41 N. E. 625.

⁴ *Longworth v. Askren*, 15 O. S. 370.

⁵ *United States Mortgage Co. v. Sperry*, 138 U. S. 313, 34 L. ed. 969; *Waggoner v. Cox*, 40 O. S. 539; *Wrenn v. University Land Co.*, 65 Or. 432, 46 L. R. A. (N.S.) 897, 133 Pac. 627.

⁶ *Waggoner v. Cox*, 40 O. S. 539. For a case much like the foregoing except that the smaller sum was treated as the real debt and the larger one therefore as the penalty, see *Cairnes v. Knight*, 17 O. S. 68.

real debt is the purchase price with interest down to the date of payment.⁷

§ 2129. Increase in rate of interest. A contract that if default is made in paying a debt when due, the debt shall bear a higher rate of interest after maturity than it did before, is not a stipulation for a penalty if the higher rate does not exceed the maximum rate fixed by statute.¹ Even if the rate exacted after maturity is in excess of the maximum rate allowed by law, some courts hold that the stipulation is not for a penalty.² In other states a provision for unlawful interest after maturity is treated as a penalty.³ Whether such contracts are usurious is a question discussed elsewhere.⁴ It may here be remarked that the theory that such a stipulation is for a penalty and therefore void is invoked in some cases to save the contract from the consequence of usury,⁵ and in other cases to enable the court to give relief to a debtor who has not brought himself within the protection of the courts on the ground of usury, as by omitting to tender the amount lawfully due.⁶ Agreements that in case of default the debt shall bear a higher though lawful rate of interest from the date at which it was contracted, have been held in some states to be provisions for liquidated damages;⁷ in others as penalties.⁸

¹ *Wren v. University Land Co.*, 65 Or. 432, 46 L. R. A. (N.S.) 897, 133 Pac. 627.

² *United States. Dehass v. Dibert*, 70 Fed. 227, 30 L. R. A. 189, 17 C. C. A. 79; *Linton v. Ins. Co.*, 104 Fed. 584, 44 C. C. A. 54.

California. Thompson v. Garner, 104 Cal. 168, 43 Am. St. Rep. 81, 37 Pac. 900.

Colorado. Eccles v. Herrick, 15 Colo. App. 350, 62 Pac. 1040.

Nebraska. Havemyer v. Paul, 45 Neb. 373, 63 N. W. 932; *Omaha, etc., Co. v. Hansen*, 46 Neb. 870, 65 N. W. 1058; *Dusenberry v. Abbott*, 1 Neb. (unoff.) 101, 95 N. W. 466.

Oregon. Close v. Riddle, 40 Or. 592, 91 Am. St. Rep. 580, 67 Pac. 932.

³ *Smith v. Whitaker*, 23 Ill. 367; *Walker v. Abt*, 83 Ill. 226; *Bane v. Gridley*, 67 Ill. 388.

⁴ *Illinois. First National Bank v. Davis*, 108 Ill. 633.

Iowa. Gower v. Carter, 3 Ia. 244, 66 Am. Dec. 71; *Wilson v. Dean*, 10 Ia. 432.

Minnesota. Newell v. Houlton, 22 Minn. 19.

Nebraska. Weyrich v. Hobelman, 14 Neb. 432, 16 N. W. 436; *Upton v. O'Donahue*, 32 Neb. 565, 49 N. W. 267; *Richardson v. Campbell*, 34 Neb. 181, 33 Am. St. Rep. 633, 51 N. W. 753.

Ohio. Brockway v. Clark, 6 Ohio 45.

Wisconsin. Fisher v. Otis, 3 Pinn. (Wis.) 78, 3 Chand. (Wis.) 83.

⁵ See § 973.

⁶ *Fisher v. Otis*, 3 Pinn. (Wis.) 78, 3 Chand. (Wis.) 83.

⁷ *Brockway v. Clark*, 6 Ohio 45.

⁸ *Alexander v. Troutman*, 1 Ga. 469.

⁹ *Waller v. Long*, 20 Va. (6 Munf.) 71.

§ 2130. Other provisions. A provision that default in payment of one installment of interest will make the whole debt due and payable is held in some jurisdictions to be a penalty,¹ though by the great weight of authority such provisions are not penalties, and are valid.² So a provision making the principal due in case of failure to pay taxes before they become delinquent is valid.³ In some states a provision for the payment of attorneys' fees, in case the debt is collected by litigation, is treated as a penalty.⁴ Provisions of the classes here discussed are sometimes attacked as being penalties, sometimes as being disguised forms of usury,⁵ and sometimes as being unconscionable,⁶ so as to be an element in establishing constructive fraud or undue influence. If such provision is held valid, it means, of course, that none of these objections is well taken. The converse of this proposition is not always true. Such provision may be held not to be a penalty, but to be usurious, and vice versa. Even if invalid, the difference in the results that would follow from holding it a penalty, or usurious, or unconscionable, may be so great as to make the solution of this question a matter of great practical importance.

§ 2131. Application of general principles—Building contracts. Provisions in a building or construction contract, that the contractor shall pay a certain sum per day if the building or other work is not completed by the time agreed upon, are generally held to be for liquidated damages if reasonable in amount.¹ In the case

¹ *Tiernan v. Hinman*, 16 Ill. 400.

² *Parker v. Olliver*, 106 Ala. 549, 18 So. 40; *Moore v. Sargent*, 112 Ind. 484, 14 N. E. 466; *Swearingen v. Lahner*, 93 Ia. 147, 57 Am. St. Rep. 261, 26 L. R. A. 765, 61 N. W. 431; *First National Bank v. Bank*, 11 Wyom. 32, 70 Pac. 726.

³ *Plummer v. Park*, 62 Neb. 665, 87 N. W. 534.

⁴ *Exchange Bank v. Lumber Co.*, 128 N. Car. 193, 38 S. E. 813.

⁵ See § 1001.

⁶ See §§ 636 et seq.

¹ *Arkansas. Lincoln v. Granite Co.*, 56 Ark. 405, 19 S. W. 1056; *Boston Store v. Schleuter*, 88 Ark. 213, 114 S. W. 242; *Nevada County Bank v. Sullivan*, 122 Ark. 235, 183 S. W. 169; *Pine*

Bluff Hotel Co. v. Monk, 122 Ark. 308, 183 S. W. 761; *East Arkansas Lumber Co. v. Swink*, 128 Ark. 240, 194 S. W. 5.

Florida. Southern Menhaden Co. v. How, 71 Fla. 123, 70 So. 1000.

District of Columbia. Emack v. Campbell, 14 D. C. App. 186.

Iowa. De Graff v. Wickham, 89 Ia. 720, 52 N. W. 503; *Kelly v. Fejervary*, 111 Ia. 693, 83 N. W. 791.

Massachusetts. Winston v. Pittsfield, 221 Mass. 356, 108 N. E. 1038.

Michigan. Lamson v. Marshall, 133 Mich. 250, 95 N. W. 78.

New York. Mosler Safe Co. v. Maiden Lane Safe Deposit Co., 199 N. Y. 479, 37 L. R. A. (N.S.) 363, 93 N. E. 81.

of a contract for the erection of a building, a provision for the payment of fifty dollars a day,² twenty dollars a day,³ ten dollars a day,⁴ or five dollars a day,⁵ have each been held to be valid as liquidated damages, where not greatly in excess of the actual damage caused by the delay. A provision in a contract for installing an electric light plant, for paying five pounds a day for delay after the time fixed by the contract, has been held to be valid as a provision for liquidated damages.⁶ So provisions for paying one hundred dollars a day for delay in erecting a grandstand,⁷ or a hotel;⁸ or fifty dollars a day for delay in erecting a church;⁹ or a provision for paying twenty-five dollars a day for delay in installing a fire-proof vault and one hundred and fifty dollars a day for delay in installing a fire and burglar-proof vault,¹⁰ have been held to be covenants for liquidated damages. So a provision for paying a reasonable amount per day for delay in building a sewer,¹¹ or sewerage works,¹² is a provision for liquidated damages. A provision that if a street railway company does not complete

South Carolina. *Carter v. Kaufman*, 67 S. Car. 456, 45 S. E. 1017.

Virginia. *Crawford v. Heatwole*, 110 Va. 358, 34 L. R. A. (N.S.) 587, 66 S. E. 46.

Texas. *Collier v. Betterton*, 87 Tex. 440, 29 S. W. 467.

²*Bird v. Church*, 154 Ind. 138, 56 N. E. 129; *Curtis v. Van Bergh*, 161 N. Y. 47, 55 N. E. 398.

³*Davis v. Hospital Association*, 121 Wis. 579, 99 N. W. 351 (for delay in completing a hospital to cost twenty-four thousand dollars).

⁴**Arkansas.** *Nevada County Bank v. Sullivan*, 122 Ark. 235, 183 S. W. 169. (For delay in completing a bank building.) *East Arkansas Lumber Co. v. Swink*, 128 Ark. 240, 194 S. W. 5 (Completion of school building.)

Iowa. *Kelly v. Fejervary*, 111 Ia. 603, 83 N. W. 791.

Texas. *Collier v. Betterton*, 87 Tex. 440, 29 S. W. 467.

Virginia. *Crawford v. Heatwole*, 110 Va. 358, 34 L. R. A. (N.S.) 587, 66 S. E. 46. (The building was to cost five thousand, four hundred dollars, and

was to be used as a residence by the owner, who was then boarding.)

Washington. *Reichenbach v. Sage*, 13 Wash. 364, 52 Am. St. Rep. 51, 43 Pac. 354.

⁵*Young v. Gaut*, 69 Ark. 114, 61 S. W. 372; *Brown Iron Co. v. Norwood* (Tex. Civ. App.), 69 S. W. 253.

⁶*Stegmann v. O'Connor* [1900], A. C., 81 L. T. N. S. 627.

⁷*Monmouth Park Association v. Iron Works*, 55 N. J. L. 132, 39 Am. St. Rep. 626 [sub nomine, *Wallis Iron Works v. Park Association*, 19 L. R. A. 450, 26 Atl. 140].

⁸*Pine Bluff Hotel Co. v. Monk*, 122 Ark. 308, 183 S. W. 761.

⁹*Bird v. Church*, 154 Ind. 138, 56 N. E. 129.

¹⁰*Mosler Safe Co. v. Maiden Lane Safe Deposit Co.*, 199 N. Y. 479, 37 L. R. A. (N.S.) 363, 93 N. E. 81.

¹¹*Lamson v. Marshall*, 133 Mich. 250, 95 N. W. 78; *Thorn, etc., Co. v. Bank*, 158 Mo. 272, 59 S. W. 109.

¹²*Law v. Redditch Local Board* [1892], 1 Q. B. 127.

the first line of its road within a year it shall lose its right of way and privileges, and shall pay five hundred dollars, is a provision for liquidated damages.¹³ So a provision that unless a certain amount of water is diverted into a given ditch the right of way thereof will be given up, is held to be a provision for liquidated damages.¹⁴ A contractor who is working under a contract by which he is to receive one hundred dollars per day for each day less than the time limit fixed by the contract in which he performs the contract, and he is to pay a thousand dollars a day for each day that he exceeds such time limit, may make a provision with a subcontractor for the payment of one hundred and fifty dollars a day for each day of delay on the part of such subcontractor; and such last provision will be treated as a provision for liquidated damages.¹⁵ If delay will cause great damage to the adversary party, the provision for payment can not be said to be necessarily a penalty, though it greatly exceeds the rental value of the property, if it does not greatly exceed the actual damage which will be caused by the delay.¹⁶ A provision in a contract for excavation that the contractor shall be liable for the wages of a superintendent and inspector from the time that the contract should have been performed to the time when the work is completed, is a provision for liquidated damages.¹⁷ Such provisions are upheld even if the building is one which would ordinarily not have a market value for rental purposes. Thus a provision for the payment of a certain reasonable amount for each day's delay in constructing a courthouse, is a provision for liquidated damages.¹⁸

The courts are by no means harmonious, however, in treating such provisions as covenants for liquidated damages. Some courts treat them as penalties.¹⁹ A provision "to forfeit the sum of twenty dollars per day for each and every day's delay" in completing a lighthouse has been held to be a penalty.²⁰ It has been

¹³ *Nilson v. Jonesboro*, 57 Ark. 168, 20 S. W. 1093.

¹⁴ *Pogue v. Water Co.*, 138 Cal. 664, 72 Pac. 144.

¹⁵ *Kunkel v. Wherry*, 189 Pa. St. 198, 69 Am. St. Rep. 802, 42 Atl. 112.

For a similar case, see *Cowan v. Meyer*, 125 Md. 450, 94 Atl. 18.

¹⁶ *Curtis v. Van Bergh*, 161 N. Y. 47, 55 N. E. 398. (Rental \$5.75 per day; stipulated damages \$50 per day.)

¹⁷ *O'Brien v. Pipe Works*, 93 Ala. 582, 9 So. 415.

¹⁸ *Heard v. Dooly County*, 101 Ga. 619, 28 S. E. 986.

¹⁹ *Mundy v. United States*, 35 Ct. Cl. 265; *The Smith Co. v. United States*, 34 Ct. Cl. 472; *Brennan v. Clark*, 29 Neb. 385, 45 N. W. 472.

²⁰ *Smith Co. v. United States*, 34 Ct. Cl. 472.

held that such provisions are to be treated as penalties if the rental value of the building is easy to be determined.²¹ If the amount agreed upon is unreasonable in comparison with the actual damage, it is regarded as a penalty.²² Under a contract for constructing a street, a provision for the payment of twenty-five dollars a day for delay is held to be a penalty.²³ Under a contract to erect a building of the value of eighteen thousand dollars, a provision for paying fifty dollars a day for delay, is treated as a penalty.²⁴ Under a contract to erect a building worth three thousand, four hundred dollars, a provision for paying three dollars a day for delay has been held to be a penalty.²⁵ So an agreement to pay ten dollars a day for delay in completing a house, the rental value of which is thirty dollars a month, is a penalty in the absence of a showing of damage other than loss of rents.²⁶ Under a provision in a mining contract for the forfeiture of the contract, in case of cessation of work, for more than thirty days, and in case of failure to pay fifteen dollars a day for each day's cessation over thirty days, the provision for paying such stipulated amount was regarded as a penalty.²⁷ However, if the amount is reasonable, the contract will generally be treated even in these jurisdictions as a provision for liquidated damages, as where the rental value is three hundred dollars a month and the contract calls for the payment of ten dollars a day for delay.²⁸ A provision for liquidated damages, which amounts to half the contract price, the amount of which is incurred after the contract has been substantially performed, has been held to be so excessive as to be treated as a penalty.²⁹ An agreement to pay a lump sum for delay without reference to the extent thereof or the amount of

²¹ *Connelly v. Priest*, 72 Mo. App. 673 (To pay \$10 a day for delay.)

²² *Elzey v. Winterset*, 172 Ia. 643, 154 N. W. 901.

²³ *Elzey v. Winterset*, 172 Ia. 643, 154 N. W. 901.

It was said there was nothing to show that any damage or injury resulted from such delay to the city in its corporate capacity, and for this reason the covenant could not be treated as one for liquidated damages. It seemed to be assumed that the interests of the general public were not to be considered, since the promise was

made to the city. *Elzey v. Winterset*, 172 Ia. 643, 154 N. W. 901.

²⁴ *Cochran v. Ry.*, 113 Mo. 359, 21 S. W. 6.

²⁵ *Zimmerman v. Conrad* (Mo. App.), 74 S. W. 139.

²⁶ *Wheeldon v. Trust Co.*, 128 N. Car 69, 38 S. E. 255.

²⁷ *Ross Tin Mine v. Cherokee Tin Mining Co.*, 103 S. Car. 243, 88 S. E. 8.

²⁸ *Ramlose v. Dollman*, 100 Mo. App. 347, 73 S. W. 917.

²⁹ *Edgar, etc., Works v. United States*, 34 Ct. Cl. 205.

damage caused has been held to be a penalty. Thus an agreement to pay twenty thousand dollars "as liquidated damages and not as a penalty" for delay in the performance of a contract to tear down a brick building and remove it, is a stipulation for a penalty.³⁰ The same result has been reached under a bond to pay twenty-five thousand dollars in the event of the breach of a contract to erect a sewage plant.³¹ If the owner insists upon payment of liquidated damages for delay, he must allow the contractor the contract price for the work which he has done.³²

§ 2132. Sale of personalty. In a contract for the sale of personal property, a provision for the payment of a reasonable sum in case of breach, has been held to be liquidated damages.¹ A provision for paying a reasonable sum per day for delay in delivery of the property sold,² as a provision for a certain reasonable amount per day for failure to place an engine and boiler in a barge;³ or a provision for paying ten dollars a day for delay in delivering church pews;⁴ or a provision for paying fifty dollars a day for delay in delivering turbines;⁵ or a provision for deducting fifteen cents a hundred feet for delay in delivering logs, thereby exposing them to the weather for a longer time,⁶ have each been held to be a provision for liquidated damages. So a covenant to pay five dollars a day for delay in delivering an engine is held to be a provision for liquidated damages.⁷ A promise contained in a note, by which the prospective purchasers of the business agree to pay five hundred dollars as liquidated damages, if they do not

³⁰ *Chicago House Wrecking Co. v. United States*, 106 Fed. 385, 53 L. R. A. 122.

³¹ *Madison v. Engineering Co.*, 118 Wis. 480, 95 N. W. 1097.

³² *Lennon v. Smith*, 124 N. Y. 578, 27 N. E. 243.

¹ *Delaware. In re Ross*, — Del. —, 95 Atl. 311.

Kentucky. Kilbourne v. Lumber Co., 111 Ky. 693, 64 S. W. 631.

Massachusetts. Lynde v. Thompson, 84 Mass. (2 All.) 456.

Ohio. Sheffield-King Milling Co. v. Domestic Science Baking Co., 95 O. S. 180, 115 N. E. 1014.

Vermont. Knight v. McNeil, 91 Vt.

214, 99 Atl. 728 (question, however, not raised properly).

² *Pressed Steel Car Co. v. Ry.*, 121 Fed. 609, 57 C. C. A. 635; *American, etc., Works v. Malting Co.*, 30 Wash. 178, 70 Pac. 236.

³ *Manistee Iron Works Co. v. Lumber Co.*, 92 Wis. 21, 65 N. W. 863.

⁴ *Illinois Central Ry. v. Cabinet Co.*, 104 Tenn. 568, 78 Am. St. Rep. 933, 50 L. R. A. 729, 58 S. W. 303.

⁵ *Wood v. Paper Co.*, 121 Fed. 818, 58 C. C. A. 256.

⁶ *Kilbourne v. Lumber Co.*, 111 Ky. 693, 64 S. W. 631.

⁷ *Hardie, etc., Co. v. Oil Mill*, 84 Miss. 259, 36 So. 262.

perform the contract for the purchase of business and by which such note is to be regarded as a part payment in case they perform, is regarded as a covenant for liquidated damages.⁸ A contract by which a purchaser of wheat agrees that in case of default on his part he will settle upon the basis of actual difference between the highest closing price of such wheat on the date of sale and on the date of cancellation, and that he will pay the seller one cent a bushel from the date of the sale and date of cancellation for carrying the wheat, and that he will pay two cents a bushel for buying and reselling the wheat, and two cents a bushel to cover the loss or profits, if any, has been held to provide for liquidated damages.⁹ A covenant in a contract between a company which manufactures and sells patterns and one who purchases them, by which the purchaser agrees to pay one-third of the purchase price as liquidated damages in case he fails to accept and pay for the amount agreed upon, is a covenant for liquidated damages.¹⁰ On the other hand, a provision that the purchaser shall make a test to see whether the article conforms to the provision of the contract, and that within a certain time after such test he shall return the article if unsatisfactory, or pay the purchase price if he does not so return it, has been held to be a provision for a penalty.¹¹

If the amount contracted for is unreasonable, it will be treated as a penalty.¹² Thus a contract to pay fifty dollars a day for delay in delivering an engine, was held to be a contract for a penalty.¹³ A provision in a contract for the special manufacture and delivery of ornamental terra cotta, to the effect that the seller should pay fifty dollars as liquidated damages for each day for which delivery was delayed, was held to impose a penalty.¹⁴ If a gross sum is to be paid for breach of the contract, the provision is more likely to be treated as a penalty. Thus under a contract for purchasing a crop of oranges while on the trees for a lump sum, a provision that the purchaser is to pay the vendor fifteen hundred dollars as part payment, and that if the purchaser fails or refuses

⁸ Knight v. McNeil, 91 Vt. 214, 99 Atl. 728 (question, however, not raised properly).

⁹ Sheffield-King Milling Co. v. Domestic Science Baking Co., 97 O. S. 180, 115 N. E. 1014.

¹⁰ In re Ross, — Del. —, 95 Atl. 311.

¹¹ Walsh Mfg. Co. v. W. T. Smith Lumber Co., 196 Ala. 371, 72 So. 73.

¹² Northwestern Terra Cotta Co. v. Caldwell, 234 Fed. 491, 148 C. C. A. 257; Glascock v. Rosengrant, 55 Ark. 376, 18 S. W. 379.

¹³ Iroquois Furnace Co. v. Mfg. Co., 181 Ill. 582, 54 N. E. 987.

¹⁴ Northwestern Terra Cotta Co. v. Caldwell, 234 Fed. 491, 148 C. C. A. 257.

to comply with the provision of the contract, such payment shall be forfeited, was held to be a penalty.¹⁵ A provision for payment by the vendee of twenty per cent. of the invoice price in case of his countermanding the order, has been held to be a penalty.¹⁶

§ 2133. Sale of good will—Reasonable restraint of trade. Contracts for the sale of good will, which contain a covenant in reasonable restraint of trade, often provide for the amount of damage to be paid in case of the breach of such covenant. Such damages are very difficult to prove, and accordingly such provisions have been treated as liquidated damages.¹ A covenant to the effect that one who has sold his business as barber will pay four hundred dollars in case he engages in competition with the purchaser in two years, is said to be a covenant for liquidated damages.² A promise to pay five thousand dollars as liquidated damages in case of a breach of a clause forbidding the buyer to advertise the sale of certain lines of goods reserved by the seller;³ to pay two thousand dollars in case of breach of a covenant not to compete;⁴ or to pay a certain sum in case of breach of an agree-

¹⁵ *Nichols v. Haines*, 98 Fed. 692, 39 C. C. A. 235.

¹⁶ *Mansur, etc., Implement Co. v Hardware Co.*, 136 Ala. 597, 33 So. 818; *Mansur, etc., Implement Co. v. Willet* 10 Okla. 383, 61 Pac. 1066.

¹ *England. Green v. Price*, 13 M. & W. 695.

United States. Fleischman v. Rahmstorf, 226 Fed. 443, 141 C. C. A. 273.

Alabama. McCurry v. Gibson, 108 Ala. 451, 54 Am. St. Rep. 177, 18 So. 806. (Sale of practice of medicine—to pay \$200 in case of breach of covenant not to engage in practice.)

California. Potter v. Ahrens, 110 Cal. 674, 43 Pac. 388.

Maine. Augusta Steam Laundry Co. v. Debow, 98 Me. 496, 57 Atl. 845.

New Jersey. Robinson v. Aid Society, 68 N. J. L. 723, 54 Atl. 416.

North Carolina. Bradshaw v. Millikin, 173 N. Car. 432, L. R. A. 1917E, 880, 92 S. E. 161. (Sale of barber's business to pay \$400 "as liquidated

damages and not as a penalty," for breach of covenant not to compete.)

Ohio. Lange v. Werke, 2 O. S. 519.

Pennsylvania. Kelso v. Reid, 145 Pa. St. 606, 27 Am. St. Rep. 716, 23 Atl. 323. (Sale of country store and goodwill for \$6,000, to pay \$1,000 for breach of agreement not to compete.)

Tennessee. Muse v. Swayne, 70 Tenn. (2 Lea) 251, 31 Am. Rep. 607.

Texas. Tobler v. Austin, 22 Tex. Civ. App. 99, 53 S. W. 706.

Vermont. Borley v. McDonald, 69 Vt. 309, 38 Atl. 60. (Employee to pay \$500 if he competes with his employer for one year after his employment ends.)

² *Bradshaw v. Millikin*, 173 N. Car. 432, L. R. A. 1917E, 880, 92 S. E. 161.

³ *May v. Crawford*, 142 Mo. 390, 44 S. W. 260.

⁴ *Fleischman v. Rahmstorf*, 226 Fed. 443, 141 C. C. A. 273.

ment not to disclose a trade secret,⁵ have each been held to be agreements for liquidated damages. Even in such jurisdictions a clause binding the promisor "in the penal sum of four hundred dollars," not to practice medicine in a certain locality, is held to be *prima facie* a contract for a penalty.⁶

On the other hand, there may be breaches of a covenant in reasonable restraint of trade of very different degrees of importance, causing very different amounts of damage. Some courts have therefore held that a provision for the payment of a fixed sum in case of any breach of a covenant in restraint of trade, is a provision for a penalty.⁷ The fact that the injury arising from a breach of a covenant not to compete will be much greater if such covenant is broken soon after the contract is made than it would be if such covenant were broken shortly before the expiration of the time for which the promisor had agreed not to compete, has been regarded by some courts as establishing the fact that the covenants are of varying degrees of importance and that a breach thereof will result in different amounts of damages; and, accordingly, a covenant for the payment of a fixed sum of money in case of breach has been held to be a covenant for a penalty.⁸ In some jurisdictions the fact that the same amount is to be paid without regard as to the time in which the breach occurs, has been regarded as indicating that the amount to be paid is a penalty and not liquidated damages.⁹ A covenant by which one who has sold a mill and agreed not to compete in business for five years, agrees to pay one-half of the purchase price of the mill in case of breach of such covenant, has been held to be a covenant for a penalty in view of the fact that such breach occurred a short time before the expiration of such period.¹⁰ A valid covenant by which one person agrees to deal exclusively in the product of another, is from its

⁵ Bagley v. Peddie, 16 N. Y. 469, 69 Am. Dec. 713; Tode v. Gross, 127 N. Y. 480, 24 Am. St. Rep. 475, 13 L. R. A. 652, 28 N. E. 469.

⁶ Wilkinson v. Colley, 164 Pa. St. 35, 26 L. R. A. 114, 30 Atl. 286.

The use of the term "forfeit" shows that a penalty is intended. Buckhout v. Witwer, 157 Mich. 406, 23 L. R. A. (N.S.) 506, 122 N. W. 184.

⁷ Radloff v. Haase, 196 Ill. 365, 63 N. E. 729; Heatwole v. Gorrell, 35 Kan. 692, 12 Pac. 135; Metz v. Clay, 101

Kan. 45, 165 Pac. 809; Perkins v. Lyman, 11 Mass. 76, 6 Am. Dec. 158; Decker v. Pierce, 191 Mich. 64, 157 N. W. 384.

⁸ Metz v. Clay, 101 Kan. 45, 165 Pac. 809.

⁹ Mount Airy Milling & Grain Co. v. Runkles, 118 Md. 371, L. R. A. 1915E, 373, 84 Atl. 533.

¹⁰ Mount Airy Milling & Grain Co. v. Runkles, 118 Md. 371, L. R. A. 1915E, 373, 84 Atl. 533.

nature not susceptible of a ready determination of damages in case of breach and accordingly a covenant for the payment of a specified amount in case of breach will be regarded as a covenant for liquidated damages.¹¹ A contract to sell certain property to be used in displaying moving pictures and not to compete in business for a certain period of time, and not to engage as employe in such business for a less period of time, contains covenants of such different degrees of importance that a covenant to pay five hundred dollars as liquidated damages in case of breach is a covenant for a penalty.¹²

§ 2134. Sale of realty. Under a contract for the sale of realty, a provision for the payment of a certain sum in case of breach, is held in some jurisdictions to be a provision for liquidated damages.¹ Thus an agreement whereby either vendor,² or vendee,³ to a contract for the sale of realty is to forfeit a deposit if he does not perform his part of the contract; or a covenant that if the vendor shall not in a specified time make a deed to vendee, the latter shall have a right to occupy the realty for a specified time;⁴ or a provision that the vendor shall remove an incumbrance within a specified time, and in default thereof shall pay a certain sum;⁵ or where lots were sold for three thousand and fifty dollars, a provision that the price should be four thousand dollars if in eighteen months the purchaser did not erect a certain building thereon,⁶ have been held valid as stipulations for liquidated damages. In other jurisdictions such a provision is held to be a penalty.⁷ Thus a contract to sell realty for forty-five thousand dollars and to pay five dollars an acre for each acre under twenty thousand,⁸ or a bond for six hundred dollars, conditioned to convey

¹¹ *Bartholomae & Roesing Brewing & Malting Co. v. Modzelewski*, 269 Ill. 539, 109 N. E. 1058.

¹² *Decker v. Pierce*, 191 Mich. 64, 157 N. W. 384.

¹ See §§ 2122 and 2127.

² *Sanders v. Carter*, 91 Ga. 450, 17 S. E. 345.

³ *Womack v. Coleman*, 80 Minn. 17, 93 N. W. 663; *Talkin v. Anderson* (Tex.), 19 S. W. 852.

⁴ *Lorius v. Abbott*, 49 Neb. 214, 68 N. W. 486.

⁵ *Fasler v. Beard*, 39 Minn. 32, 38 N. W. 755.

⁶ *Everett Land Co. v. Maney*, 16 Wash. 552, 48 Pac. 243.

⁷ *O'Keefe v. Dyer*, 20 Mont. 477, 52 Pac. 196; *Monroe v. South* (Tex. Civ. App.), 64 S. W. 1014. (A provision to forfeit "as a penalty the sum of three hundred dollars.")

⁸ *Gates v. Parmly*, 93 Wis. 294, 66 N. W. 253 [affirmed on rehearing, 67 N. W. 739].

realty worth three hundred dollars,⁹ have been held to be provisions for penalties. The two lines of cases are not all inconsistent, since where such provision is held to be a penalty the amount provided for is generally greatly in excess of the actual damages.

§ 2135. Lease of realty or personalty. An agreement to pay a certain sum of money in case of the violation of a covenant of a lease, is held to be a provision for liquidated damages if apportioned to the separate covenants, and not unreasonable, especially if the actual damages are difficult to estimate. Thus a provision in a lease which provides for an annual rental of seven thousand dollars, that in case the premises are retained after the expiration of the term, damages shall be paid for such detention at the rate of thirty dollars a day, is liquidated damages.¹ So a covenant that lessees shall pay five dollars a day for delay in removing tracks and ties from realty has been held to be a provision for liquidated damages.² A provision in a lease for paying five thousand dollars in case of breach is treated as a covenant for a penalty where the only breach is delay in payment of rent.³ So under a lease, a provision that if the tenant should assign or underlet, or remove or attempt to remove any of his goods and chattels, his term should cease immediately, and "one whole year's rent of three thousand dollars shall immediately thereon become due and owing," is rent, and not a penalty.⁴ An agreement made when a vessel is chartered, to pay a certain sum therefor if the vessel is lost, or irreparably damaged, is treated as liquidated damages.⁵ By California statute in such cases, however, as such provisions are void by statute, only the actual damages sustained can be recovered.⁶ So an agreement to pay for the use of a button-sewing machine at a certain sum per thousand buttons, with a provision that if the lessee does not keep account of the number of buttons sewed, the lessor may, at his option, charge five dollars a day for the use of such machine, is not a penalty.⁷

⁹ McIntosh v. Johnson, 8 Utah 359, 31 Pac. 450.

¹ Poppers v. Meagher, 148 Ill. 192, 35 N. E. 805 [affirming, 47 Ill. App. 593].

² Townsend v. Ry. Co., 28 Ont. 195.

³ Gay Mfg. Co. v. Camp, 65 Fed. 794, 13 C. C. A. 137.

⁴ Dermott v. Wallace, 68 U. S. (1 Wall.) 61, 17 L. ed. 680.

⁵ Sun, etc., Association v. Moore, 183 U. S. 642, 46 L. ed. 366.

⁶ Wilmington Transportation Co. v. O'Neil, 98 Cal. 1, 32 Pac. 705.

⁷ Standard, etc., Co. v. Breed, 163 Mass. 10, 39 N. E. 346.

§ 2136. Contracts for royalties. Provisions fixing the amount of royalty to be paid for the use of another's mine, patent, and the like, are usually held not to be penalties. A provision in a mining contract for the payment of a minimum royalty is not a penalty.¹ So a provision in an oil lease that the lessee shall sink one well during the first year, and in default thereof will pay five hundred dollars a year for delay, is not a penalty,² even if a subsequent test of adjoining realty shows that there is no oil or gas on the leased property.³ So a provision in a contract for the use of a patent to pay the minimum royalty,⁴ or to pay double the contract rate if the patent right is used after the time fixed for the expiration of the license,⁵ is not a penalty.

¹ *Martin v. Mining Co.*, 114 Fed. 553; *Consolidated Coal Co. v. Peers*, 150 Ill. 344, 37 N. E. 937.

² *Gibson v. Oliver*, 158 Pa. St. 277, 27 Atl. 961.

³ *Gibson v. Oliver*, 158 Pa. St. 277, 27 Atl. 961,

⁴ *Van Tuyl v. Young*, 23 Ohio C. C. 15.

⁵ *Knox Rock Blasting Co. v. Stone Co.*, 64 O. S. 361, 60 N. E. 563 [reversing, 16 Ohio C. C. 21, 8 Ohio C. D. 478].

CHAPTER LXIX

THE PAROL EVIDENCE RULE

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I

SCOPE OF RULE

§ 2137. Statement of rule. If the parties to a contract have reduced it to writing, and if such written contract is clear and unambiguous,¹ and if it appears upon its face to be complete and to embody all the terms upon which the parties have agreed,² the parties are regarded by the law as having intended that such written contract should be the final repository of their common intention; and it is accordingly held that such written contract merges all their prior and contemporaneous negotiations.³

¹ **Arkansas.** *Luce v. Arkansas Brick & Mfg. Co.*, 125 Ark. 219, 188 S. W. 566.
Georgia. *Townsend v. Southern Product Co.*, 127 Ga. 342, 119 Am. St. Rep. 340, 56 S. E. 436.

Illinois. *Roberts v. Dazey*, 284 Ill. 241, 119 N. E. 910.

Iowa. *Conklin v. Silver*, — Ia. —, 174 N. W. 573.

Kansas. *Walsh v. Kansas Fuel Co.*, 102 Kan. 29, 169 Pac. 219.

Maine. *Bell v. Flanders*, 115 Me. 332, 98 Atl. 825; *Bassett v. Breen*, — Me. —, 107 Atl. 832.

Michigan. *Lake Erie Land Co. v. Chilinski*, 197 Mich. 214, 163 N. W. 929; *Ogooshevitz v. Arnold*, 197 Mich. 203, 163 N. W. 946; *Phelps v. Brevoort* — Mich. —, 174 N. W. 281.

Montana. *Pritchett v. Jenkins*, 52 Mont. 81, 155 Pac. 974.

Nebraska. *Roden v. Williams*, 100 Neb. 46, 158 N. W. 360.

New Hampshire. *Hill v. Hill*, 74 N. H. 288, 12 L. R. A. (N.S.) 848, 67 Atl. 406.

North Carolina. *A. B. Farquhar Co. v. Hardy Hardware Co.*, 174 N. Car. 369, 93 S. E. 922.

Oklahoma. *Brown v. Connecticut Fire Ins. Co.*, 52 Okla. 392, 153 Pac. 173; *Futoransky v. Pope*, 57 Okla. 755, L. R. A. 1916F, 548, 157 Pac. 905; *Lusk v. White*, — Okla. —, 161 Pac. 541.

Oregon. *Hoffman v. Dorris*, 83 Or. 625, 163 Pac. 972.

Vermont. *Jones v. Campbell*, — Vt. —, 102 Atl. 102.

Washington. *Van Doren Roofing & Cornice Co. v. Guardian Casualty & Guaranty Co.*, 99 Wash. 68, 168 Pac. 1124. See § 2036.

² *Hazen Mfg. Co. v. Wareham*, 242 Fed. 642; *Kerwin Machine Co. v. Baker*, 199 Mich. 122, 165 N. W. 625; *Snow v. Beard*, 82 Or. 518, 162 Pac. 258; *Peterson v. Denny-Renton Clay & Coal Co.*, 89 Wash. 141, 154 Pac. 123. See § 2151.

³ **United States.** *Ryan v. Ohmer*, 244 Fed. 31, — C. C. A. —; *Simonton v. Shaw*, 246 Fed. 683; *California Bridge & Const. Co. v. United States*, 50 Ct. Cl. 40.

Arizona. *Smith v. Mosbarger*, 18 Ariz. 19, 156 Pac. 79.

Arkansas. *Graves v. Bodcaw Lumber Co.*, 129 Ark. 354, 196 S. W. 800.

California. *Remsberg v. Hackney Manufacturing Co.*, 174 Cal. 799, 164 Pac. 792; *Smith-Booth-Usher Co. v. Los Angeles Ice & Cold Storage Co.*, 175 Cal. 136, 165 Pac. 430.

Colorado. *Frantz v. Bartels*, — Colo. —, 165 Pac. 769.

District of Columbia. *Kinney v. McNabb*, 44 D. C. App. 340.

Georgia. *Gray v. Phillips*, 88 Ga. 199, 14 S. E. 205; *McElveen v. Ry.*, 109 Ga. 249, 77 Am. St. Rep. 371, 34 S. E. 281.

Indiana. *Walters v. Ward*, 153 Ind. 578, 55 N. E. 735.

Iowa. *Armstrong v. Cavanagh*, — Ia. —, 166 N. W. 673 (obiter); *Conklin v. Silver*, — Ia. —, 174 N. W. 573.

§ 2138. Application of parol evidence rule at law and in equity.

The parol evidence rule applies to actions at law, whether they are brought upon the contract to enforce it or whether the contract is used as a means of defense.¹ Even if the actual contract between the parties is not properly reduced to writing because of mistake or fraud, the common law has no means of reforming such contract so as to make it express the true intent of the parties.² A mistake in expression in a chattel mortgage can not be shown

Kentucky. *Kreitz v. Gallenstein*, 170 Ky. 16, 185 S. W. 132.

Maine. *Bassett v. Breen*, — Me. —, 107 Atl. 832.

Michigan. *Grand Rapids Wood Finishing Co. v. Hatt*, 152 Mich. 132, 115 N. W. 714; *Phelps v. Brevoort*, — Mich. —, 174 N. W. 281.

Minnesota. *Hagstrom v. McDougall*, 131 Minn. 389, 155 N. W. 391; *Anderson v. Upper Cuyuna Land Co.*, 132 Minn. 382, 157 N. W. 581; *Virginia & Rainy Lake Co. v. Helmer*, 140 Minn. 135, 167 N. W. 355.

New Mexico. *Locke v. Murdoch*, 20 N. M. 522, L. R. A. 1917B, 267, 151 Pac. 298.

North Carolina. *American Potato Co. v. Jenette Bros. Co.*, 172 N. Car. 1, 89 S. E. 791; *Caffey v. Oak Furniture Co.*, 175 N. Car. 387, 95 S. E. 619.

North Dakota. *Gilbert Mfg. Co. v. Bryan*, — N. D. —, 166 N. W. 805.

Oklahoma. *Lusk v. White*, — Okla. —, 161 Pac. 541; *J. M. Hoard, Jr., Co. v. Grand Rapids Showcase Co.*, — Okla. —, 173 Pac. 844.

Oregon. *Muir v. Morris*, 80 Or. 378, 154 Pac. 117 [rehearing denied, *Muir v. Morris*, 80 Or. 378, 157 Pac. 785]; *Snow v. Beard*, 82 Or. 518, 162 Pac. 258; *Leavitt v. Dimick*, 86 Or. 278, 168 Pac. 292.

Pennsylvania. *Williams v. Notopolos*, — Pa. St. —, 103 Atl. 290.

Tennessee. *McCrary v. Bank*, 97 Tenn. 469, 37 S. W. 543.

Utah. *Johnson v. Geddes*, 49 Utah 137, 161 Pac. 910.

West Virginia. *Mineral Ridge Mfg. Co. v. Smith*, 79 W. Va. 736, 91 S. E.

817; *Paxton v. Benedum-Trees Oil Co.*, 80 W. Va. 187, 94 S. E. 472.

On the subject of the parol evidence rule in general, see *The Parol Evidence Rule*, by James B. Thayer, 6 *Harvard Law Review*, 325, 417; *The Parol Evidence Rule in California*, by Robert L. McWilliams, 7 *California Law Review*, 417; *A Brief History of the Parol Evidence Rule*, by John H. Wigmore, 4 *Columbia Law Review*, 338; *The Superiority of Written Evidence*, by J. W. Salmond, 6 *Law Quarterly Review*, 75; *Extrinsic Evidence in Aid of Interpretation*, by Sidney L. Phipson, 20 *Law Quarterly Review*, 245; *Ambiguities in Written Instruments*, 5 *American Law Register (N.S.)*, 140; *A View of the Parol Evidence Rule*, by John H. Wigmore, 38 *American Law Register (N.S.)*, 337, 432, 683, and *Extrinsic Evidence in Respect to Written Instruments*, by Charles A. Graves, 28 *American Law Review*, 321.

¹ **North Carolina.** *Caffey v. Oak Furniture Co.*, 175 N. Car. 387, 95 S. E. 619.

North Dakota. *Gilbert Mfg. Co. v. Bryan*, — N. D. —, 166 N. W. 805.

Pennsylvania. *Phoenix Mill Co. v. Kresge*, 254 Pa. St. 36, 98 Atl. 772.

Washington. *Van Doren Roofing & Cornice Co. v. Guardian Casualty & Guaranty Co.*, 99 Wash. 68, 168 Pac. 1124.

Wisconsin. *Jilek v. Zahl*, 162 Wis. 157, 155 N. W. 909.

² *Kupferschmidt v. Agricultural Insurance Co.*, 80 N. J. L. 441, 34 L. R. A. (N.S.) 503, 78 Atl. 225. "The court is not at liberty to introduce a short cut to reformation by letting the jury

in an action of replevin.³ Such relief must be sought in equity in a suit which is brought for the purpose of reforming the written contract so as to make it conform to the actual contract between the parties.⁴ While relief can not be given in an action at law, a declaration or complaint which is filed upon the theory that the action is one at law, may be amended so as to set up a cause of action in equity for the purpose of reforming the contract.⁵

If the suit in equity is brought for the purpose of enforcing the contract and not for the purpose of reforming it, the parol evidence rule applies in equity as well as at law.⁶ Whatever difference between law and equity appears to exist in actual results, is based not upon the different theories of law and equity as to the operation and application of the parol evidence rule, but upon the conflict between law and equity as to the effect of mistake, misrepresentation, fraud, and the like. This intention to set forth the intention of the parties in such writing is, in all actions upon the contract for the purpose of enforcing it, to be regarded as the standardized intention of the parties and not as the actual intention which either or both of the parties had in the particular case.⁷ While it is sometimes said that there is a presumption that the parties intend the written contract to be the oral repository of their common intention, this presumption is said to be conclusive.⁸

In stating the rule in this form it is assumed that the contract itself is valid and that both in its original formation and in its reduction to writing the contract is free from fraud and mistake, and from other defenses which render the contract either void or

strike out a clause." *Lumber Underwriters v. Rife*, 237 U. S. 605, 59 L. ed. 1140

³ *Maxson v. Ashland Iron Works*, 85 Or. 345, 166 Pac. 37.

⁴ See §§ 2211 et seq.

⁵ *Jilek v. Zahl*, 162 Wis. 157, 155 N. W. 909.

⁶ *Connecticut F. Ins. Co. v. Buchanan*, 141 Fed. 877, 73 C. C. A. 111, 4 L. R. A. (N.S.) 758; *Gainesville v. Jaudon*, 145 Ga. 299, 89 S. E. 210; *Jersey City v. Flynn*, 74 N. J. Eq. 104, 70 Atl. 497.

"It is a common error to suppose that these are rigid principles of law, the severity of which will be mitigated by a court of equity, and that the

party who feels their operation has nothing to do but to change his ground and get into the climate of the chancellor to meet with different treatment. This, however will be found a vain and fruitless escape." *Baugh v. Ramsey*, 20 Ky. (4 T. B. Mon.) 155, 157.

⁷ *Smith v. Vose & Sons Piano Co.*, 194 Mass. 193, 120 Am. St. Rep. 539, 9 L. R. A. (N.S.) 966, 80 N. E. 527; *American Potato Co. v. Jenette Bros. Co.*, 172 N. Car. 1, 89 S. E. 791. See § 2153.

⁸ *Smith v. Vose & Sons Piano Co.*, 194 Mass. 193, 120 Am. St. Rep. 539, 9 L. R. A. (N.S.) 966, 80 N. E. 527; *American Potato Co. v. Jenette Bros. Co.*, 172 N. Car. 1, 89 S. E. 791; *Leavitt v. Dimick*, 86 Or. 278, 168 Pac. 292.

voidable.⁹ Accordingly, a written contract which is conceded to be valid or the validity of which is established, which is free from ambiguity and which appears to be complete upon its face, can not be contradicted by extrinsic evidence;¹⁰ nor can prior or contemporaneous parol agreements be used to contradict the written contract,¹¹ so as to substitute for the intention therein expressed that expressed in such oral agreements.¹² To violate this rule and

⁹ **United States.** *Simonton v. Shaw*, 246 Fed. 683.

Kansas. *Walsh v. Kansas Fuel Co.*, 102 Kan. 29, 169 Pac. 219.

Kentucky. *Gabbard v. Sheffield*, 179 Ky. 442, 200 S. W. 940.

North Dakota. *Gilbert Mfg. Co. v. Bryan*, — N. D. —, 166 N. W. 805.

Pennsylvania. *Williams v. Notopolos*, 259 Pa. St. 469, 103 Atl. 290. See §§ 2171 et seq.

¹⁰ **United States.** *California Bridge & Const. Co. v. United States*, 50 Ct. Cl. 40; *American & British Mfg. Co. v. United States*, 50 Ct. Cl. 204.

Arizona. *Smith v. Mosbarger*, 18 Ariz. 19, 156 Pac. 79.

California. *Smith-Booth-Usher Co. v. Los Angeles Ice & Cold Storage Co.*, 175 Cal. 136, 165 Pac. 430.

District of Columbia. *Kinney v. McNabb*, 44 D. C. App. 340.

Iowa. *Houge v. St. Paul Fire & Marine Ins. Co.*, 174 Ia. 607, 156 N. W. 862.

Kentucky. *Citizens' Trust & Guaranty Co. v. Farmers' Bank*, 166 Ky. 234, 179 S. W. 29; *Scott v. Spurr*, 169 Ky. 575, 184 S. W. 866; *Kreitz v. Galenstein*, 170 Ky. 16, 185 S. W. 132.

Massachusetts. *Doyle v. Dixon*, 94 Mass. (12 All.) 576; *Pike v. McIntosh*, 167 Mass. 309, 45 N. E. 749.

Michigan. *Holland City State Bank v. Meeuwsen*, 192 Mich. 326, 158 N. W. 1032.

New Mexico. *Locke v. Murdoch*, 20 N. M. 522, L. R. A. 1917B, 267, 151 Pac. 298.

Oklahoma. *Spaulding v. Howard*, 51

Okla. 502, 152 Pac. 106; *Futoransky v. Pope*, 57 Okla. 755, 157 Pac. 905.

Pennsylvania. *Hall's Appeal*, 60 Pa. St. 458, 100 Am. Dec. 584.

Washington. *Holt Mfg. Co. v. Brotherton*, 91 Wash. 354, 157 Pac. 849.

Wisconsin. *Gilbert v. Stockman*, 76 Wis. 62, 20 Am. St. Rep. 23, 44 N. W. 845.

¹¹ *Samuelson v. Palmer*, 96 Kan. 587, 152 Pac. 627; *Lesem v. Harris*, 102 Kan. 222, 169 Pac. 959; *Holland City State Bank v. Meeuwsen*, 192 Mich. 326, 158 N. W. 1032; *Boston Piano & Music Co. v. Pontiac Clothing Co.*, 199 Mich. 141, 165 N. W. 856; *Hagstrom v. McDougall*, 131 Minn. 389, 155 N. W. 391; *Anderson v. Upper Cuyuna Land Co.*, 132 Minn. 382, 157 N. W. 581; *Gile v. Interstate Motor Car Co.*, 27 N. D. 108, L. R. A. 1915B, 109, 145 N. W. 732.

"A written contract can not be varied or contradicted by a prior or contemporaneous parol agreement between the parties." *Garneau v. Cohn*, 61 Neb. 500, 501, 85 N. W. 531 [citing among other cases, *Gerner v. Church*, 43 Neb. 690, 62 N. W. 51; *Quinn v. Moss*, 45 Neb. 614, 63 N. W. 931; *Commercial State Bank v. Antelope County*, 48 Neb. 496, 67 N. W. 465; *Sylvester v. Paper Co.*, 55 Neb. 621, 75 N. W. 1092].

¹² **United States.** *Ryan v. Ohmer*, 244 Fed. 31, — C. C. A. —.

Alabama. *Davis v. Robert*, 89 Ala. 402, 18 Am. St. Rep. 126, 8 So. 114.

Colorado. *Frantz v. Bartela*, — Colo. —, 165 Pac. 769.

Illinois. *Diederich v. Rose*, 228 Ill. 610, 81 N. E. 1140.

to admit extrinsic evidence of the intention of the parties direct for the purpose of displacing their intention as shown in the written contract, is "to substitute the inferior for the superior degree evidence—conjecture for fact—presumption for the highest degree of legal authority—loose recollection and uncertainty of memory for the most sure and faithful memorials which human ingenuity can devise or the law adopt."¹³ In an early Massachusetts case, the court after observing that it was "remarkable that so considerable a degree of obscurity should remain at this day (1814) upon a branch of the law of evidence so constant in its recurrence in courts of law," said: "When parties have deliberately put their engagements in writing, in such terms as impart a legal obligation, without any uncertainty as to the object or extent of such obligation, it shall be presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; so that oral testimony of a previous colloquium between the parties, or of conversation or declarations at the time when it was completed or afterwards, would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties."¹⁴

This rule is often stated inaccurately in some such form as this: extrinsic evidence is inadmissible to contradict or vary the terms

Kansas. Samuelson v. Palmer, 96 Kan. 587, 152 Pac. 627.

Kentucky. Kreitz v. Gallenstein, 170 Ky. 16, 185 S. W. 132.

Mississippi. Cox v. Reed, 113 Miss. 188, 74 So. 330.

New Jersey. Decker v. Smith, 88 N. J. L. 630, 96 Atl. 915; Jersey City v. Flynn, 74 N. J. Eq. 104, 70 Atl. 497.

New Mexico. Locke v. Murdoch, 20 N. M. 522, L. R. A. 1917B, 267, 151 Pac. 208.

North Carolina. A. B. Farquhar Co. Hardy Hardware Co., 174 N. Car. 100, 93 S. E. 922.

North Dakota. Gilbert Mfg. Co. v. Bryan. — N. D. —, 166 N. W. 805.

Oklahoma. Deming Investment Co. v. Shawnee F. Ins. Co., 16 Okla. 1, 4

L. R. A. (N.S.) 607, 83 Pac. 918; Spaulding v. Howard, 51 Okla. 502, 152 Pac. 106.

Oregon. Muir v. Morris, 80 Or. 378, 154 Pac. 117 [rehearing denied, Muir v. Morris, 80 Or. 378, 157 Pac. 785].

South Carolina. Gill v. Ruggles, 104 S. Car. 461, 89 S. E. 503.

Washington. Farley v. Letterman, 87 Wash. 641, 152 Pac. 515; Peterson v. Denny-Renton Clay & Coal Co., 89 Wash. 141, 154 Pac. 123.

West Virginia. Martin v. Ry., 48 W. Va. 542, 37 S. E. 563.

¹³ Baugh v. Ramsey, 20 Ky. (4 T. B. Mon.) 155, 157.

¹⁴ Stackpole v. Arnold, 11 Mass. 27, 30.

of a written contract.¹⁵ As we shall see hereafter,¹⁶ extrinsic evidence is often admissible to vary the contract, to the extent that the contract when read in connection with the admissible evidence has a different meaning from that which it would have had but for such evidence. Unless this result were expected, extrinsic evidence which explains the surrounding facts and circumstances, the relations of the parties, and the purpose underlying the transaction,¹⁷ would never be offered. The evidence which is forbidden by the rule is not extrinsic evidence in general, but extrinsic evidence of the intention direct of the parties to the contract, which is introduced to displace the intention set forth in the written contract, or to add further terms to a contract in writing which is apparently completed.

§ 2139. Place of rule in law. The question of the application of the rule is generally raised by objection to the admission of oral evidence to show the intention of the parties. The parol evidence

¹⁵ **Arkansas.** *Graves v. Bodcaw Lumber Co.*, 129 Ark. 354, 196 S. W. 800.

Iowa. *Houge v. St. Paul Fire & Marine Ins. Co.*, 174 Ia. 607, 156 N. W. 862; *Armstrong v. Cavanagh*, — Ia. —, 166 N. W. 673.

Kentucky. *Citizens' Trust & Guaranty Co. v. Farmers' Bank*, 166 Ky. 234, 179 S. W. 29; *Scott v. Spurr*, 169 Ky. 575, 184 S. W. 866; *Kreitz v. Gallenstein*, 170 Ky. 16, 185 S. W. 132; *Gabbard v. Sheffield*, 179 Ky. 442, 200 S. W. 940.

Michigan. *Lake Erie Land Co. v. Chilinski*, 197 Mich. 214, 163 N. W. 929; *Kerwin Machine Co. v. Baker*, 199 Mich. 122, 165 N. W. 625; *Boston Piano & Music Co. v. Pontiac Clothing Co.*, 199 Mich. 141, 165 N. W. 856.

Minnesota. *Virginia & Rainy Lake Co. v. Helmer*, 140 Minn. 135, 167 N. W. 355.

Nebraska. *Roden v. Williams*, 100 Neb. 46, 158 N. W. 380.

New Mexico. *Locke v. Murdoch*, 20 N. M. 522, L. R. A. 1917B, 267, 151 Pac. 298; *Gooch v. Coleman*, 22 N. M. 45, 159 Pac. 945.

North Carolina. *American Potato Co. v. Jenette Bros. Co.*, 172 N. Car. 1, 89 S. E. 791; *Caffey v. Oak Furniture Co.*, 175 N. Car. 387, 95 S. E. 619.

Oklahoma. *Gish v. Insurance Co.*, 16 Okla. 59, 13 L. R. A. (N.S.) 826, 87 Pac. 869; *J. M. Hoard, Jr., Co. v. Grand Rapids Showcase Co.*, — Okla. —, 173 Pac. 844.

Oregon. *Mercer v. Germania Fire Insurance Co.*, 88 Or. 410, 171 Pac. 412.

Vermont. *Jones v. Campbell*, — Vt. —, 102 Atl. 102.

West Virginia. *Paxton v. Benedum-Trees Oil Co.*, 80 W. Va. 187, 94 S. E. 472.

"Its positive terms, being expressed in writing, can not be contradicted or varied by parol evidence." *Walker v. Price*, 62 Kan. 327, 333, 84 Am. St. Rep. 392, 62 Pac. 1001 [citing, *Rodgers v. Perrault*, 41 Kan. 385, 21 Pac. 237; *Willard v. Ostrander*, 46 Kan. 591, 26 Pac. 1017].

¹⁶ See §§ 2188 et seq.

¹⁷ See § 2060.

rule was in its origin applied to sealed contracts, and forbade varying them by parol.¹ The combination of the use of the term "parol" with the fact that, at modern law, questions which arise under this rule are generally raised by objection to the introduction of evidence, has caused the rule in which it is sought to embody these principles to be known as the parol evidence rule. It has, however, nothing to do with the law of evidence.² Any rule of substantive law can be stated in terms of the admissibility of evidence; and this is perhaps the best known illustration of the systematic statement of a rule of substantive law in the form of a rule of evidence.

A few illustrations will suffice to show that this is not a rule of evidence: (1) In its original form the rule was stated as a rule of pleading³—namely, that the legal effect of a sealed instrument could not be aided on behalf of the pleader by averment. (2) While the written contract usually acts substantially as a merger of prior or contemporaneous oral negotiations,⁴ it also operates as a merger of prior written negotiations,⁵ as where it merges prior letters between the parties,⁶ or a prior written instrument not

¹ *Butcher v. Butcher*, 1 Bos. & P. N. R. 113; *Blake v. Marnell*, 2 Ball & B. 35 [affirmed, 4 Dow. 248; *Palmer v. Newell*, 20 Beav. 32].

² *Pitcairn v. Philip Hiss Co.*, 125 Fed. 110.

"While the rule known as the parol evidence rule is usually referred to as a rule of evidence, it is more properly a rule of substantive law." *Andersonian Investment Co. v. Wade*, — Wash. —, 184 Pac. 327.

³ *Rutland's Case*, 5 Coke 25.

⁴ See §§ 2137 and 2144.

⁵ *Illinois. Graham v. Sadlier*, 165 Ill. 95, 46 N. E. 221.

Kentucky. Berlin Machine Works v. Jefferson Woodworking Co., 173 Ky. 347, 191 S. W. 82.

Massachusetts. N. J. Magnan Co. v. Fuller, 222 Mass. 530, 111 N. E. 399.

Michigan. John D. Gruber Co. v. Smith, 195 Mich. 336, 162 N. W. 124.

Rhode Island. Stern v. Chagnon, 39 R. I. 567, 99 Atl. 592.

Washington. Farley v. Letterman, 87 Wash. 641, 152 Pac. 515. Thus a deed

merges a prior written contract. *Neal v. Hopkins*, 87 Md. 19, 39 Atl. 322. See §§ 1354 and 2557.

⁶ *United States. South Boston Iron Works v. United States*, 34 Ct. Cl. 174.

Illinois. Graham v. Sadlier, 165 Ill. 95, 46 N. E. 221; *Christopher, etc., Co. v. Yeager*, 202 Ill. 486, 67 N. E. 166 [affirming, 105 Ill. App. 126].

Indiana. Ralya v. Atkins, 157 Ind. 331, 61 N. E. 726.

Kentucky. Berlin Machine Works v. Jefferson Woodworking Co., 173 Ky. 347, 191 S. W. 82.

Massachusetts. N. J. Magnan Co. v. Fuller, 222 Mass. 530, 111 N. E. 399.

Michigan. John D. Gruber Co. v. Smith, 195 Mich. 336, 162 N. W. 124.

Nevada. Gage v. Phillips, 21 Nev. 150, 37 Am. St. Rep. 494, 26 Pac. 60.

Rhode Island. Stern v. Chagnon, 39 R. I. 567, 99 Atl. 592.

Washington. Farley v. Letterman, 87 Wash. 641, 152 Pac. 515.

Wisconsin. Hunter v. Hathaway, 108 Wis. 620, 84 N. W. 996.

made part of the subsequent contract.⁷ Thus a term of an accepted bid which is not carried into the complete written contract subsequently entered into between the parties, is no part of their contract.⁸ The real objection to the evidence, therefore, is not that it is oral as distinguished from written, but that it is extrinsic—that is, that it tends to prove what is not a term of the contract. (3) If a contract is made and to be performed in one jurisdiction, and suit is brought in another, the law of the former jurisdiction applies in determining whether oral agreements are merged by the written contract.⁹ If the rule were really one of evidence the law of the forum would apply. Being really a rule of substantive law, the law of the place of performance ordinarily controls. Accordingly, there is a strong tendency at modern law to treat the parol evidence rule as a rule of substantive law.¹⁰

The rule is frequently referred to as a rule of evidence,¹¹ and it is justified by reasons which apply rather to the law of evidence than to substantive law.¹²

⁷ *Brown v. Markland*, 16 Utah 360, 67 Am. St. Rep. 620, 52 Pac. 597. Still less can the meaning of a contract between A and B be affected by a similar clause in a contract between A and X. *Commonwealth Roofing Co. v. Leather Co.*, 67 N. J. L. 566, 52 Atl. 389.

⁸ *McCrary v. Trust Co.*, 97 Tenn. 469, 37 S. W. 543.

⁹ *Bank v. Talbot*, 154 Mass. 213, 13 L. R. A. 53, 28 N. E. 163.

¹⁰ *Pitcairn v. Philip Hiss Co.*, 125 Fed. 110.

¹¹ *American Potato Co. v. Jenette Bros. Co.*, 172 N. Car. 1, 89 S. E. 791.

¹² "There is no rule of evidence better settled than that prior negotiations and treaties are merged in the written contract of the parties, and the law excludes parol testimony offered to contradict, vary, or add to its terms as expressed in the writing. *Moffitt v. Maness*, 102 N. Car. 457, 9 S. E. 399. The principle lies at the very foundation of all contracts, and if permitted to be violated, the ultimate injury to the commercial world and to society generally, would be incalculable and certainly far-reaching. It is unfortu-

nate that loose dicta in occasional and ill-considered cases are to be found which seem to be hostile to this safe and sound axiom of the law, because they have strained the law in order to defeat or circumvent some suspected fraud, perhaps gross and vicious, but the method of preventing the consummation of the wrong will be far more disastrous in its results than a steady adherence to the rules of the law, although in special cases actual imposition or fraud may be perpetrated. The rules of law are and must needs be universal in their application, this being essential to certainty in business transactions and to the integrity of contracts; for otherwise 'commerce may degenerate into chicanery, and trade become another name for trick.' *Rearick v. Rearick*, 15 Pa. St. 66. It is true that Cicero in his eloquent defense of the poet Archias, denied the superiority of the record, or the written memorial, over the spoken word, upon the ground that the witness is subjected to an oath and cross-examination, with other safeguards against falsehood, while the record has no such test to assure its

In South Carolina the parol evidence rule has been treated rather as a rule of evidence. It was held that a demurrer to a complaint, based on a note signed by "A, agent," who was alleged to have executed the instrument as the agent of B, was improperly sustained, even though no evidence in support of the allegations of agency could have been introduced.¹³ It was, however, suggested that the evidence might show that the principal was doing business in the name of the agent.

The actual result of the parol evidence rule, whether it is to be explained as a rule of substantive law or as a rule of evidence, is to cause a written, simple contract to operate in law as a sort of a formal contract. This, of course, is a contradiction in terms, but it can be justified by the authorities which are discussed in the following sections which show that the effect of a valid, complete, unambiguous, written contract is to exclude all consideration of the actual agreement of the parties in actions at law, and to have the same effect in suits in equity except those in which reformation is sought. Such a contract is a simple contract in that it requires a consideration;¹⁴ but it is like the formal contract of the common law in that the actual intention of the parties ceases to have any legal significance and that the legal effect of the instrument depends entirely upon the written words thereof, except as far as their meaning may be modified by evidence of surrounding circumstances, trade customs, and the like, which are admissible under the ordinary rules of construction.

accuracy; but his plausible argument has never been accepted by the wiser sages of the law, who have consistently adhered to the safer rule, and so arranged the degrees of proof as to give decided preference to written over unwritten evidence. Chief Justice Taylor, in referring to this view of the law, believed that the fallibility of human memory weakens the effect of oral testimony to such an extent that even the most upright mind, though awfully impressed with the solemnity of an oath, perfectly honest and sincere in its processes, and aiming solely to a disclosure of the truth, may still err, and thereby unconsciously substitute falsehood for it. He said that: "Time wears away the distinct image and clear impression of facts, and leaves in

the mind uncertain opinions, imperfect notions, and vague surmises." It is better, therefore, to rely upon the written word as less apt to deceive or falsify. *Smith v. Williams*, 5 N. Car. 426, 4 Am. Dec. 564." *American Potato Co. v. Jenette Bros. Co.*, 172 N. Car. 1, 89 S. E. 791.

¹³ *Tarver v. Garlington*, 27 S. Car. 107, 13 Am. St. Rep. 628, 2 S. E. 846. "Upon the face of the paper, unexplained by parol testimony, the jury would have been compelled under the cases above to answer (the question of agency) in the negative. But before the judge, with the agency not even disputed, it seems to us error to hold that there was no cause of action."

¹⁴ See §§ 537 et seq.

§ 2140. Waiver of parol evidence rule by failure to interpose objection to evidence. If the parol evidence rule is a rule of substantive law and the evidence of prior or contemporaneous negotiations is inadmissible, and not because of any defect in the evidence itself, but because such negotiations are not a part of the contract, such objection is not waived by failure to object to such evidence as inadmissible when it is offered at the trial, since such evidence, even if it is received without objection, does not tend to prove the question at issue, which is the actual agreement entered into between the parties as embodied in the writing and the true meaning and effect thereof. Failure to object to such evidence when it is offered or before the issues of fact are decided by the trier of fact, does not operate as a waiver of such an objection to such evidence on the part of the party who would necessarily prevail if the written contract were regarded as the sole and exclusive repository of the intention of the parties, since there is a total failure of proof on the part of the adversary party and the legal effect of this total failure can not be waived by failure to object to such evidence when it is offered. On the other hand, if the parol evidence rule is a rule of evidence and not a rule of substantive law, and if the only objection to such evidence is that it is an improper means of proving a fact embodied in the issue, failure to object to such evidence when offered at the trial, or possibly failure to object to such evidence at any time before the issue of fact is determined by the trier of fact, operates as a waiver of an objection of this sort to such evidence, and the question can not be raised for the first time in the reviewing court. A few courts are consistent in applying the theory that the parol evidence rule is a rule of substantive law, and in holding accordingly that failure to object to such evidence does not alter the legal effect of a total failure of proof on the part of the party who contends that the terms of the real contract between the parties are different from those which appear in the writing.¹ If there is

¹ *Dollar v. International Banking Corporation*, 13 Cal. App. 331, 109 Pac. 499; *Goddard v. Cutts*, 11 Me. 440.

"Appellant presents a petition for a rehearing on this appeal wherein, among other things, exception is taken to the following language contained in the opinion of this court, filed April 28, 1910, to wit: 'No objection was made

to the introduction of this testimony, but the incompetency of parol evidence to vary a writing may be considered as a matter of law.' In support of the contention that this is not a correct declaration of the law a number of cases are cited to sustain the proposition that, in the absence of objection, secondary evidence is sufficient to sup-

no conflict in evidence as to the execution and contents of the written contract, and if a special verdict has been rendered to the effect that an inconsistent oral contract exists, a judgment should be rendered notwithstanding such special verdict.²

It must be admitted, however, that the numerical weight of authority seems to regard the parol evidence rule from this standpoint as a rule of evidence and not a rule of substantive law, and to hold that failure to object to such evidence when offered at the

port the findings of a court based thereon. The rule declared by this court is entirely distinct from that applied in those cases. Whether or not a contract in writing may be varied by parol evidence is a question of substantive law, while the admission or rejection of secondary evidence is governed by the rules of evidence. (1 Greenleaf on Evidence, 16th ed., § 305a.) Where a contract is reduced to writing, whether required by law to be written or not, the writing supersedes all other negotiations and stipulations concerning the matter made at the time or prior thereto. (Civ. Code, § 1625.) If the terms as agreed upon have not all been reduced to writing, these can be supplied only by an appropriate proceeding, or under proper allegations. (Code Civ. Proc., § 1856; *Germain Fruit Co. v. Armsby Co.*, 153 Cal. 595 [96 Pac. 319].) By way of illustration of the distinction between the rule declared by this court and that cited by appellant, it may be said that parol or secondary evidence, unobjected to, might supply the terms, or purport, of a contract which had been reduced to writing, and, in this form, furnish sufficient proof to sustain a finding, but parol evidence would neither be admissible to vary this contract, nor, if admitted without objection, be sufficient to support a finding which was in conflict with or which in any manner varied the original written contract which the parties entered into. The purpose of the rule relating to the

varying of a writing by parol evidence is to prohibit this from being done, while the rule relating to the admission of secondary evidence goes only to the form in which the evidence may be introduced. These rules are in no way inconsistent and the rule as to secondary evidence is not applicable here." *Dollar v. International Banking Corporation*, 13 Cal. App. 331. 109 Pac. 499.

"It does appear, from the testimony of the witnesses for the defendants, that the suits were withdrawn, a discharge on the copy of the old notes given, and the note in question signed and delivered, upon the condition that the original notes should be procured, and sent to the defendant, Cutts, within two weeks; and that to this the attorney of the plaintiffs assented. This is manifestly a condition subsequent, not to be found in the note, but attempted to be attached thereto by parol evidence. This testimony was received without objection; but when called upon to determine whether the verdict is or is not against the weight of evidence, it must be weighed, according to the rules established by law. This testimony, such as it is, is contradicted by two witnesses. If false, it sought not to affect the note; and if true, it was not competent to change its terms, or interpose new conditions. The defense itself is without merits." *Goddard v. Cutts*, 11 Me. 440.

² *In re Winzenreid's Estate*, 165 Wis. 63, 160 N. W. 1064.

trial or at least failure to move to strike it out before the case is finally submitted, operates as a waiver of such objection.³ If oral evidence of a warranty has been received without objection in the trial court, the reviewing court will not reverse, although the

³Tebbs v. Weatherwax, 23 Cal. 58; Brady v. Nally, 151 N. Y. 258, 45 N. E. 547

"The objection that the evidence to prove this fact was parol and inadmissible to vary the terms of the written acceptance can not be raised here for the first time, after the evidence had been given in the court below without objection. Hobart v. Dumerits, 3 Ind. 346; McCloud v. O'Neill, 16 Cal. 392." Tebbs v. Weatherwax, 23 Cal. 58.

"Unless the written agreement is to be regarded as modified by the parol agreement previously made as to partial payments, this evidence was improperly received. The question is whether the parol agreement, although proved without objection, can be given any force after the written agreement was put in evidence. No motion was made to strike out the verbal testimony. No challenge was made to the parol evidence except as stated, unless it was after the close of the trial and the decision of the issues by the referee, by an exception to the finding of fact that 'the plaintiff agreed to pay the defendant the sum of \$11,000 in installments, or sums, proportionate to the work done and materials furnished as aforesaid at the time payments were received from the comptroller of the city.' When the plaintiff objected to any testimony showing 'a different agreement than that produced in writing,' it was to a question that was clearly competent, as we have held, to show that the person, who executed the written agreement in his own name, was an agent and not a principal. That objection should be limited in its effect to the question in respect to which it was interposed and not ex-

tended so as to change the position of the plaintiff with reference to other testimony received without objection and allowed to remain unchallenged by a motion to strike out, for, obviously, it was neither designed nor adapted to that end. The same is true of the objection made to the offer to show the value of the labor performed and material furnished in part performance of the contract, for no reference was made to the parol evidence that tended to vary the effect of the written agreement, nor was any claim made that such evidence could not properly be considered by the referee in deciding the case. The exception to the finding of fact that payment was to be made in installments, was too late to be effective as notice, either to the defendant or the referee, that the plaintiff was unwilling that the parol evidence under consideration should remain in the case, or that it should be regarded or treated as ineffectual for any purpose. We think that the plaintiff waived his right to object to the consideration of that testimony by failing to make objection when it was received and by neither moving to strike it out, nor directly challenging its effect in any way. If he desired the referee to disregard it, it was his duty to say so before the close of the trial. If he wished to have it out of the case, he should have made a motion to that effect. He could not expect the court, of its own motion, to refuse to consider testimony which he did not see fit to object to when it was received and which he allowed to remain as evidence, without protest or question. By failing to take the position during the trial that it was not legal

record shows that the warranty was in writing.⁴ In this case, however, it does not appear whether the oral evidence was used to contradict the written warranty and thus to violate the parol evidence rule, or whether it was merely a case of the use of secondary evidence of the contents of a written instrument without objection. It has been said that if the petition shows upon its face that oral evidence is to be relied upon to vary a written contract, failure to take advantage of such defect by demurrer or by a motion in arrest of judgment operates as a waiver of an objection to the admission of such evidence.⁵

This principle has been applied in some cases in which it apparently was not necessary to invoke it. Oral evidence tending to show that a written contract which purported to be a contract of hire was really a contract of conditional sale, is probably admissible, even if objection is made in time, since such written contract is an attempt to evade the rights of the parties under a contract of conditional sale,⁶ but its admission has been justified on the ground that the case was tried without objection upon the oral evidence of the actual transaction as well as upon the written contract, and that whatever the true legal construction of the written contract might be, the reviewing court must for the purpose of the particular case, construe it in the light of the oral evidence offered

evidence, and, hence, that it should be disregarded, he impliedly consented that it should be considered and acted upon by the referee, who, indeed, had no right to refuse consideration to anything that the parties had spread before him as evidence to guide him in passing upon their rights.

"It is, however, insisted that in view of the conclusive nature of the presumption that the written agreement embraced the entire contract between the parties, the parol evidence, although received by consent, can not overcome that presumption. The answer to this position is that the parties may, by agreement, express or implied, accept oral testimony instead of the presumption ordinarily arising from written evidence. They have the right to make a rule of evidence for their own case, and they are presumed

to have done so when testimony, otherwise incompetent, is received without objection and without any effort to have it stricken from the minutes, or disregarded by the trial court. They may waive the rules established by the courts to govern the admission of evidence, the same as they may waive the rule established by the legislature, that certain contracts must be in writing, and a waiver may be inferred from the failure of the party, for whose benefit the rule was made, to object in due season, or in some way to insist upon compliance with the law." *Brady v. Nally*, 151 N. Y. 258, 45 N. E. 547.

⁴ *McCormick v. Laughran*, 16 Neb. 87, 20 N. W. 107.

⁵ *Wiseman v. Thompson*, 94 Ia. 607, 63 N. W. 346.

⁶ See § 2183.

at the trial.⁷ A provision in a bill of lading which limits the liability of the carrier, must be supported by a consideration, such as a reduction in rates; and evidence which shows that there was no reduction in rates is admissible, showing that there was no consideration for such limitation of common-law liability.⁸ The admission of such evidence has, however, been justified on the ground that no objection to the admission of such evidence was made and that no exception was taken.⁹ If a suit is brought in equity for specific performance and evidence which tends to show a mistake in expression is admitted without objection, and the court treats such defense as an equivalent to a cross-petition for reformation and grants such relief, the reviewing court will regard objection to the admission of such evidence as made too late, if it is made in the reviewing court for the first time, although the admissibility of such evidence would have been doubtful if the objection had been made at the trial.¹⁰

Other principles of law are occasionally confused with the parol evidence rule upon questions of this sort, and accordingly cases are cited in support of the rule that failure to object to the introduction of parol evidence at the trial operates as a waiver of objection to its admissibility, which are really to be explained on other grounds. In some cases the oral evidence is not offered to vary the terms of a written contract, but it is offered without objection as secondary evidence of the terms of the written agreement. If so offered and received without objection the admission of such evidence can not be urged as error in the reviewing court for the first time.¹¹ In other cases the ground of objection to the oral evidence is that it is oral evidence of a contract or other

⁷ *Walters v. Americus Jewelry Co.*, 114 Ga. 564, 40 S. E. 803.

⁸ See § 2180.

⁹ *McFadden v. Missouri Pacific Ry. Co.*, 92 Mo. 343, 1 Am. St. Rep. 721, 4 S. W. 689.

¹⁰ *Chamberlain v. Black*, 64 Me. 40.

¹¹ *Wagner v. Ellis*, 85 Miss. 422, 37 So. 959; *Dorais v. Doll*, 33 Mont. 314, 83 Pac. 884; *Vietti v. Nesbitt*, 22 Nev. 390, 41 Pac. 151; *Zipp v. Colchester Rubber Co.*, 12 S. D. 218, 80 N. W. 367.

Oral evidence of contents of judgment. *Selleck v. Garland*, 184 Mass. 596, 69 N. E. 345.

Oral evidence of title. *Steadman v. Keets*, 129 Mich. 669, 89 N. W. 555.

Oral evidence of contents of letters. *Freeland v. Williamson*, 220 Mo. 217, 119 S. W. 560.

Oral evidence of contents of mortgage. *Klötty v. Delles*, 45 Wis. 484.

Even in cases of this sort, it has been held that title to realty can not be proved by parol evidence although such objection was not made specifically when the evidence was offered. *Presnell v. Garrison*, 121 N. Car. 366, 28 S. E. 409 [rehearing denied, 122 N. Car. 595, 29 S. E. 839].

transaction which is required by law to be in writing or to be proved by writing, and such objection is waived if it is offered without objection, at least if no motion is made to strike out such evidence before the case is finally submitted.¹² In some cases the oral evidence is offered for the purpose of showing whether or not the written instrument was executed or signed in accordance with the requirements of some specific statute, and the real point which is involved is that error in admitting evidence prematurely may be cured by the subsequent production of proper evidence.¹³ If the written instrument does not express its purpose, oral evidence is admissible to show that it was entered into by way of security.¹⁴ The admission of such evidence has been justified, however, on the theory that no objection was made thereto.¹⁵

It will be seen, however, that even after eliminating the cases which do not really involve the parol evidence rule, the numerical weight of authority is in favor of regarding this rule as a rule of evidence in so far that failure to object to the introduction of evidence at the trial operates as a waiver of such introduction in the reviewing court. In taking this view the courts do not seem to have noted the inconsistency between this rule and the general rule that the parol evidence rule is not a rule of evidence, but is a rule of substantive law.

§ 2141. Oral terms as part of contract for purpose of consideration. In at least another respect there is some authority for saying that the parol evidence rule is merely a rule of evidence. If A and B have agreed upon certain terms orally and subsequently they reduce the contract to writing and intentionally omit certain oral terms which impose a liability upon one party alone, it has been held that a written modification of the written contract made after such written contract is executed and delivered, and without any new consideration, may incorporate such oral negotiations into

¹² Sweetland v. Shattuck, 66 Cal. 31, 4 Pac. 885; Barton v. Koon, 20 S. D. 7, 104 N. W. 521; Ray v. Rood, 62 Vt. 293, 19 Atl. 226; Eaves v. Vial, 98 Va. 134, 34 S. E. 978.

This principle has been applied to oral evidence of a trust. Poole v. McGahan, 124 Ind. 583, 24 N. E. 723; Merritt-Allen Co. v. Torrence (Ia.), 102 N. W. 154. (In this case the greater

part of the corpus of the trust was personalty and oral evidence was admissible as to such property.)

¹³ Le Mesnager v. Hamilton, 101 Cal. 532, 40 Am. St. Rep. 81, 35 Pac. 1054; Beckwith v. Talbot, 2 Colo. 639.

¹⁴ See § 2154.

¹⁵ Ryan v. Logan County Bank, 132 Ky. 625, 116 S. W. 1179, 119 S. W. 768.

such written contract.¹ Where the admission of such evidence might have been justified on the ground that the oral agreement was the inducement for the written agreement,² or on the ground that oral evidence might be admitted to show the connection between two different writings,³ the court preferred to place its holding upon the ground that the parol evidence rule is essentially a rule of evidence.⁴

If the parol evidence rule were a rule of substantive law, and if the oral terms were in a part of the contract, the addition to the contract by subsequent agreement of terms which impose an obligation upon one party alone would be without legal effect, because no consideration would exist for such modification.⁵ In this case, too, the inconsistency between the result thus reached and the theory that the parol evidence rule is a rule of substantive law, does not seem to be noticed.

§ 2142. Relation of parol evidence rule to rules requiring writing or written evidence. As far as the parol evidence rule itself is concerned, it makes no difference what the subject-matter of the contract is, with what formalities the contract has in fact been executed, or with what formalities it is required by law to be executed in order to be operative. In itself it applies, primarily, to contracts which the parties have reduced to writing voluntarily, and which would have been operative although such contracts had not been reduced to writing and although no written evidence of such contract had ever been in existence. Other rules than the parol evidence rule may, however, apply to contracts which involve certain classes of subject-matter and which are required by law to be in writing or to be proved by writing or to be executed with

¹ Hurless v. Wiley, 91 Kan. 347, L. R. A. 1915C, 177, 137 Pac. 981.

² See § 2165.

³ See § 2046.

⁴ "We prefer, however, to put the decision on this ground: If originally the buyer would not have been permitted to show that at the time of his purchase, and as an inducement thereto, the seller orally agreed to find a new buyer at an advanced price within the year, the reason is that the law protects the seller from having his documentary evidence overthrown

by mere word of mouth. When he reduced the promise to writing, the requirement of the law was met. The reason for his protection no longer existed. Oral evidence was necessary, not to prove the promise, but to show for what it was given. A consideration was implied from the contract being in writing, and its character was properly shown by parol." Hurless v. Wiley, 91 Kan. 347, L. R. A. 1915C, 177, 137 Pac. 981.

⁵ See § 589.

other formalities. While the parol evidence rule applies to contracts of these classes as well as to ordinary contracts, as far as it operates to exclude extrinsic evidence, parol evidence is frequently excluded by reason of the application of these other rules of law in cases in which the parol evidence rule itself would permit the admission of such evidence. If the contract is one of a type which by law must be in writing, or which by law must be proved by writing, the rules of law which require such contract to be proved by writing or to be in writing may prevent the use of oral evidence for the purpose of identifying the parties or the subject-matter, or for the purpose of explaining ambiguities, or for the purpose of supplementing a written memorandum or contract which is incomplete upon its face.

§ 2143. What is "written contract" in parol evidence rule. The parol evidence rule applies to contracts in which the parties have attempted to reduce all the terms to writing in one instrument which they have then executed as a written contract.¹ Accordingly, the parol evidence rule applies to a contract of insur-

¹ **United States.** *Lumber Underwriters v. Rife*, 237 U. S. 605, 59 L. ed. 1140.

Alabama. *Parker v. Law*, 194 Ala. 693, 60 So. 879.

California. *Smith v. Murphy*, 168 Cal. 328, 143 Pac. 594.

Connecticut. *Fidelity & Casualty Co. v. Thames Ferry Co.*, 82 Conn. 475, 74 Atl. 780.

Iowa. *Kelsey v. Continental Casualty Co.*, 131 Ia. 207, 108 N. W. 221.

Kansas. *Graham County Mill & Elevator Co. v. Saunders*, 96 Kan. 459, 152 Pac. 622.

Maryland. *Cowan v. Meyer*, 125 Md. 450, 94 Atl. 18.

Massachusetts. *Ewer v. Washington Insurance Co.*, 33 Mass. (16 Pick.) 502, 28 Am. Dec. 258; *Fuller v. N. J. Magnan Co.*, 222 Mass. 530, 111 N. E. 399.

Nebraska. *Whitnack v. Chicago, B. & Q. R. Co.*, 82 Neb. 464, 19 L. R. A. (N.S.) 1011, 118 N. W. 67.

North Carolina. *Boushall v. Stronach*, 172 N. Car. 273, 90 S. E. 198.

Oklahoma. *Huster v. Newkirk Creamery & Ice Co.*, 42 Okla. 440, L. R. A. 1915A, 390, 141 Pac. 790.

Ohio. *Union Central Life Insurance Co. v. Hook*, 62 O. S. 256, 56 N. E. 906.

Oregon. *Peters v. Queen City Ins. Co.*, 63 Or. 382 [subnomine, *Peters & Roberts Furniture Co. v. Queen City Fire Ins. Co.*, 126 Pac. 1005].

Pennsylvania. *Lowry v. Roy*, 238 Pa. St. 9, 85 Atl. 986.

Utah. *Johnson v. Geddes*, 49 Utah 137, 161 Pac. 910.

West Virginia. *Clarksburg Board of Trade Land Co. v. Davis*, 77 W. Va. 70, 86 S. E. 929.

Wisconsin. *Beers v. North Milwaukee Town Site Co.*, 93 Wis. 569, 67 N. W. 936; *Rief v. Casualty Co.*, 131 Wis. 368, 111 N. W. 502.

Wyoming. *Reynolds v. Morton*, 23 Wyom. 528, 154 Pac. 325.

ance,² or to a building contract,³ or to a bill of lading,⁴ or to a written contract of subscription to corporate stock,⁵ or to a deed of realty,⁶ or to a contract for the sale,⁷ or exchange,⁸ or lease,⁹ of realty, or to a contract for the sale of personalty,¹⁰ or to a chattel mortgage,¹¹ or to notes as far as they express contractual terms on their face,¹² or to a contract with reference to the inter-

² **United States.** *Lumber Underwriters v. Rife*, 237 U. S. 605, 59 L. ed. 1140.

Connecticut. *Fidelity & Casualty Co. v. Thames Ferry Co.*, 82 Conn. 475, 74 Atl. 780.

Iowa. *Kelsey v. Continental Casualty Co.*, 131 Ia. 207, 108 N. W. 221.

Massachusetts. *Ewer v. Washington Ins. Co.*, 33 Mass. (16 Pick.) 502, 28 Am. Dec. 258.

Ohio. *Union Central Life Ins. Co. v. Hook*, 62 O. S. 256, 56 N. E. 906.

Oklahoma. *Brown v. Connecticut Fire Ins. Co.*, 52 Okla. 392, 153 Pac. 173.

Oregon. *Peters v. Queen City Fire Ins. Co.*, 63 Or. 382 [sub nomine, *Peters & Roberts Furniture Co. v. Queen City Fire Ins. Co.*, 126 Pac. 1005]; *Mercer v. Germania Fire Insurance Co.*, 88 Or. 410, 171 Pac. 412.

Virginia. *Connecticut Fire Ins. Co. v. W. H. Roberts Lumber Co.*, 119 Va. 479, 89 S. E. 945.

Wisconsin. *Rief v. Continental Casualty Co.*, 131 Wis. 368, 111 N. W. 502.

³ **California.** *Smith v. Murphy*, 168 Cal. 328, 143 Pac. 594.

Maryland. *Cowan v. Meyer*, 125 Md. 450, 94 Atl. 18.

Massachusetts. *Fuller v. N. J. Magnam Co.*, 222 Mass. 530, 111 N. E. 399.

Pennsylvania. *Lowry v. Roy*, 238 Pa. St. 9, 85 Atl. 986.

Wisconsin. *Beers v. North Milwaukee Town Site Co.*, 93 Wis. 569, 67 N. W. 936.

⁴ *John Vittuci Co. v. Canadian Pac. Ry. Co.*, 238 Fed. 1005; *Atlanta & West Point R. Co. v. Fairburn Marble Co.*, 145 Ga. 708, 89 S. E. 817; *Whit-*

nack v. Chicago, B. & Q. R. Co., 82 Neb. 464, 19 L. R. A. (N.S.) 1011, 118 N. W. 67; *Strong v. Wells Fargo*, 39 S. D. 389, 164 N. W. 967.

⁵ **Kansas.** *Graham County Mill & Elevator Co. v. Saunders*, 96 Kan. 459, 152 Pac. 622.

North Carolina. *Boushall v. Stronach*, 172 N. Car. 273, 90 S. E. 198.

Oklahoma. *Huster v. Newkirk Creamery & Ice Co.*, 42 Okla. 440, L. R. A. 1915A, 390, 141 Pac. 790.

Washington. *Bergman v. Evans*, 92 Wash. 158, 158 Pac. 961.

West Virginia. *Clarksburg Board of Trade Land Co. v. Davis*, 77 W. Va. 70, 86 S. E. 929.

⁶ *Harman v. Dry Fork Colliery Co.*, 80 W. Va. 780, 94 S. E. 355.

⁷ *Johnson v. Geddes*, 49 Utah 137, 161 Pac. 910.

⁸ *Rampton v. Cole*, — Utah —, 172 Pac. 477.

⁹ *Farley v. Letterman*, 87 Wash. 641, 152 Pac. 515.

¹⁰ **Alabama.** *Manchester Sawmills Co. v. A. L. Arundel Co.*, 197 Ala. 505, 73 So. 24.

Arkansas. *Gunter v. Road Improvement District*, 125 Ark. 492, 189 S. W. 53.

California. *Budd v. Hughes*, — Cal. —, 171 Pac. 287.

Oklahoma. *Futoransky v. Pope*, 57 Okla. 755, L. R. A. 1916F, 548, 157 Pac. 905.

¹¹ *Reynolds v. Morton*, 23 Wyom. 528, 154 Pac. 325.

¹² **Iowa.** *Cochran v. Zachery*, 137 Ia. 585, 16 L. R. A. (N.S.) 235, 115 N. W. 486.

est of the parties in a savings account,¹³ or to a surety bond,¹⁴ or to a written contract for work and labor which purports to be complete,¹⁵ or to a contract for the payment of a commission,¹⁶ or to a contract which affects the rights of the parties arising out of the marital relation,¹⁷ if such instruments show upon their face that the terms are contractual in character and if they purport to be complete.

It is not, however, necessary that the contract should be reduced to a single instrument or that it should be executed by the parties in any particular way or with any formality. If the writing shows the intention of the parties to enter into a contract, and if it shows the terms of such contract, the parol evidence rule applies, no matter how informal the instrument may be.¹⁸ The contract may be embodied in a number of different writings,¹⁹ such as a written order and a written acceptance,²⁰ or in the correspondence of the parties,²¹ or in letters and telegrams.²² The parol evi-

Kansas. First National Bank v. Staab, 102 Kan. 369, 171 Pac. 3.

Michigan. Northern Assurance Co. v. Meyer, 194 Mich. 371, 160 N. W. 617.

North Carolina. Pierce v. Cobb, 161 N. Car. 300, 44 L. R. A. (N.S.) 379, 77 S. E. 350.

Oklahoma. Guthrie & W. R. Co. v. Rhodes, 19 Okla. 21, 21 L. R. A. (N.S.) 490, 91 Pac. 1119.

If the terms of a sale are set forth in the note which is given under such contract, such note is a written contract within the parol evidence rule. Bond v. Perrin, 145 Ga. 200, 88 S. E. 954.

¹³ In re Gurnsey's Estate, — Cal. —, 170 Pac. 402.

¹⁴ Phoenix Mill Co. v. Kresge, 254 Pa. St. 36, 98 Atl. 772.

¹⁵ Parker v. Law, 194 Ala. 693, 69 So 879.

¹⁶ Allen v. Torbert, 140 Minn. 195, 167 N. W. 1033.

¹⁷ Hill v. Hill, 74 N. H. 288, 12 L. R. A. (N.S.) 848, 67 Atl. 406.

¹⁸ **United States.** Thullen v. Triumph Electric Co., 227 Fed. 837, 142 C. C. A. 361.

Arkansas. Engles v. Blocker, 127 Ark. 385, 192 S. W. 193.

Kentucky. Citizens' Trust & Guaranty Co. v. Farmers' Bank, 166 Ky. 234, 179 S. W. 29.

Massachusetts. Woods v. Oakman, 116 Mass. 599; American Toy Mfg. Co. v. McLoughlin, 221 Mass. 567, 109 N. E. 836.

Oklahoma. Hollister v. National Cash Register Co., 55 Okla. 214, 154 Pac. 1157.

Wisconsin. Manufacturers' & M. Inspection Bureau v. Everwear Hosiery Co., 152 Wis. 73, 42 L. R. A. (N.S.) 847, 138 N. W. 624; Ohio Electric Co. v. Wisconsin-Minnesota Light & Power Co., 161 Wis. 632, 155 N. W. 112.

¹⁹ Citizens' Trust & Guaranty Co. v. Farmers Bank, 166 Ky. 234, 179 S. W. 29.

²⁰ Ohio Electric Co. v. Wisconsin-Minnesota Light & Power Co., 161 Wis. 632, 155 N. W. 112.

²¹ Rail & River Coal Co. v. Paisley, 233 Fed. 337, 147 C. C. A. 273; Engles v. Blocker, 127 Ark. 385, 192 S. W. 193; American Toy Mfg. Co. v. McLoughlin, 221 Mass. 567, 109 N. E. 836; Odeneal v. Henry, 70 Miss. 172, 12 So. 154.

²² Rough v. Breitung, 117 Mich. 48, 75 N. W. 147.

dence rule has, however, been applied to a memorandum signed by the seller and accepted by the buyer, which purports to be a recital of the order under which the seller had paid in full for the article sold.²³ A memorandum on the back of a promissory note, setting forth the articles to which title was reserved by a provision upon the face of the note, is a part of such contract and can not be contradicted by extrinsic evidence.²⁴

It is not necessary that the instrument be signed by both of the parties in order to bring it within the application of the parol evidence rule.²⁵ If an order for goods and a note signed by the purchaser embody the contract of sale, such contract is within the application of the parol evidence rule.²⁶ The parol evidence rule applies as well to a written offer which is signed by one party and which is accepted by the other.²⁷ If a written offer which is complete upon its face is accepted by the acts and conduct of the offeree, such written offer expresses the contract within the meaning of the parol evidence rule.²⁸ In the absence of statutory provision requiring a contract to be signed by the parties, and in the absence of rules of the law-merchant, such as require bills and notes to be signed by the parties, an unsigned written contract to which the parties have assented embodies their mutual intention within the meaning of the parol evidence rule.²⁹ An entry upon the minutes of a public corporation, which is contractual in its character and which is accepted by the adversary party, may be a written contract within the meaning of the parol evidence rule.³⁰

The parol evidence rule has no application to a memorandum which is made after the contract has been entered into between the parties and which the parties do not agree upon as a new contract embodying the terms of a new agreement.³¹ A written memoran-

²³ *MacAlman v. Gleason*, 228 Mass. 454, 117 N. E. 795.

²⁴ *Fears v. Watson*, 124 Ark. 341, 187 S. W. 178.

²⁵ *Thullen v. Triumph Electric Co.*, 227 Fed. 837, 142 C. C. A. 361; *Cincinnati, Hamilton & Dayton R. R. v. Pontius*, 19 O. S. 221, 2 Am. Rep. 391; *Hollister v. National Cash Register Co.*, 55 Okla. 214, 154 Pac. 1157.

²⁶ *Hollister v. National Cash Register Co.*, 55 Okla. 214, 154 Pac. 1157.

²⁷ *Dunn v. Mayo Mills*, 134 Fed. 804, 67 C. C. A. 450; *Thullen v. Triumph Electric Co.*, 227 Fed. 837, 142 C. C. A.

361; *Horn v. Hansen*, 56 Minn. 43, 22 L. R. A. 617, 57 N. W. 315.

²⁸ *Manufacturers' & M. Inspection Bureau v. Everwear Hosiery Co.*, 152 Wis. 73, 42 L. R. A. (N.S.) 847, 138 N. W. 624.

²⁹ *Farmer v. Gregory*, 78 Ky. 475.

³⁰ *Gainesville v. Jaudon*, 145 Ga. 290, 89 S. E. 210.

³¹ *United States. Shubert v. Rosenberger*, 204 Fed. 934, 123 C. C. A. 256, 45 L. R. A. (N.S.) 1062.

Connecticut. Alderman v. Westinghouse Air Brake Co. (Conn.), 103 Atl. 267.

dum which is signed by one party only, does not merge a prior oral contract of sale,³² and does not prevent the seller from showing that the buyer had no credit upon the books of the seller, that under such circumstances the custom of the trade was to ship the goods attaching the sight draft to the bill of lading and that at the request of the buyer, the written memorandum provided for "sight draft on arrival at destination" for the sole purpose of extending the time of payment.³³ An oral contract for the sale of a specific second-hand automobile is not merged in a subsequent written memorandum which is signed by the buyer as a receipt upon a blank form which purports to be a general order for a new car to be delivered in the future.³⁴ A power of attorney, executed long after securities were delivered, does not merge the original oral contract under which such securities were delivered, at least if it does not purport to set forth such terms.³⁵ A written memorandum made a month after an oral contract had been entered into and performed by one of the parties, does not merge such oral contract.³⁶ A written statement by A, which sets forth his contention as to the contents of an oral contract with B, and in which B does not acquiesce, does not operate as a merger of the oral contract so as to prevent A from showing terms of such contract which are inconsistent with such written statement.³⁷ If an oral contract of insurance has been made such contract is not merged in a policy which is mailed to the insured some time thereafter,³⁸ especially if the insured did not read such policy until after the loss.³⁹

In other cases an oral contract is regarded as merged in a written contract which is delivered as evidence of the terms of the

Iowa. *Mollison v. Rittgers*, 140 Ia. 365, 29 L. R. A. (N.S.) 1179, 118 N. W. 512.

Oregon. *Bouchet v. Oregon Motor Car Co.*, 78 Or. 230, 152 Pac. 888.

Washington. *In re Crim's Estate*, 89 Wash. 395, 154 Pac. 811.

West Virginia. *Fisher v. Sun Insurance Office*, 74 W. Va. 694, L. R. A. 1915C, 619, 83 S. E. 729.

³² *Alderman v. Westinghouse Air Brake Co.*, 92 Conn. 419, 103 Atl. 267.

³³ *Alderman v. Westinghouse Air Brake Co.*, 92 Conn. 419, 103 Atl. 267.

³⁴ *Bouchet v. Oregon Motor Car Co.*, 78 Or. 230, 152 Pac. 888.

³⁵ *Mollison v. Rittgers*, 140 Ia. 365, 29 L. R. A. (N.S.) 1179, 118 N. W. 512.

³⁶ *In re Crim's Estate*, 89 Wash. 395, 154 Pac. 811.

³⁷ *Shubert v. Rosenberger*, 204 Fed. 934, 123 C. C. A. 256, 45 L. R. A. (N.S.) 1062.

³⁸ *Fisher v. Sun Insurance Office*, 74 W. Va. 694, L. R. A. 1915C, 619, 83 S. E. 729.

³⁹ *Fisher v. Sun Insurance Office*, 74 W. Va. 694, L. R. A. 1915C, 619, 83 S. E. 729.

oral contract either at the time that the oral contract is made or subsequent thereto.⁴⁰ A bill of lading is regarded as superseding an oral contract for transportation.⁴¹ If the carrier delivers to the consignee, whose name appears in the bill of lading, it has performed its contract, although a different consignee was agreed upon in the oral agreement between the parties.⁴²

In the rule that a written contract embodies the intention of the parties to the exclusion of the prior negotiations, priority of time is to be determined by the time that the contract was executed, and not by the time that the contract was drawn up,⁴³ or by the date which the contract bears.⁴⁴ A letter written between the time at which a lease was prepared and dated and the time at which the lease was executed, by which letter it is sought to modify the terms of the lease, is a prior negotiation within the meaning of the rule, although it was written after the terms of the original contract had been agreed upon.⁴⁵

If the parties to the alleged contract in writing attack the validity of the contract, a question as to the admissibility of extrinsic evidence to show that such contract is invalid is presented, which is discussed elsewhere.⁴⁶

§ 2144. Written contract merges prior negotiations. In an action on an unambiguous written contract, which is complete in itself, and the validity of which is conceded, the parties are not permitted to show that their prior or contemporaneous oral agreements were not all reduced to writing, but remain as oral contracts in full force and effect between the parties.¹ This rule applies as well where the intention of the parties is completely

⁴⁰ *Porter v. Oceanic S. S. Co.*, 223 Mass. 224, 111 N. E. 864.

⁴¹ *Porter v. Oceanic S. S. Co.*, 223 Mass. 224, 111 N. E. 864.

⁴² *Porter v. Oceanic S. S. Co.*, 223 Mass. 224, 111 N. E. 864.

⁴³ *Farley v. Letterman*, 87 Wash. 641, 152 Pac. 515.

⁴⁴ *Farley v. Letterman*, 87 Wash. 641, 152 Pac. 515.

⁴⁵ *Farley v. Letterman*, 87 Wash. 641, 152 Pac. 515.

⁴⁶ See §§ 2171 et seq.

¹ *England. Abrey v. Crux*, L. R. 5

C. P. 37; *Omerod v. Hardman*, 5 Ves. Jr. 722; *Woollam v. Hearn*, 7 Ves. Jr. 211.

United States. Union, etc., Ins. Co. v. Mowry, 96 U. S. 549, 24 L. ed. 676; *Sun, etc., Association v. Edwards*, 113 Fed. 445, 51 C. C. A. 279; *Connecticut F. Ins. Co. v. Buchanan*, 141 Fed. 877, 73 C. C. A. 111, 4 L. R. A. (N.S.) 758; *President Suspender Co. v. Macwilliam*, 238 Fed. 159, 151 C. C. A. 235 [affirming, *President Suspender Co. v. Macwilliam*, 233 Fed. 433]; *Stark Electric R. Co. v. McGinty Contracting Co.*, 238 Fed. 657, 151 C. C. A. 507.

embodied in two written contracts instead of one.² If the parties have voluntarily omitted terms in reducing the contract to writing,³ as where they voluntarily omit from a lease a clause providing for an abatement of rent,⁴ or for lessor's approval as a condition to lessee's making certain improvements,⁵ they can not enforce such terms thus voluntarily omitted. Accordingly, where A executes a written instrument whereby she relinquishes her claim to certain horses and carriages in B's possession until B's claim for board is paid in full, A can not show a contemporaneous oral

California. Remsberg v. Hackney Manufacturing Co., 174 Cal. 799, 164 Pac. 792.

Connecticut. Quinn v. Roath, 37 Conn. 16; Hildreth v. Tramway Co., 73 Conn. 631, 48 Atl. 963.

Florida. Herrin v. Abbe, 55 Fla. 769, 18 L. R. A. (N.S.) 907, 46 So. 183.

Illinois. Tichenor v. Newman, 186 Ill. 264, 57 N. E. 826; Rector v. Deposit Co., 190 Ill. 380, 60 N. E. 523 [affirming, 92 Ill. App. 175].

Kansas. Ehram v. Brown, 64 Kan. 466, 67 Pac. 867; German-American State Bank v. Watson, 99 Kan. 686, 163 Pac. 637; Frith v. Thomson, — Kan. —, 173 Pac. 915.

Kentucky. Wight v. R. R., 55 Ky. (16 B. Mon.) 4, 63 Am. Dec. 522.

Maine. Bell v. Flanders, 115 Me. 332, 98 Atl. 825.

Michigan. Loth v. Friederick, 95 Mich. 598, 55 N. W. 369; McCray Refrigerator Co. v. Zent, 99 Mich. 269, 41 Am. St. Rep. 509, 58 N. W. 320; Holmes v. Holmes, 129 Mich. 412, 89 N. W. 47; Grand Rapids Wood Finishing Co. v. Hatt, 152 Mich. 132, 115 N. W. 714.

Missouri. Plumb v. Cooper, 121 Mo. 668, 26 S. W. 678.

Montana. Crawford v. Improvement Co., 15 Mont. 153, 38 Pac. 713; Montana Mining Co. v. Milling Co., 20 Mont. 394, 51 Pac. 824; Largey v. Leggatt, 30 Mont. 148, 75 Pac. 950.

New Jersey. Russell v. Russell, 63 N. J. Eq. 282, 49 Atl. 1081 [affirming, 47 Atl. 37].

New Mexico. Locke v. Murdoch, 20 N. M. 522, L. R. A. 1917B, 267, 151 Pac. 298.

New York. Thomas v. Scutt, 127 N. Y. 133, 27 N. E. 961.

North Carolina. Boushall v. Stronach, 172 N. Car. 273, 90 S. E. 198.

North Dakota. Gilbert Mfg. Co. v. Bryan, — N. D. —, 166 N. W. 805.

Ohio. Union Central, etc., Co. v. Hook, 62 O. S. 256, 56 N. E. 906; Travelers' Ins. Co. v. Myers, 62 O. S. 529, 57 N. E. 458.

Pennsylvania. Heist v. Hart, 73 Pa. St. 286; Philadelphia, etc., Ry. v. Conway, 177 Pa. St. 364, 35 Atl. 716; Williams v. Notopolos, 259 Pa. St. 469, 103 Atl. 290.

Tennessee. Sommerville v. Gullett Gin Co., 137 Tenn. 509, 194 S. W. 576.

Utah. Johnson v. Geddes, 49 Utah 137, 161 Pac. 910.

Vermont. Hebard v. Cutler, — Vt. —, 99 Atl. 870.

Wisconsin. Gilbert v. Stockman, 76 Wis. 62, 20 Am. St. Rep. 23, 44 N. W. 845.

Contra, under the California statute. Snyder v. Mfg. Co., 134 Cal. 324, 66 Pac. 311.

² Harrison v. Tate, 100 Ga. 383, 28 S. E. 227.

³ Eleventh Street Church v. Pennington, 18 Ohio C. C. 408, 10 Ohio C. D. 74.

⁴ Seitz Brewing Co. v. Ayres, 60 N. J. Eq. 100, 46 Atl. 535.

⁵ Williams v. Notopolos, 259 Pa. St. 469, 103 Atl. 290.

agreement that she might use such horses in the ordinary course of her business.⁶ So in jurisdictions where there is no priority of payment between notes secured by one mortgage, but falling due at different times, extrinsic evidence is inadmissible to show that the assignee should have priority.⁷ So an indorser of one of several notes secured by mortgage, can not show an oral agreement that the proceeds of the mortgage were to be applied first to the note last maturing.⁸ If a mortgage is given to secure four notes, extrinsic evidence is inadmissible to show that such mortgage was to be released when two of such notes were paid.⁹ If a grantee has accepted a deed which clearly shows on its face that he has assumed a mortgage indebtedness, such clause can not be contradicted by oral evidence of the actual consideration which was given for such deed;¹⁰ nor by oral evidence to the effect that the grantee had said before he accepted such deed that he would not accept it so as to be responsible for the incumbrance upon such realty.¹¹ If a contractor has agreed in writing to assume the contracts for materials already made, he can not show a contemporaneous oral agreement that he should assume only a certain amount of those contracts, the other party to assume the excess over such amount.¹² So under a contract for payment of an entire indebtedness, extrinsic evidence is inadmissible to show that a part only of such indebtedness was to be paid.¹³ So under a contract to pay "all of the outstanding indebtedness" of X, "not to exceed in all one hundred and thirty thousand dollars," extrinsic evidence is inadmissible to show an oral contract to pay part only of all X's debts.¹⁴ So under a contract to supply X the material which he needed, evidence is inadmissible to show that the contract was for a limited amount only.¹⁵ So under a complete written contract for the sale of machines, extrinsic evidence is inadmissible to show that the agent was to set them up.¹⁶ Under written permission for the

⁶ Radigan v. Johnson, 174 Mass. 68, 54 N. E. 358.

⁷ Jennings v. Moore, 83 Mich. 231, 21 Am. St. Rep. 601, 47 N. W. 127.

⁸ Schulty v. Bank, 141 Ill. 116, 33 Am. St. Rep. 200, 30 N. E. 346.

⁹ First National Bank v. Prior, 10 N. D. 146, 86 N. W. 362.

¹⁰ Lamoille County Savings Bank & Trust Co. v. Belden, 90 Vt. 535, 98 Atl. 1002.

¹¹ Herrin v. Abbe, 55 Fla. 769, 18 L. R. A. (N.S.) 907, 46 So. 183.

¹² Bandholz v. Judge, 62 N. J. L. 526, 41 Atl. 723.

¹³ First National Bank v. Ry. (Tenn. Ch. App.), 46 S. W. 312.

¹⁴ Bell v. Mendenhall, 78 Minn. 57, 80 N. W. 843.

¹⁵ Dean v. Mfg. Co., 177 Mass. 137, 58 N. E. 162.

¹⁶ Dowagiac Mfg. Co. v. Corbit, 127 Mich. 473, 478, 86 N. W. 954 [rehearing denied, 87 N. W. 886].

assignment of a lease, it is inadmissible to show that the lessee's liability was to end by such assignment.¹⁷ So if a written contract for the sale of land provides for the payment of taxes and assessments, extrinsic evidence is inadmissible to show an agreement by the vendor to pay taxes upon such realty,¹⁸ or to show that certain taxes were excepted from a covenant against encumbrances.¹⁹ So if the parties have made a contract whereby one of them is to furnish castings and sink a well at a given price, extrinsic evidence is inadmissible to show that he was to furnish the tubing and pump for the same price.²⁰ So under a contract for employing an insurance agent, which by its terms could be ended at will without liability except for commissions earned, the agent can not show a contemporaneous oral contract giving him commissions on future renewals.²¹ So one who ships under an ordinary bill of lading, constituting a contract in writing between himself and the railroad company, can not enforce a prior oral contract to give him as low a rate as was given to any shipper.²²

§ 2145. Evidence inadmissible to contradict written contract.

Extrinsic evidence is inadmissible to contradict the intention of the parties as expressed in a written contract by showing a prior or contemporaneous oral agreement contrary to the written agreement.¹ If there is no dispute as to the genuineness of the letters which make up a contract, the offeree who admits that he wrote a

¹⁷ *Rector v. Deposit Co.*, 190 Ill. 380, 60 N. E. 528.

¹⁸ *Gilbert v. Stockman*, 76 Wis. 62, 20 Am. St. Rep. 23, 44 N. W. 845; and see *Garwood v. Wheaton*, 128 Cal. 399, 60 Pac. 961.

¹⁹ *Stanisics v. McMurtry*, 64 Neb. 761, 90 N. W. 884.

²⁰ *Meador v. Allen*, 110 Ia. 588, 81 N. W. 799.

²¹ *Stowell v. Ins. Co.*, 163 N. Y. 298, 57 N. E. 480.

²² *Hopkins v. Ry.*, 29 Kan. 544.

¹ *United States. Smith v. Bank*, 89 Fed. 832, 32 C. C. A. 368; *Housekeeper Publishing Co. v. Swift*, 97 Fed. 290, 38 C. C. A. 187; *El Dia Insurance Co. v. Sinclair*, 228 Fed. 833, 143 C. C. A. 231; *President Suspender Co. v. Mac-*

william, 238 Fed. 159, 151 C. C. A. 235 [affirming, *President Suspender Co. v. Macwilliam*, 233 Fed. 433]; *Stark Electric R. Co. v. McGinty Contracting Co.*, 238 Fed. 657, 151 C. C. A. 507; *Hazen Mfg. Co. v. Wareham*, 242 Fed. 642.

Alabama. Bomar v. Rosser, 131 Ala. 215, 31 So. 430; *Manchester Sawmills Co. v. A. L. Arundel Co.*, 197 Ala. 505, 73 So. 24.

Arizona. Hurley v. Young Men's Christian Association, 16 Ariz. 26, 52 L. R. A. (N.S.) 221, 140 Pac. 816.

Arkansas. Fears v. Watson, 124 Ark. 341, 187 S. W. 178; *Luce v. Arkansas Brick & Mfg. Co.*, 125 Ark. 219, 188 S. W. 566.

California. In re Gurnsey's Estate, — Cal. —, 170 Pac. 402; *Budd v. Hughes*, — Cal. —, 171 Pac. 287.

letter which on its face purports to be his acceptances, can not introduce oral evidence to the effect that he did not accept the

Colorado. *Brown v. Barth*, — Colo. —, 184 Pac. 300.

Connecticut. *Adams v. Turner*, 73 Conn. 38, 46 Atl. 247.

District of Columbia. *Gerber v. Probey*, 44 D. C. App. 392.

Georgia. *Maxwell v. Willingham*, 101 Ga. 55, 28 S. E. 672; *Carter v. Williamson*, 106 Ga. 280, 31 S. E. 651; *American Harrow Company v. Dolvin*, 119 Ga. 186, 45 S. E. 983; *Townsend v. Southern Product Co.*, 127 Ga. 342, 119 Am. St. Rep. 340, 56 S. E. 436.

Illinois. *Diederick v. Rose*, 228 Ill. 610, 81 N. E. 1140.

Iowa. *Becker v. Dalby (Ia.)*, 86 N. W. 314.

Kansas. *Graham County Mill & Elevator Co. v. Saunders*, 96 Kan. 459, 152 Pac. 622; *German-American State Bank v. Watson*, 99 Kan. 686, 163 Pac. 637; *First National Bank v. Staab*, 102 Kan. 369, 171 Pac. 3; *Fontron v. Kruse*, — Kan. —, 172 Pac. 1007.

Kentucky. *White v. Williams*, 105 Ky. 802, 49 S. W. 808; *Crane v. Williamson*, 111 Ky. 271, 63 S. W. 610, 975.

Louisiana. *St. Landry State Bank v. Meyers*, 52 La. Ann. 1769, 28 So. 136.

Michigan. *Wallace v. Kelly*, 148 Mich. 336, 118 Am. St. Rep. 580, 111 N. W. 1049.

Minnesota. *Baylor v. Butterfass*, 82 Minn. 21, 84 N. W. 640; *Northwestern Fuel Co. v. Boston Insurance Co.*, 131 Minn. 19, 154 N. W. 515.

Mississippi. *Cooper v. Robertson Investment Co.*, 117 Miss. 108, 77 So. 953.

Montana. *Ming v. Pratt*, 22 Mont. 262, 56 Pac. 279.

Nebraska. *Aultman v. Hawk (Neb.)*, 95 N. W. 695.

New Jersey. *Kupferschmidt v. Agricultural Insurance Co.*, 80 N. J. L. 441, 34 L. R. A. (N.S.) 503, 78 Atl. 225; *Ferber v. Cona*, — N. J. —, 103 Atl. 471.

New Mexico. *Locke v. Murdoch*, 20 N. M. 522, L. R. A. 1917B, 267, 151 Pac. 298; *Gooch v. Coleman*, 22 N. M. 45, 159 Pac. 945.

North Carolina. *Hoffman v. Accident Co.*, 127 N. Car. 337, 37 S. E. 466; *Kernodle v. Williams*, 153 N. Car. 475, 34 L. R. A. (N.S.) 934, 69 S. E. 431; *Acme Manufacturing Co. v. McCormick*, 175 N. Car. 277, L. R. A. 1918F, 572, 95 S. E. 555.

North Dakota. *Gile v. Interstate Motor Car Co.*, 27 N. D. 108, L. R. A. 1915B, 109, 145 N. W. 732.

Ohio. *Harley v. Weber*, 1 Ohio C. D. 360; *First National Bank v. Chandelier Co.*, 17 Ohio C. C. 443.

Oklahoma. *Deming Investment Co. v. Shawnee F. Ins. Co.*, 16 Okla. 1, 4 L. R. A. (N.S.) 607, 83 Pac. 918; *Gish v. Insurance Co.*, 16 Okla. 59, 13 L. R. A. (N.S.) 826, 87 Pac. 869; *First National Bank v. Sappington*, — Okla. —, 157 Pac. 937.

Oregon. *Muir v. Morris*, 80 Or. 378, 157 Pac. 785 [denying rehearing, *Muir v. Morris*, 80 Or. 378, 154 Pac. 117]; *Leavitt v. Dimmick*, 86 Or. 278, 168 Pac. 292.

Pennsylvania. *Ivery v. Phillips*, 196 Pa. St. 1, 46 Atl. 133; *Kaufmann v. Friday*, 201 Pa. St. 178, 50 Atl. 942.

South Carolina. *Burwell & Dunn Co. v. Chapman*, 59 S. Car. 581, 38 S. E. 222; *Gill v. Ruggles*, 104 S. Car. 461, 89 S. E. 503.

South Dakota. *Black Hills Trust & Savings Bank v. Plunkett*, — S. D. — 166 N. W. 527.

Utah. *Rampton v. Cole*, — Utah —, 172 Pac. 477.

Virginia. *Connecticut Fire Ins. Co. v. W. H. Roberts Lumber Co.*, 119 Va. 479, 89 S. E. 945; *Hoster's Committee v. Zollman*, 122 Va. 41, 94 S. E. 164; *Holt Mfg. Co. v. Brotherton*, 91 Wash. 354, 157 Pac. 849.

offer.² The unequivocal provisions of a negotiable instrument,³ such as provisions fixing the rate of interest,⁴ even when introduced for the purpose of showing that no interest was to be exacted, and that accordingly such note was invalid as being a disguised contract for a partial rebate upon a premium of life insurance,⁵ can not be contradicted by extrinsic evidence. A note which shows on its face that it is a promise to pay the attorneys of the wife of the maker, can not be contradicted by extrinsic evidence to show that such note was also given for her alimony.⁶ Extrinsic evidence is inadmissible to contradict a written contract of sale,⁷ or to show that the real agreement was to include more property than was provided for in the written contract.⁸ Extrinsic evidence is inadmissible to show that a bill of sale,⁹ or chattel mortgage,¹⁰ of personal property, was not intended to include all property therein described, or that under a written contract of sale, title was really reserved by the vendor,¹¹ or that under a written contract of sale, which purports to reserve title, it was not intended to reserve title.¹² A written contract for a conditional sale of automobiles which provides that the buyer shall make no claim for work done thereon, can not be contradicted by an oral agreement to the effect that the buyer is to have a lien upon the automobiles for repairs.¹³ If a written lease provides for the payment of a gross sum as

West Virginia. *Martin v. Ry.*, 48 W. Va. 542, 37 S. E. 563; *Clarksburg Board of Trade Land Co. v. Davis*, 77 W. Va. 70, 86 S. E. 929; *Mineral Ridge Mfg. Co. v. Smith*, 79 W. Va. 736, 91 S. E. 817.

Wisconsin. *Newell v. Canning Co.*, 119 Wis. 635, 97 N. W. 487; *Coman v. Wunderlich*, 122 Wis. 138, 99 N. W. 612; *Neff v. Rubin*, 161 Wis. 511, 154 N. W. 976.

² *Engles v. Blocker*, 127 Ark. 385, 192 S. W. 193.

³ *Cochran v. Zachery*, 137 Ia. 585, 16 L. R. A. (N.S.) 235, 115 N. W. 486; *Fontron v. Kruse*, — Kan. —, 172 Pac. 1007; *Northern Assurance Co. v. Meyer*, 194 Mich. 371, 160 N. W. 617; *Acme Manufacturing Co. v. McCormick*, 175 N. Car. 277, L. R. A. 1918F. 572, 95 S. E. 555.

⁴ *Cochran v. Zachery*, 137 Ia. 585, 16 L. R. A. (N.S.) 235, 115 N. W. 486;

Fontron v. Kruse, — Kan. —, 172 Pac. 1007.

⁵ *Northern Assurance Co. v. Meyer*, 194 Mich. 371, 160 N. W. 617.

⁶ *Pierce v. Cobb*, 161 N. Car. 300, 44 L. R. A. (N.S.) 379, 77 S. E. 350.

⁷ *Pritchett v. Jenkins*, 52 Mont. 81, 155 Pac. 974; *Schwartzman v. Creveling*, 85 N. J. Eq. 402, 96 Atl. 896.

⁸ *Schwartzman v. Creveling*, 85 N. J. Eq. 402, 96 Atl. 896.

⁹ *Hodson v. Varney*, 122 Cal. 619, 55 Pac. 413.

¹⁰ *Drum-Flato Commission Co. v. Barnard*, 66 Kan. 568, 72 Pac. 257; *Lawrence v. Comstock*, 124 Mich. 120, 82 N. W. 808.

¹¹ *Finnigan v. Shaw*, 184 Mass. 112, 68 N. E. 35.

¹² *Fears v. Watson*, 124 Ark. 341, 187 S. W. 178.

¹³ *Gerber v. Probey*, 44 D. C. App. 392.

rent, the lessee can not show that the real agreement was to have the land surveyed and to deduct a certain amount from the rental agreed upon for each acre less than a specified area.¹⁴ Extrinsic evidence is inadmissible to show that a deed was not intended to convey the land therein described,¹⁵ or that it was meant only as a power of attorney,¹⁶ or that written contracts for work were not intended to include work specified therein.¹⁷ An unambiguous contract for the payment of a commission in certain specified cases, can not be modified by prior oral agreements,¹⁸ whether such oral agreement is to pay a commission not provided for by the written contract,¹⁹ or whether such oral agreement provides for not paying a commission under certain circumstances not specified in the written contract.²⁰ An unequivocal contract for an automobile agency can not be modified by extrinsic evidence so as to show that the agent is not liable to the principal for the price of automobiles if by the terms of the written contract he is thus liable.²¹ A written agreement for the dissolution of a partnership can not be modified so as to impose upon the partners who continue in business a liability in excess of that provided for by the written contract.²² A written contract for the purchase of bonds can not be modified by an oral agreement to the effect that the purchaser had agreed to advance money for preliminary expenses for which no provision was made in the contract.²³ A written contract providing for the guarantee of certain liabilities, can not be contradicted by evidence tending to show that the guarantor understood that one of such liabilities was not to be included.²⁴ A provision in a contract for termination upon notice can not be contradicted by extrinsic evidence.²⁵ A deed deposited in escrow under a writ-

¹⁴ *Slump v. Blain*, 177 Ia. 239, 158 N. W. 491.

¹⁵ *Oliver v. Brown*, 102 Ga. 157, 29 S. E. 159; *Jacob Tome Institution v. Davis*, 87 Md. 591, 41 Atl. 166.

¹⁶ *Anderson v. Ins. Co.*, 112 Ga. 532, 37 S. E. 766.

¹⁷ *Daly v. Kingston*, 177 Mass. 312, 58 N. E. 1109; *Norwood v. Lathrop*, 178 Mass. 208, 59 N. E. 650.

¹⁸ *Rail & River Coal Co. v. Paisley*, 233 Fed. 337, 147 C. C. A. 273; *Buxton v. Colver*, 102 Kan. 871, 171 Pac. 1158; *Cohen v. Edinberg*, 225 Mass. 177, 114 N. E. 294.

¹⁹ *Rail & River Coal Co. v. Paisley*, 233 Fed. 337, 147 C. C. A. 273.

²⁰ *Buxton v. Colver*, 102 Kan. 871, 171 Pac. 1158; *Cohen v. Edinberg*, 225 Mass. 177, 114 N. E. 294.

²¹ *Leavitt v. Dimmick*, 86 Or. 278, 168 Pac. 292.

²² *Muir v. Morris*, 80 Or. 378, 157 Pac. 735 [denying rehearing, *Muir v. Morris*, 80 Or. 378, 154 Pac. 117].

²³ *Gunter v. Road Improvement District*, 125 Ark. 402, 189 S. W. 53.

²⁴ *Wear-Well Pants Co. v. West*, 175 N. Car. 565, 96 S. E. 33.

²⁵ *Emerson-Brantingham Co. v. Lyons*, 102 Kan. 733, 172 Pac. 513.

ten contract for delivery on specified conditions can not be shown to be intended as a gift.²⁶ A written agreement by which one agrees to assume a specified obligation, can not be contradicted by showing that the oral agreement between the parties provided that no liability should be imposed upon the party who assumed such obligation.²⁷ An oral contemporaneous agreement that a written release of mutual rights should have no validity can not be enforced.²⁸ A written contract whereby a lessor, whose title is in dispute, agrees to indemnify his lessee against any loss that might be incurred from paying rent, in case his title is adjudged defective, can not be contradicted by a contemporaneous oral contract providing that the rent should not be paid until the title was settled.²⁹ Where a railroad ticket is a complete contract, extrinsic evidence is inadmissible to contradict its terms, as to show that a limited ticket was by oral agreement to operate as an unlimited ticket.³⁰ An unequivocal bill of lading can not be varied by extrinsic evidence,³¹ as by evidence tending to contradict a limitation upon the liability of the carrier contained in the bill of lading,³² such as evidence tending to show that the valuation was inserted for the purpose of limiting the liability, but not for the purpose of determining the rate.³³ Extrinsic evidence is inadmissible to show that a different amount from that specified in a written contract for the payment of money was to be paid.³⁴ Thus under a contract for the sale of milk, evidence is inadmissible to show that there was to be a discount of four cents a can, to be applied on a note for a milk route.³⁵ So a contract to pay royalties at a certain rate can not be contradicted by showing an oral contract for a certain minimum amount to be paid.³⁶ So where a written contract shows that it was "agreed and stipulated" that a

²⁶ *Hilgar v. Miller*, 42 Or. 552, 72 Pac. 319.

²⁷ *Boushall v. Stronach*, 172 N. Car. 273, 90 S. E. 198.

²⁸ *Loth v. Friederick*, 95 Mich. 598, 55 N. W. 369.

²⁹ *Prouty v. Adams*, 141 Cal. 304, 74 Pac. 845.

³⁰ *Walker v. Price*, 62 Kan. 327, 84 Am. St. Rep. 392, 62 Pac. 1001.

³¹ *John Vittuci Co. v. Canadian Pac. Ry. Co.*, 238 Fed. 1005; *Whitnack v. Chicago, B. & Q. R. Co.*, 82 Neb. 464, 19 L. R. A. (N.S.) 1011, 118 N. W. 67.

³² *Atlanta & West Point R. Co. v. Fairburn Marble Co.*, 145 Ga. 708, 89 S. E. 817.

³³ *Strong v. Wells Fargo*, 39 S. D. 389, 164 N. W. 967.

³⁴ *McLeod v. Hunt*, 128 Mich. 124, 87 N. W. 101; *O'Neal v. McLeod* (Miss.), 28 So. 23.

³⁵ *Kelley v. Thompson*, 175 Mass. 427, 56 N. E. 713.

³⁶ *Standard Fireproofing Co. v. Fireproofing Co.*, 177 Mo. 559, 76 S. W. 1008.

criminal case should be discontinued, evidence is inadmissible to show that it was discontinued by the prosecuting witness, and that the defendant merely acquiesced therein.³⁷ So under a contract between two railroad companies, whereby all the trains belonging to one company are to have a priority of crossings, extrinsic evidence is inadmissible to show that this priority was to apply only to certain classes of trains.³⁸ So a contract to "purchase" land can not be shown to be a contract for a right of way.³⁹ A contract which on its face is to be performed in the alternative, can not be shown to be restricted by oral agreement to the performance of one of the alternatives. Thus where a bill of lading is a contract whereby the carrier agrees to deliver to a connecting railroad, or to a steamer, extrinsic evidence is inadmissible to show that the contract was to deliver to the connecting railroad, and not to the steamer.⁴⁰ So under a contract to ship property to New York, not specifying by which route, extrinsic evidence is inadmissible to show that the parties had agreed upon one specific route.⁴¹ However, where the bill of lading did not show the route, it was held proper to show an oral agreement specifying to what connecting carrier the initial carrier was to deliver the goods.⁴² The terms of a policy of insurance can not be contradicted by extrinsic evidence,⁴³ such as evidence contradicting the terms of the policy as to the risk which has been assumed.⁴⁴ Where a contract for a policy provides it shall not go into effect until the application is accepted, and the policy is issued and delivered, extrinsic evidence is inadmissible to show that the policy is to go into effect at once.⁴⁵ Extrinsic evidence is inadmissible to show that a policy which on its face covers only the husband's interest, was intended to cover the wife's interest too. Accordingly, a clause providing that the policy shall become inoperative if the insured conveys his interest, operates where the husband conveys to the wife, an oral provision

³⁷ *Russell v. Morgan*, 24 R. I. 134, 52 Atl. 809.

³⁸ *Appeal of Cornwall, etc.*, R. R., 125 Pa. St. 232, 11 Am. St. Rep. 889, 17 Atl. 427.

³⁹ *Camden, etc., Ry. v. Adams*, 62 N. J. Eq. 656, 51 Atl. 24.

⁴⁰ *McElveen v. Ry.*, 109 Ga. 249, 77 Am. St. Rep. 371, 34 S. E. 281.

⁴¹ *Webster v. Paul*, 10 O. S. 531.

⁴² *Louisville, etc., Ry. v. Duncan*, 137 Ala. 446, 34 So. 988.

⁴³ *Kelsey v. Continental Casualty Co.*, 131 Ia. 207, 8 L. R. A. (N.S.) 1014, 108 N. W. 221; *Northwestern Fuel Co. v. Boston Insurance Co.*, 131 Minn. 19, 154 N. W. 515.

⁴⁴ *Kelsey v. Continental Casualty Co.*, 131 Ia. 207, 8 L. R. A. (N.S.) 1014, 108 N. W. 221; *Northwestern Fuel Co. v. Boston Insurance Co.*, 131 Minn. 19, 154 N. W. 515.

⁴⁵ *Chamberlain v. Ins. Co.*, 109 Wis. 4, 83 Am. St. Rep. 851, 85 N. W. 128.

to the contrary notwithstanding.⁴⁶ So where a clause provides that the policy shall become inoperative if the building is enlarged without the consent of the insurance company, extrinsic evidence is inadmissible to show that the enlargement was agreed upon before the policy issued, where the building is described as it existed when the policy issued.⁴⁷ So where a policy is made payable directly to a granddaughter, extrinsic evidence is inadmissible to show that it was issued to the grandfather on his own life, and at his request made payable to the granddaughter.⁴⁸ So extrinsic evidence is inadmissible to show that a policy payable on its face to the insured was really payable to his sister.⁴⁹ So extrinsic evidence is inadmissible to eliminate a warranty,⁵⁰ or a contract of guaranty.⁵¹ A contract which provides for a warranty deed can not be varied by extrinsic evidence tending to show that the parties agreed upon a deed which was subject to certain restrictive covenants and to certain provisions for reversion.⁵² So extrinsic evidence is inadmissible to contradict the effect of a covenant against incumbrances.⁵³ A written contract which provides for the rescission of a bond to make title, can not be contradicted by an oral agreement to the effect that such bond was to remain in full force and effect.⁵⁴ The maker of a note can not show an oral agreement between himself and the payee, that the note should have no validity.⁵⁵ The statement of the payee of a note to the effect that he gave the

⁴⁶ *Walton v. Ins. Co.*, 116 N. Y. 317, 5 L. R. A. 677, 22 N. E. 443.

⁴⁷ *Frost's, etc., Works v. Ins. Co.*, 37 Minn. 300, 5 Am. St. Rep. 846, 34 N. W. 35.

⁴⁸ *Burton v. Ins. Co.*, 119 Ind. 207, 12 Am. St. Rep. 405, 21 N. E. 746.

⁴⁹ *Union Central Life Ins. Co. v. Phillips*, 102 Fed. 19, 41 C. C. A. 263 [reversing, 101 Fed. 33].

⁵⁰ *Arguimbau v. Ins. Co.*, 106 La. 139, 30 So. 148.

⁵¹ *Singmaster v. Robinson*, 181 Ia. 522, 164 N. W. 776.

⁵² *Neff v. Rubin*, 161 Wis. 511, 154 N. W. 976.

⁵³ *Smith v. Bank*, 171 Mass. 178, 50 N. E. 545; *First National Bank v. Sappington*, — Okla. —, 157 Pac. 937.

⁵⁴ *Cooper v. Robertson Investment Co.*, 117 Miss. 108, 77 So. 953.

⁵⁵ *United States. Wagner v. Kohn*, 225 Fed. 718, 140 C. C. A. 592.

California. Leonard v. Miner, 120 Cal. 403, 52 Pac. 655.

Kansas. German-American State Bank v. Watson, 90 Kan. 686, 163 Pac. 637.

Massachusetts. Henry Wood's Sons Co. v. Schaefer, 173 Mass. 443, 73 Am. St. Rep. 305, 53 N. E. 881.

Ohio. Lillie v. Bates, 3 Ohio C. C. 94, 2 Ohio C. D. 54.

Oklahoma. Bailey v. Lankford, 54 Okla. 692, 154 Pac. 672.

Wisconsin. In re Winzenreid's Estate, 165 Wis. 63, 160 N. W. 1064.

This rule, of course, assumes that the note is in other respects valid. If there is in fact no consideration for the note, this may, of course, be shown. See §§ 537 and 651.

amount thereof to the maker, can not operate to relieve the maker from liability.⁵⁶ The maker of a note which is given as collateral security can not show an oral agreement to the effect that such note should be paid by another.⁵⁷ The maker of a note can not show a contemporaneous oral agreement to the effect that he should be liable for only a specified portion of the face of such note.⁵⁸ Under a contract for the transfer of property, which provides for the delivery of a mortgage as a part of the consideration, extrinsic evidence is inadmissible to show that no personal liability was to be imposed upon the mortgagor.⁵⁹ Extrinsic evidence is inadmissible to show that a note and mortgage were given to the bank in order that the bank might use them as apparent collateral security,⁶⁰ or might show them to the bank examiner as apparent assets.⁶¹ A written stock subscription by which each subscriber agrees to pay a certain amount, can not be contradicted by extrinsic evidence to the effect that no assessment would be levied for such stock and that the subscribers would not be required to pay more than the initial payment.⁶² Where a payee in assigning a note signs it on the face under the name of the maker, he can not use extrinsic evidence to show that he was merely an indorser.⁶³ So a surety may not show an agreement with the payee whereby he was not to be held liable on the note.⁶⁴ So a note, negotiable in form, can not be shown to be intended to be non-negotiable.⁶⁵ So the maker of a check in payment of a subscription to a soldiers' monument, can not show an agreement with the payee that the check should be surrendered and the maker's bond payable at a later time was to be taken in place thereof;⁶⁶ and where a written

⁵⁶ *In re Winzenreid's Estate*, 165 Wis. 63, 160 N. W. 1064.

⁵⁷ *Wagner v. Kohn*, 225 Fed. 718, 140 C. C. A. 592.

⁵⁸ *Bailey v. Lankford*, 54 Okla. 692, 154 Pac. 672.

⁵⁹ *Rhodes v. Owens*, 101 Wash. 324, 172 Pac. 241.

⁶⁰ *Dominion National Bank v. Manning*, 60 Kan. 720, 57 Pac. 949 [questioning and distinguishing, *Higgins v. Ridgway*, 153 N. Y. 130, 47 N. E. 32; *Breneman v. Furniss*, 90 Pa. St. 186, 35 Am. Rep. 651].

⁶¹ *Mills County National Bank v. Perry*, 72 Ia. 15, 2 Am. St. Rep. 228, 33 N. W. 341.

⁶² *Bergman v. Evans*, 92 Wash. 158, 158 Pac. 961.

⁶³ *Cook v. Brown*, 62 Mich. 473, 4 Am. St. Rep. 870, 20 N. W. 46. [No mistake in execution being shown.]

⁶⁴ *Kulenkamp v. Groff*, 71 Mich. 675, 15 Am. St. Rep. 283, 1 L. R. A. 594, 40 N. W. 57; *German-American State Bank v. Watson*, 99 Kan. 686, 163 Pac. 637.

⁶⁵ *Mallory v. Fitzgerald's Estate*, 69 Neb. 312, 95 N. W. 601.

⁶⁶ *La Fayette County Monument Corporation v. Magoon*, 73 Wis. 627, 3 L. R. A. 761, 42 N. W. 17.

subscription is given, extrinsic evidence is inadmissible to show that it was given solely to secure the necessary certificate of the state engineer, and that the town was to raise funds to pay the amount of the subscription.⁶⁷

If a son receives property from his father, and gives his father his note in return therefor, extrinsic evidence is inadmissible to show that the property was given as an advancement, and that the note was intended merely as a receipt therefor.⁶⁸ In some jurisdictions, however, it has been held that extrinsic evidence is admissible to show that a note given under such circumstances is intended as evidence of an advancement, and that it was not intended to create a primary and unconditional liability.⁶⁹ The maker of such note has been permitted to show by extrinsic evidence that the transfer of such property was intended as an advancement and that the note was not to be paid unless it was necessary to pay the grantor's debts.⁷⁰ This can be reconciled with the general rule only on the theory that under the facts of the transaction there was no consideration for the note.⁷¹ So extrinsic evidence that an obligor signed a bond under an agreement with the obligee that he should not be liable thereon, is inadmissible.⁷² So a written receipt for wheat, with the promise to pay therefor, can not be contradicted by showing that the person receiving the wheat did so merely as a bailee.⁷³ So a written contract for the sale of a machine can not be contradicted by showing that it was merely a rental on commission.⁷⁴ A written contract for the payment of money can not be contradicted by showing that it was to be performed in some other manner,⁷⁵ as by showing that it was

⁶⁷ *Grand Isle v. Kinney*, 70 Vt. 381, 41 Atl. 130.

⁶⁸ *Russell v. Smith*, 115 Ia. 261, 88 N. W. 361.

⁶⁹ *Norman v. Norman*, 11 Ind. 288; *Brook v. Latimer*, 44 Kan. 431, 21 Am. St. Rep. 292, 11 L. R. A. 805, 24 Pac. 946; *Kernodle v. Williams*, 153 N. Car. 475, 34 L. R. A. (N.S.) 934, 69 S. E. 431; *Kernodle v. Kernodle*, 174 N. Car. 441, 93 S. E. 956.

⁷⁰ *Kernodle v. Williams*, 153 N. Car. 475, 34 L. R. A. (N.S.) 934, 69 S. E. 431; *Kernodle v. Kernodle*, 174 N. Car. 441, 93 S. E. 956.

⁷¹ *Marsh v. Chown*, 104 Ia. 556, 73 N. W. 1046; *Brook v. Latimer*, 44 Kan. 431, 21 Am. St. Rep. 292, 11 L. R. A. 805, 24 Pac. 946.

⁷² *Wallace v. Langston*, 52 S. Car. 133, 29 S. E. 552.

⁷³ *Horn v. Hansen*, 56 Minn. 43, 22 L. R. A. 617, 57 N. W. 315.

⁷⁴ *Price v. Marthen*, 122 Mich. 655, 81 N. W. 551.

⁷⁵ *Harmon v. Harmon*, 131 Ark. 501, 199 S. W. 553; *Lesem v. Harris*, 102 Kan. 222, 169 Pac. 959.

to be paid in work,⁷⁶ or in property,⁷⁷ as in building material,⁷⁸ or in corporate stock,⁷⁹ or in lots and in corporate stock,⁸⁰ or in accounts against third person,⁸¹ or in merchandise.⁸² So in an action on a lease to recover rent, evidence is inadmissible to show that part of the rent was to be paid to the lessor by the lessee's furnishing him with table-board.⁸³ So in an action on a note evidence is inadmissible to show that such note was to be paid by the maker's collecting certain claims for the payee at a certain commission, which commission would amount to the face of the note.⁸⁴ Such a contract may, however, be the basis of a counterclaim if broken. So a contract that a note is to be paid in part by having damages due the maker arising out of another transaction credited on the note, is unenforceable.⁸⁵ A covenant which provides for giving a mortgage for value upon an exchange of property, can not be modified by showing a contemporaneous oral contract to the effect that the mortgage thus given should not be paid until the mortgagee had paid a mortgage upon the land which was conveyed to him in such transaction.⁸⁶ An unequivocal provision of a note which identifies the payee, can not be contradicted,⁸⁷ as by showing that a beneficiary was intended other than the beneficiary who is named in a note payable to trustee,⁸⁸ or by showing that one of two joint payees was the real owner of the amount which was paid to the maker by both of such payees.⁸⁹ If a note is payable in money, an oral contract that it is payable in certain bank notes not legal tender is unenforceable,⁹⁰ though a contract to redeem in gold the

⁷⁶ *Stein v. Fogarty*, 4 Ida. 702, 43 Pac. 681; *Merrigan v. Hall*, 175 Mass. 508, 56 N. E. 605; *Vradenburg v. Johnston* (Neb.), 91 N. W. 496.

⁷⁷ *Harmon v. Harmon*, 131 Ark. 501, 199 S. W. 553; *Clement v. Houck*, 113 Ia. 504, 85 N. W. 765.

⁷⁸ *Kimball v. Bryan*, 56 Ia. 632, 10 N. W. 218.

⁷⁹ *Perry v. Bigelow*, 128 Mass. 129.

⁸⁰ *Mosher v. Rogers*, 117 Ill. 446, 5 N. E. 583.

⁸¹ *Bender v. Montgomery*, 68 Tenn. (8 Lea) 586.

⁸² *Harmon v. Harmon*, 131 Ark. 501, 199 S. W. 553.

⁸³ *Stull v. Thompson*, 154 Pa. St. 43, 25 Atl. 890.

⁸⁴ *Singer Mfg. Co. v. Potter*, 59 Minn. 240, 61 N. W. 23. But see *Johnston v. McCart*, 24 Wash. 19, 63 Pac. 1121, where such a contract was enforced.

⁸⁵ *Phelps v. Abbott*, 114 Mich. 88, 72 N. W. 3.

⁸⁶ *Rhodes v. Owens*, 101 Wash. 324, 172 Pac. 241.

⁸⁷ *Kincade v. Peck*, 193 Mich. 207, 159 N. W. 480; *Roberts v. Morgan*, 56 Okla. 513, 156 Pac. 319.

⁸⁸ *Roberts v. Morgan*, 56 Okla. 513, 156 Pac. 319.

⁸⁹ *Kincade v. Peck*, 193 Mich. 207, 159 N. W. 480.

⁹⁰ *Baugh v. Ramsey*, 20 Ky. (4 T. B. Mon.) 155; *Racine County Bank v. Keep*, 13 Wis. 209.

bank bills for which the note was given is enforceable.⁹¹ An exception to this rule was recognized in contracts made during the Civil War in Southern states, in which the weight of authority recognizes the right of the parties to the contract to show that they intended payment in money of the United States,⁹² or in money of the Confederate states.⁹³ Whether this is an illustration of evidence showing the intention of the parties direct, or whether it is merely an illustration of the admissibility of evidence showing the surrounding facts and circumstances, to enable the court to place itself in the position of the parties to the contract, and thus to determine what medium of payment they contemplated is a question not always easy to determine from an examination of the opinions of the courts. So a written contract to pay money, which by its terms imports a general personal liability, can not be shown to be a contract to pay out of a particular fund,⁹⁴ as out of the profits of the transaction in connection with which the written promise was made,⁹⁵ or out of dividends on the stock for which the note was given.⁹⁶ So if a note is payable to the firm of A and B, it can not be shown that A was intended as the real payee.⁹⁷ If a building contract gives exact dimensions, such provisions can not be contradicted by evidence that the property owner had no definite idea as to the size of such building.⁹⁸ An instrument which purports to be a new contract can not be contradicted by showing that it was an assignment intended as performance of the original contract.⁹⁹

§ 2146. Evidence of intention direct inadmissible. Extrinsic evidence is inadmissible in an action on an unambiguous written contract, to show the understanding of the meaning and effect of

⁹¹ *Racine County Bank v. Keep*, 13 Wis. 209.

⁹² *Bryan v. Harrison*, 76 N. Car. 360; *Stearns v. Mason*, 65 Va. (24 Gratt.) 484.

⁹³ *Confederate Note Case*, 86 U. S. (19 Wall.) 548, 22 L. ed. 196; *Carmichael v. White*, 58 Tenn. (11 Heisk) 262; *Donley v. Tindall*, 32 Tex. 43, 5 Am. Rep. 234.

⁹⁴ *California*. *Conner v. Clark*, 12 Cal. 168, 73 Am. Dec. 529.

Illinois. *Murchie v. Peck*, 160 Ill. 175, 43 N. E. 356.

Massachusetts. *Currier v. Hale*, 90 Mass. (8 All.) 47.

Minnesota. *Harrison v. Morrison*, 39 Minn. 319, 40 N. W. 66.

Oregon. *Wilson v. Wilson*, 26 Or. 251, 38 Pac. 185.

Tennessee. *Ellis v. Hamilton*, 36 Tenn. (4 Sneed) 512.

⁹⁵ *Lake Side Land Co. v. Dromgoole*, 89 Ala. 505.

⁹⁶ *Fuller v. Law*, 207 Pa. St. 101, 56 Atl. 333.

⁹⁷ *McMicken v. Webb*, 47 U. S. (6 How.) 292, 12 L. ed. 443.

⁹⁸ *Ferber v. Cona*, 91 N. J. L. 474, 103 Atl. 471.

⁹⁹ *Brown v. Barth*. Colo. —, 184 Pac. 300.

such contract entertained by one or both the parties thereto when the contract was entered into. If the intention of one party alone is shown, and the evidence does not show that the other parties acquiesced therein, no contract of any sort is shown to exist.¹ The meaning of a written contract is to be ascertained from the language which is employed, and not from the actual intention of the person who drew such contract.² Evidence offered by one party as to his actual intention in executing the contract, should not be considered.³ The declarations of a grantor as to his intention can not be considered in construing a deed.⁴ Extrinsic evidence to the effect that the insured intended that a policy which covered his interest in certain property should cover the profits, and which does not show that the insurer intended that such policy should cover the profits, does not show the existence of a contract, and it is inadmissible for that reason, as well for the reason that it is in violation of the parol evidence rule.⁵

If extrinsic evidence is introduced to show the common understanding and intention of both the parties to the contract, such evidence violates the parol evidence rule.⁶ Thus where the con-

¹ **California.** *Hershey v. Los Angeles Pacific Co.*, 171 Cal. 353, 153 Pac. 230.
Georgia. *Terrell v. Huff*, 108 Ga. 655, 34 S. E. 345.

Indiana. *Brown v. Langner*, 25 Ind. App. 538, 58 N. E. 743.

Maine. *McLeod v. Johnson*, 96 Me. 271, 52 Atl. 760.

Minnesota. *Bell Lumber Co. v. Seaman*, 136 Minn. 106, 161 N. W. 383; *Allen v. Torbert*, 140 Minn. 195, 167 N. W. 1033.

Mississippi. *Gulledge v. Woolen Mills*, 75 Miss. 297, 22 So. 952.

Missouri. *McMahill v. Schowengerdt* (Mo.), 183 S. W. 605.

Montana. *Armington v. Stelle*, 27 Mont. 13, 94 Am. St. Rep. 811, 69 Pac. 115.

North Carolina. *American Potato Co. v. Jenette Bros. Co.*, 172 N. Car. 1, 89 S. E. 791; *Wear-Well Pants Co. v. West*, 175 N. Car. 565, 96 S. E. 33.

Oklahoma. *Liverpool, etc., Co. v. Lumber Co.*, 11 Okla. 579, 585, 69 Pac. 936, 938.

Virginia. *Connecticut Fire Insurance Co. v. W. H. Roberts Lumber Co.*, 119 Va. 479, 89 S. E. 945.

² *Comptograph Co. v. Burroughs Adding Mach. Co.*, 179 Ia. 83, 159 N. W. 465. " * * * a contract is to be understood by the language employed therein, and not according to the views of its meaning intended by the person who drew it." *Comptograph Co. v. Burroughs Adding Mach. Co.*, 179 Ia. 83, 159 N. W. 465 [citing, *Congower v. Association*, 94 Ia. 499, 63 N. W. 192].

See §§ 2020 et seq.

³ *Hershey v. Los Angeles Pacific Co.*, 171 Cal. 353, 153 Pac. 230.

⁴ *McMahill v. Schowengerdt* (Mo.), 183 S. W. 605.

⁵ *Connecticut Fire Insurance Co. v. W. H. Roberts Lumber Co.*, 119 Va. 479, 89 S. E. 945.

⁶ **United States.** *Bijur Motor Lighting Co. v. Eclipse Machine Co.*, 243 Fed. 600.

Alabama. *Davis v. Robert*, 89 Ala. 402, 18 Am. St. Rep. 126, 8 So. 114.

tract is conceded to be valid, extrinsic evidence of representations of an agent, made at the time the contract was entered into, is inadmissible to show the intention of the parties.⁷ If the instrument shows the location of a right of way, evidence of the intention of the parties can not be regarded for the purpose of changing such location.⁸ If it is contended that a written contract binds

California. *Robertson v. Buckler*, — Cal. —, 170 Pac. 424.

Connecticut. *Hartford, etc., Association v. Goldreyer*, 71 Conn. 95, 41 Atl. 659.

Florida. *Georgia Home Ins. Co. v. Hoskins*, 71 Fla. 282, 71 So. 285.

Georgia. *Bass Dry Goods Co. v. Mfg. Co.*, 113 Ga. 1142, 39 S. E. 471.

Illinois. *Commercial, etc., Co. v. Bates*, 176 Ill. 194, 52 N. E. 49; *Roberts v. Dazey*, 284 Ill. 241, 119 N. E. 910.

Indiana. *Cravens v. Cotton Mills*, 120 Ind. 6, 16 Am. St. Rep. 298, 21 N. E. 981; *Buckeye Mfg. Co. v. Machine Works*, 26 Ind. App. 7, 58 N. E. 1069.

Iowa. *Pratt v. Prouty*, 104 Ia. 419, 65 Am. St. Rep. 472, 73 N. W. 1035; *Clement v. Drybread*, 108 Ia. 701, 78 N. W. 235.

Maryland. *Neal v. Hopkins*, 87 Md. 19, 39 Atl. 322.

Massachusetts. *Morton v. Clark*, 181 Mass. 134, 63 N. E. 409.

Michigan. *Sheley v. Brooks*, 114 Mich. 11, 72 N. W. 37; *Crane v. Bayley*, 126 Mich. 323, 85 N. W. 874; *Haynes v. Hobbs*, 136 Mich. 117, 98 N. W. 978; *John D. Gruber Co. v. Smith*, 195 Mich. 336, 162 N. W. 124.

Mississippi. *Chicago, etc., Co. v. Higginbotham (Miss.)*, 29 So. 79.

Nebraska. *Latenser v. Misner*, 56 Neb. 340, 76 N. W. 897; *Garneau v. Cohn*, 61 Neb. 500, 85 N. W. 531; *Faulkner v. Gilbert*, 61 Neb. 602, 85 N. W. 843.

New Hampshire. *Saddlery Hardware Co. v. Hillsborough Mills*, 68 N. H. 216, 73 Am. St. Rep. 569, 44 Atl. 300.

New Mexico. *Price v. Weed*, 9 N. M. 397, 54 Pac. 231.

North Carolina. *McKenzie v. Houston*, 130 N. Car. 566, 41 S. E. 780.

Pennsylvania. *Melcher v. Hill*, 194 Pa. St. 440, 45 Atl. 488; *Dougherty v. Norwood*, 196 Pa. St. 32, 46 Atl. 384.

South Carolina. *Guimarin v. Southern Life & Trust Co.*, 106 S. Car. 37, 90 S. E. 319.

Texas. *Sloan v. King (Tex. Civ. App.)*, 69 S. W. 541.

Virginia. *Providence Washington Ins. Co. v. Board of Education*, 49 W. Va. 360, 38 S. E. 679.

Washington. *Michels v. Rustmeyer*, 20 Wash. 597, 56 Pac. 380; *Gibson v. Rourke Co.*, 22 Wash. 449, 61 Pac. 162.

West Virginia. *Crislip v. Cain*, 10 W. Va. 438.

Wisconsin. *Wussow v. Hase*, 108 Wis. 382, 84 N. W. 433; *Johnson v. Pugh*, 110 Wis. 167, 85 N. W. 641.

⁷ **United States.** *McMaster v. Ins. Co.*, 99 Fed. 856, 40 C. C. A. 119 [affirming, 90 Fed. 40].

Georgia. *Barry v. Smith*, 105 Ga. 34, 31 S. E. 121.

Iowa. *Burgher v. Ry.*, 105 Ia. 335, 75 N. W. 192.

Maryland. *Scott v. Ry.*, 93 Md. 475, 49 Atl. 327.

Ohio. *Union Central Life Ins. Co. v. Hook*, 62 O. S. 256, 56 N. E. 906.

Pennsylvania. *Meyer-Bruns v. Ins. Co.*, 189 Pa. St. 579, 42 Atl. 297.

Wisconsin. *Milwaukee Carnival Association v. King, etc., Co.*, 112 Wis. 647, 88 N. W. 598.

⁸ *Hoffman v. Dorris*, 83 Or. 625, 163 Pac. 972.

the parties to enter into the contract in the future, instead of incurring a present liability, such intention can not be shown by extrinsic evidence if it does not appear from the terms of the written contract.⁹ If machinery is sold under a contract which specifies the character of work which it is to do, in guaranteeing that it will do such work, extrinsic evidence is inadmissible to show what one of the parties,¹⁰ such as the purchaser,¹¹ understood that such guaranty meant. If the contract provides that the machinery shall be satisfactory to the purchaser, extrinsic evidence is inadmissible to show that the seller understood that the machinery would be satisfactory if it performed certain work in a certain specified manner.¹² So a written contract for employment can not be varied by extrinsic evidence of a contract to pay extra compensation for work overtime.¹³ A contract to "log" certain land and to cut and remove merchantable timber, is so clear that evidence of the intention of the parties is inadmissible.¹⁴ So if the time of performance is fixed in the written contract, a contemporaneous oral agreement changing such time, either lengthening it,¹⁵ or shortening it,¹⁶ is inadmissible. So a contemporaneous agreement can not change the place of performance from that fixed by the written contract.¹⁷

§ 2147. Evidence of intention direct inadmissible to vary written contract. Extrinsic evidence of prior or contemporaneous oral agreements between parties is inadmissible to vary the terms of the written contract which they have entered into,¹ and this is true

⁹ *Bijur Motor Lighting Co. v. Eclipse Machine Co.*, 243 Fed. 600.

¹⁰ *Inman Manufacturing Co. v. American Cereal Co.*, 133 Ia. 71, 8 L. R. A. (N.S.) 1140, 110 N. W. 287; *Mineral Ridge Mfg. Co. v. Smith*, 79 W. Va. 736, 91 S. E. 817.

¹¹ *Mineral Ridge Mfg. Co. v. Smith*, 79 W. Va. 736, 91 S. E. 817.

¹² *Inman Manufacturing Co. v. American Cereal Co.*, 133 Ia. 71, 8 L. R. A. (N.S.) 1140, 110 N. W. 287.

¹³ *The Lakme*, 93 Fed. 230.

¹⁴ *Bell Lumber Co. v. Seaman*, 136 Minn. 106, 161 N. W. 383.

¹⁵ *Gordon v. Niemann*, 118 N. Y. 152, 23 N. E. 454.

¹⁶ *Cleckley v. Fidelity Co.*, 117 Ga. 466, 43 S. E. 725.

¹⁷ *Samuel M. Lawder & Sons Co. v. Grocer Co.*, 97 Md. 1, 54 Atl. 634.

¹ *Arkansas*. *Anderson v. Wainwright*, 67 Ark. 62, 53 S. W. 566.

California. *Hawley v. Kaftz*, 148 Cal. 393, 3 L. R. A. (N.S.) 741, 83 Pac. 248.

Georgia. *Bullard v. Brewer*, 118 Ga. 918, 45 S. E. 711.

Kansas. *Rose v. Zinc Co.*, 68 Kan. 468, 74 Pac. 625.

Michigan. *Rough v. Breitung*, 117 Mich. 48, 75 N. W. 147.

Minnesota. *Emkee v. Ahston*, 139 Minn. 443, 166 N. W. 1079.

Mississippi. *Coates v. Bacon*, 77 Miss. 320, 27 So. 621.

Nebraska. *Te Poel v. Shutt*, 57 Neb. 592, 78 N. W. 288; *Norfolk Beet Sugar*

of prior written negotiations.² Thus in a land contract extrinsic evidence changing a corner,³ or a boundary,⁴ of the land contracted for, is inadmissible. If a land contract refers to certain liens as of doubtful validity, extrinsic evidence is inadmissible to show that the existence and validity of such liens were known and that the property was purchased subject thereto.⁵ So under a written lease extrinsic evidence of an oral covenant not to assign is inadmissible.⁶ So under a written contract for subscription to corporate stock of a railroad company, a prior oral contract that a railroad station will be located next to the property of the subscriber, can not be enforced.⁷ So under a written contract to make and sell a machine, an oral representation that such machine could be put on the market at a certain price can not be regarded as a term of the contract.⁸ If a written contract for the dissolution of a partnership states in detail the obligation which each partner is to pay, the actual intention of the parties to such contract can not be shown to contradict such written agreement.⁹ If a contractor has agreed with the property owner to pay all claims for labor performed and materials furnished and to give a bond to pay such claims, the sureties who have entered into such bond can not show by extrinsic evidence that they did not intend to be bound except to the property owner.¹⁰

Co. v. Berger, 1 Neb. (unoff.) 151, 95 N. W. 336.

Oklahoma. *Liverpool, etc., Ins. Co. v. Lumber Co.*, 11 Okla. 579, 585, 69 Pac. 936, 938.

Oregon. *Muir v. Morris*, 80 Or. 378, 157 Pac. 785 [denying rehearing, *Muir v. Morris*, 80 Or. 378, 154 Pac. 117].

Pennsylvania. *Streator v. Paxton*, 201 Pa. St. 135, 50 Atl. 926.

South Carolina. *Roach v. Williams*, — S. Car. —, 95 S. E. 120.

Utah. *Haskins v. Dern*, 19 Utah 89, 56 Pac. 953.

West Virginia. *Maupin v. Ins. Co.*, 53 W. Va. 557, 45 S. E. 1003.

Wisconsin. *United States Gypsum Co. v. Gleason*, 135 Wis. 539, 17 L. R. A. (N.S.) 906, 116 N. W. 238.

² *Rough v. Breitung*, 117 Mich. 48, 75 N. W. 147.

³ *Town of Kane v. Farrelly*, 192 Ill. 521, 61 N. E. 648.

⁴ *Weaver v. Stoner*, 114 Ga. 165, 39 S. E. 874.

⁵ *Emkee v. Ahston*, 139 Minn. 443, 166 N. W. 1079.

⁶ *Rickard v. Dana*, 74 Vt. 74, 52 Atl. 113.

⁷ *Philadelphia, etc., R. R. v. Conway*, 177 Pa. St. 364, 35 Atl. 716.

⁸ *Macklem v. Fales*, 130 Mich. 66, 89 N. W. 581.

⁹ *Muir v. Morris*, 80 Or. 378, 157 Pac. 785 [denying rehearing, *Muir v. Morris*, 80 Or. 378, 154 Pac. 117].

¹⁰ *United States Gypsum Co. v. Gleason*, 135 Wis. 539, 17 L. R. A. (N.S.) 906, 116 N. W. 238.

§ 2148. Legal effect of contract can not be contradicted. The rule that prior or contemporaneous negotiations can not be used to contradict, add to, or otherwise vary, a written contract applies not merely to the letter of the written contract, but also to its legal effect.¹ Thus where no time is fixed for performance, and the implication therefrom would be that a reasonable time was allowed, evidence that a specific time had been agreed upon is inadmissible.²

While evidence of the intention of the parties can not be considered for the purpose of fixing a definite time for the performance of the contract which did not specify the time in which it was to be performed, the surrounding circumstances may be considered for the purpose of determining what a reasonable time is.³

¹ **California.** *Fisk v. Casey*, 119 Cal. 643, 51 Pac. 1077.

Georgia. *Bond v. Perrin*, 145 Ga. 200, 88 S. E. 954.

Idaho. *Jensen v. McConnell*, 31 Ida. 87, 169 Pac. 292.

Iowa. *State Security Bank v. Hoskins*, 130 Ia. 339, 8 L. R. A. (N.S.) 376, 106 N. W. 764.

Kentucky. *Johnson v. Tackitt*, 173 Ky. 406, 191 S. W. 117.

Maine. *Bassett v. Breen*, — Me. —, 107 Atl. 832.

Massachusetts. *Taylor v. Kennedy*, 228 Mass. 390, 117 N. E. 901; *Graves v. Apt*, — Mass. —, 124 N. E. 432.

Michigan. *In re Johnson's Estate*, 177 Mich. 500, L. R. A. 1916E, 217, 143 N. W. 627; *Kincade v. Peck*, 193 Mich. 207, 169 N. W. 480.

Oklahoma. *Cameron Coal & M. Co. v. Universal Metal Co.*, 26 Okla. 615, 110 Pac. 720 [sub nomine, *Cameron Coal & M. Co. v. Block*, 31 L. R. A. (N.S.) 618].

Rhode Island. *Boston Floor Machine Co. v. Loeff*, — R. I. —, 103 Atl. 626.

Washington. *Smith Sand & Gravel Co. v. Corbin*, 89 Wash. 43, 154 Pac. 150; *United Iron Works v. Wagner*, 89 Wash. 293, 154 Pac. 460.

West Virginia. *Light v. Grant*, 73 W. Va. 56, 51 L. R. A. (N.S.) 792, 79 S. E. 1011.

Wyoming. *Stickney v. Hughes*, 12 Wyom. 397, 75 Pac. 945.

² **Georgia.** *Central R. R. v. Hasselkus*, 91 Ga. 382, 44 Am. St. Rep. 37, 17 S. E. 838.

Illinois. *Loeb v. Stern*, 198 Ill. 371, 64 N. E. 1043.

Indiana. *Barney v. Ry.*, 157 Ind. 228, 61 N. E. 194.

Massachusetts. *Tripp v. Smith*, 180 Mass. 122, 61 N. E. 804.

Michigan. *Stange v. Wilson*, 17 Mich. 342; *Harrow Spring Co. v. Harrow Co.*, 90 Mich. 147, 30 Am. St. Rep. 421, 51 N. W. 197; *Sloman v. Express Co.*, 134 Mich. 16, 95 N. W. 999.

Minnesota. *Liljengren, etc., Co. v. Mead*, 42 Minn. 420, 44 N. W. 306.

Oklahoma. *Cameron Coal & M. Co. v. Universal Metal Co.*, 26 Okla. 615, 110 Pac. 720 [sub nomine, *Cameron Coal & M. Co. v. Block*, 31 L. R. A. (N.S.) 618].

Rhode Island. *Boston Floor Machine Co. v. Loeff*, — R. I. —, 103 Atl. 626.

Washington. *Smith Sand & Gravel Co. v. Corbin*, 89 Wash. 43, 154 Pac. 150; *United Iron Works v. Wagner*, 89 Wash. 293, 154 Pac. 460.

Wisconsin. *Irish v. Dean*, 39 Wis. 562.

³ *Berry v. Marion County Lumber Co.*, 108 S. Car. 108, 93 S. E. 328.

Among other circumstances evidence of conversations between the parties to the contract may be considered to show what they considered to be a reasonable time.⁴ Evidence of a statement by the party who agreed to perform as to the time within which such performance would take place, may be considered for the purpose of determining the understanding of the parties as to what amounted to a reasonable time.⁵ The rule that wherever a reasonable time is inferred from the written contract, extrinsic evidence is inadmissible to show that a definite time was actually fixed, is to be distinguished from the rule that if the written contract shows on its face that there had been a definite agreement as to time and that such agreement had been omitted, or if it shows on its face that it is but an incomplete memorandum, extrinsic evidence is admissible to show the real terms of the contract, including that as to time, as long as such terms are not inconsistent with the written memorandum.⁶ The two rules have apparently been confused, however, and without discussion as to the legal effect of whether a failure to fix the time of performance amounted to fixing it at a reasonable time, it has been assumed that such contract must be incomplete; and it has been held that if a written contract does not specify how long it is to continue in force, extrinsic evidence is admissible to show the actual agreement of the parties as to such time.⁷ If the contract in legal effect calls for prompt performance, an oral contract delaying performance until some specified time in the future is unenforceable.⁸ Thus where a bill of exchange has been drawn, an oral contract that it should not be presented for payment until another draft had been paid, was unenforceable.⁹ It has been held, however, that an oral contract, made when a check was delivered, that it should not be presented until a certain date in the future, was valid.¹⁰ So under a contract of sale, with delivery in installments at a gross price, the legal effect of which was

⁴ *Cocker v. Mfg. Co.*, 3 Sumn. (U. S.) 530; *Coates v. Sangston*, 5 Md. 121.

⁵ *Harmon v. Michigan United Traction Co.*, — Mich. —, 168 N. W. 521.

The duration of a contract may be shown by oral evidence, if the contract appears on its face to be incomplete in this regard. *Breckenridge v. Hearne Timber Co.*, — Ark. —, 204 S. W. 981.

⁶ See § 2151.

⁷ *Breckenridge v. Hearne Timber Co.*, — Ark. —, 204 S. W. 981; *Kaul v. American Telephone Co.*, 95 Kan. 1, 147 Pac. 1130.

⁸ *Brown v. Wiley*, 61 U. S. (20 How.) 442, 15 L. ed. 965.

⁹ *Brown v. Wiley*, 61 U. S. (20 How.) 442, 15 L. ed. 965.

¹⁰ *Gray v. Anderson*, 99 Ia. 342, 61 Am. St. Rep. 243, 68 N. W. 790.

to make the price payable when the entire quantity was delivered, an oral contract that at the delivery of each installment the price therefor should be paid, was unenforceable.¹¹ So a guaranty for a specified amount to be advanced by the maker, payable on demand after thirty days, can not be modified by showing that the guaranty was to last for thirty days only.¹² If the written contract is so drawn that time is not of its essence, the parties can not show a contemporaneous oral agreement that time should be of the essence.¹³ It has been held, however, that prior negotiations may be considered for the purpose of showing that a higher bid was accepted because of the fact that performance was to be made in a shorter time for the purpose of determining that time was of the essence and that an amount to be paid for delay was liquidated damages.¹⁴ If a contract for the sale of realty contains a provision for a survey in a specified time and for payment for an area in excess of that stipulated in the contract, the purchaser has been permitted to show that the time within which such survey was to be had was of the essence of the contract, at least if the contract is ambiguous upon such point.¹⁵ Under a contract appointing an agent "in the immediate vicinity of" a certain town, extrinsic evidence is inadmissible to show that he was to have the exclusive agency.¹⁶ Where a check was given, payable on the date thereof, the drawer could not show an oral agreement that the check was not to bear interest.¹⁷ So where two persons have signed a contract in such a way that they are jointly liable thereon, an oral agreement that each shall be severally liable for one-half of the liability can not be used to modify the contract.¹⁸ So where A, a member of a firm, made and signed a written entry of part payment on a partnership note barred by the Statute of Limitations, the legal effect of which was to make A liable for the entire amount of the note, A can not show that he signed under an oral contract that he should be liable for only one-half the amount of the note.¹⁹

¹¹ Brandon Mfg. Co. v. Morse, 48 Vt. 322.

¹² West-Winfree Tobacco Co. v. Waller, 66 Ark. 445, 51 S. W. 320.

¹³ Ferguson v. Arthur, 128 Mich. 297, 87 N. W. 259; Tufts v. Morris, 87 Mo. App. 98.

¹⁴ United States v. Bethlehem Steel Co., 205 U. S. 105, 51 L. ed. 731.

¹⁵ Harris v. Harris, 104 S. Car. 33, 88 S. E. 276.

¹⁶ Roberts v. Machine Co., 8 S. D. 579, 59 Am. St. Rep. 777, 67 N. W. 607.

¹⁷ Haynes v. Wesley, 112 Ga. 668, 81 Am. St. Rep. 72, 37 S. E. 990.

¹⁸ Hanson v. Gunderson, 95 Wis. 613, 70 N. W. 827. So of a joint chattel mortgage. Williams Bros. Co. v. Hanmer, 132 Mich. 635, 94 N. W. 176.

¹⁹ Powell v. Fraley, 98 Ga. 370, 25 S. E. 450.

A written contract to deliver two or more articles to one person can not be modified by evidence tending to show that the real intention of the parties was to deliver certain articles, each to certain specified persons.²⁰ So in a contract by one person to support another; where no place of support is fixed, and therefore the party to be supported may fix any reasonable place for receiving support, extrinsic evidence is inadmissible to show that the parties had agreed that such support was to be furnished at a fixed place.²¹ It has, however, been held under a contract of employment that where no specific place of performance is fixed, oral evidence of the intention of the parties direct is admissible to show on what locality they had agreed.²² So where no rate is fixed in a bill of lading, and accordingly a reasonable rate is implied, an oral agreement between the parties fixing the rate can not be enforced.²³ A contract for the sale of property can not be modified by evidence of the intention of the parties that the seller should warrant that the price which he received was the price which he had paid for the property sold.²⁴ A written contract of hire can not be contradicted by showing that the employer could terminate the contract at will.²⁵ A contract of employment as a sales agent can not be modified by showing the actual agreement of the parties that the agent bound himself to sell a certain amount of goods.²⁶ A contract for the sale of a business can not be modified by showing the agreement of the parties that such business could be operated with profit by the purchaser.²⁷ A contract to convey land "for all legitimate railroad purposes," can not be modified by showing an oral agreement not to erect an eating-house or hotel thereon;²⁸ nor can a lease for "business purposes" be modified by a contemporaneous oral agreement not to use the premises as a saloon.²⁹ A contract for the sale of land, which states the area as an estimate, and provides for a survey to ascertain the exact amount, can not be varied

²⁰ *New Orleans Northeastern Ry. Co. v. Lott*, 118 Miss. 57, 79 So. 1.

²¹ *Tuttle v. Burgett*, 53 O. S. 498, 53 Am. St. Rep. 649, 30 L. R. A. 214, 42 N. E. 427; *Flinn v. Boso*, 79 W. Va. 403, 92 S. E. 130. See § 2196.

²² *Cook v. Todd* (Ky.), 72 S. W. 779.

²³ *Louisville, etc., R. R. v. Wilson*, 119 Ind. 352, 4 L. R. A. 244, 21 N. E. 341.

²⁴ *Carpenter v. Sugden*, 231 Mass. 1, 119 N. E. 959.

²⁵ *Drennen v. Satterfield*, 119 Ala. 84, 24 So. 723.

²⁶ *Standard Scale & Supply Co. v. Reiter*, 227 Fed. 414, 142 C. C. A. 110.

²⁷ *Eblan v. Edwards*, 145 Ga. 383, 89 S. E. 327.

²⁸ *Abraham v. Ry.*, 37 Or. 495, 82 Am. St. Rep. 779, 60 Pac. 899.

²⁹ *Harrison v. Howe*, 109 Mich. 476, 67 N. W. 527.

by contemporaneous oral agreement that this estimate was to be taken as correct for purposes of tendering the price of the property.³⁰ So a deed of land in which the description is such as to carry future accretions on the side bounded by a river, can not be modified by a prior oral contract that accretions should not pass to the grantee.³¹ A contract for the purchase of electric power can not be modified by evidence that the purchaser had agreed not to operate a gas engine.³² If a gas engine is in law part of the realty, evidence of the intention of the parties to pass such engine by a bill of sale of the personal property, and not by a deed of realty, can not be shown as by offering in evidence a list of personalty in which such engine was enumerated.³³ If a deed in legal effect gives to the grantee the right to collect rent falling due thereafter, such conveyance can not be modified by evidence to show the intention of the parties that the grantor should receive such rent.³⁴ Under a contract for the sale of goods "f. o. b.," the intention of the parties that the buyer should obtain the cars, can not be considered in jurisdictions in which the plain import of such language is that the seller should obtain the cars.³⁵ If, by the terms of the contract, the quantity of the subject-matter within certain limits depends upon the discretion of one of the parties, evidence that the parties had agreed upon a certain quantity can not be regarded as part of the contract.³⁶ A contract by A to transport all the goods that B may furnish within a certain period of time, can not be varied by showing that the real understanding of the parties was that B should furnish a certain quantity.³⁷ The parol evidence rule prevents evidence to vary warranties which are implied from the written contract as fully as it operates to protect express warranties.³⁸ A written contract of employment can not be added to by showing an oral agreement that the employees should give bond.³⁹ So a written contract to confess

³⁰ *Starin v. Kraft*, 174 Ill. 120, 50 N. E. 1059.

³¹ *Gorton v. Rice*, 153 Mo. 676, 55 S. W. 241.

³² *Phoenix Pad Mfg. Co. v. Roth*, 127 Md. 540, 96 Atl. 762.

³³ *State Security Bank v. Hoskins*, 130 Ia. 339, 8 L. R. A. (N.S.) 376, 106 N. W. 764.

³⁴ *Taylor v. Kennedy*, 228 Mass. 390, 117 N. E. 901.

³⁵ *Vogt v. Schienebeck*, 122 Wis. 491, 106 Am. St. Rep. 989, 67 L. R. A. 756, 100 N. W. 820.

³⁶ *Johnson v. Tackitt*, 173 Ky. 406, 191 S. W. 117.

³⁷ *Johnson v. Tackitt*, 173 Ky. 406, 191 S. W. 117.

³⁸ *Bond v. Perrin*, 145 Ga. 200, 88 S. E. 954.

³⁹ *Kerr v. Sanders*, 122 N. Car. 635, 29 S. E. 943.

judgment and take a stay of execution, which in law required giving a surety on the stay-bond, can not be modified by an oral contract that no surety should be required.⁴⁰ So a contract "to deliver to the order of A \$800 (less 20 per cent. discount) in wall paper at wholesale price," means wholesale price at the time of demand, and an oral provision that the wholesale price fixed by a price card given to the vendee when the contract was made, containing the prices intended, was unenforceable.⁴¹ Under a written lease conveying a dining-room situated in a hotel, the lessee agreed to furnish "board or meals, such as are served to the guests of the hotel, for three persons." This provision in legal effect meant any three suitable persons whom the lessor might designate; and the lessee could not show by oral contemporaneous agreement between himself and the lessor that it meant the housekeeper, the chambermaid and the porter.⁴² Under a written contract in escrow, by the terms of which A's note was to be delivered to B, when B delivered to A a certain track-laying machine then in the custody of X, who was asserting a lien thereon, A's expenses in getting such machine to be credited upon the note, B could not show an oral contract whereby A promised to take certain steps to obtain this machine from X.⁴³ So a contract giving the right to construct a telephone over A's land generally, can not be shown by oral agreement to be limited to a particular part of the land.⁴⁴ A covenant against incumbrances can not be modified by showing that the real agreement of the parties was that the purchaser should assume and pay certain incumbrances.⁴⁵ Under such a covenant extrinsic evidence can not be regarded to show that the purchaser agreed to pay certain taxes,⁴⁶ or street assessments,⁴⁷ or that he had agreed to take such realty subject to an existing lease.⁴⁸ A contract which

⁴⁰ *Mayse v. Briggs*, 40 Tenn. (3 Head.) 36.

⁴¹ *Fawkner v. Wall Paper Co.*, 88 Ia. 169, 45 Am. St. Rep. 230, 55 N. W. 200.

⁴² *Rector v. Bernaschina*, 64 Ark. 650, 44 S. W. 222.

⁴³ *Pacific National Bank v. Bridge Co.*, 23 Wash. 425, 63 Pac. 207. (The legal effect of the written contract was not to bind either party to obtain the machine, but to give B the option to furnish the machine and get the note, or to give up the note.)

⁴⁴ *Southern, etc., Co. v. Harris*, 117 Ga. 1001, 44 S. E. 885.

⁴⁵ *Hardage v. Durrett*, 110 Ark. 63, L. R. A. 1916E, 211, 160 S. W. 883; *In re Johnson's Estate*, 177 Mich. 500, L. R. A. 1916E, 217, 143 N. W. 627; *Mandler v. Starks*, 35 Okla. 809, L. R. A. 1916E, 213, 131 Pac. 912.

⁴⁶ *Hardage v. Durrett*, 110 Ark. 63, L. R. A. 1916E, 211, 160 S. W. 883.

⁴⁷ *In re Johnson's Estate*, 177 Mich. 500, L. R. A. 1916E, 217, 143 N. W. 627.

⁴⁸ *Mandler v. Starks*, 35 Okla. 809, L. R. A. 1916E, 213, 131 Pac. 912.

is one, in legal effect, for the conveyance of certain realty only, can not be modified by showing that other property was to be included.⁴⁶ A bond to secure release of defendant from custody, which, in legal effect, secures the judgment to be rendered in such action, can not be modified by showing that the obligor did not intend to be liable for such judgment.⁴⁷

§ 2149. Prima facie inferences subject to contradiction. Some of the inferences as to the legal effect and operation of a contract, which are drawn from the terms which are in writing, are merely prima facie. Such inferences may be rebutted by the actual agreement of the parties.¹ A contract for the rendition of services for which compensation is usually paid and which is silent as to compensation, means prima facie that reasonable compensation is to be paid,² but this presumption or inference does not prevent the introduction of extrinsic evidence to show that no charge was to be made for such services.³

The conveyance of realty carries with it crops which are growing thereon at the time of the conveyance, unless such crops are reserved to the vendor. Whether this is the absolute legal effect of such a conveyance or whether it is a prima facie inference which may be explained by extrinsic evidence, is a question upon which there is a conflict of authority. In many jurisdictions it is held or assumed that such inference is merely prima facie, and that accordingly extrinsic evidence is admissible to show that there was an oral agreement between the parties, by which such crops were reserved to the vendor.⁴ In other jurisdictions the courts regard such oral evidence as contradicting the plain legal effect of the conveyance, and accordingly they hold that evidence of such oral agreement reserving the growing crops to the vendor is inadmis-

⁴⁶ *Bassett v. Breen*, — Me. —, 107 Atl. 832.

⁴⁷ *Graves v. Apt.*, — Mass. —, 124 N. E. 432.

¹ *Clark v. Townsend*, 96 Kan. 650, 153 Pac. 555 [rehearing denied, *Clark v. Townsend*, 97 Kan. 161, 154 Pac. 1009]; *Cooper v. Kennedy*, 86 Neb. 119, 31 L. R. A. (N.S.) 761, 124 N. W. 1131.

² *Clark v. Townsend*, 96 Kan. 650, 153 Pac. 555 [rehearing denied, *Clark v. Townsend*, 97 Kan. 161, 154 Pac. 1009].

³ *Clark v. Townsend*, 96 Kan. 650, 153

Pac. 555 [rehearing denied, *Clark v. Townsend*, 97 Kan. 161, 154 Pac. 1009].

⁴ *Indiana*. *Harvey v. Million*, 67 Ind. 90 [overruling, *Turner v. Coal*, 23 Ind. 56, 85 Am. Dec. 449].

Nebraska. *Cooper v. Kennedy*, 86 Neb. 119, 31 L. R. A. (N.S.) 761, 124 N. W. 1131.

North Carolina. *Walton v. Jordan*, 65 N. Car. 170.

Ohio. *Baker v. Jordan*, 3 O. S. 438

Pennsylvania. *Backenstoss v. Stahler*, 33 Pa. St. 251, 75 Am. Dec. 592.

sible.⁵ The reasons which the courts give for reaching each of these different results do not always turn on the question of the conclusive effect of such transaction as opposed to a *prima facie* inference only. The question is furthermore complicated with the question of the validity of an oral sale of growing crops under the Statute of Frauds.⁶ It is sometimes assumed that if such property is to be regarded as personalty, so that the clause of the Statute of Frauds, which deals with contracts for the sale of lands or an interest therein, does not apply, the oral reservation must be valid, since an oral sale would be valid; overlooking the fact that if the vendor retains the land and sells the crops there is no written transaction to be contradicted, while if he sells the land and reserves the crops, oral evidence of the reservation of the crops tends to contradict the legal effect of the written transaction for the sale of the land.

"A deed purports to convey the realty. But what is the realty? Growing corn may be part of it, for some purposes, but it is generally to be considered as personalty. If the parties to a deed, either by words or their behavior, signify their understanding, that as between them it is personalty, the law will so regard it, and will respect their intention in the construction of the deed. When the evidence of such understanding is produced, it is not to contradict the deed, for with that it is perfectly consistent; but it is to show that what in some instances would go with the lands as part of the realty, was, in that case, converted into personalty by the will of the parties, and thus to hold the deed to its true meaning and effect." *Baker v. Jordan*, 3 O. S. 438.

⁵*Gibbons v. Dillingham*, 10 Ark. 9, 50 Am. Dec. 233; *Smith v. Price*, 30 Ill. 28, 39 Am. Dec. 284; *Adams v. Watkins*, 103 Mich. 431, 61 N. W. 774; *Kammrath v. Kidd*, 89 Minn. 380, 99 Am. St. Rep. 603, 95 N. W. 213.

"Error is assigned upon the order of the court in refusing to admit oral testimony to the effect that, in addition to the money consideration expressed in the deed, appellant was to

retain his interest in the growing crops. The testimony was refused upon the ground that it tended to change the terms of the contract as expressed in the deed. In this ruling we think the court was correct. In this state the law is settled that growing crops, such as wheat and oats, are attached to and become a part of the real estate, and are transferred by a conveyance of the land, unless expressly reserved. *Erickson v. Paterson*, 47 Minn. 525, 50 N. W. 699; *Cummings v. Newell*, 86 Minn. 130, 90 N. W. 311. The record is silent as to the nature of the preliminary contract, whatever it was, and we must assume that it was merged into the deed, which, according to its terms, carried the crops. The parol testimony offered was not admissible upon the ground that an agreement to retain the crops by the grantor was part of the consideration of the conveyance. The true consideration may generally be shown, but, when evidence offered for such purpose will have the effect to restrict the legal operation of the covenants, it is incompetent. *Rooney v. Koenig*, 80 Minn. 483, 83 N. W. 399." *Kammrath v. Kidd*, 89 Minn. 380, 99 Am. St. Rep. 603, 95 N. W. 213.

⁶See § 1277.

II

CASES OUTSIDE THE TERMS OF THE RULE

§ 2150. Limitations of the rule. From the statement of the parol evidence rule, it evidently can apply only under a combination of certain facts. The rule applies: (1) where there is a complete written contract; (2) in an action between the parties to the contract or their representatives; (3) in an action in which the meaning of the contract is involved directly; (4) where the validity of the contract itself is not in issue; and (5) where an attempt is made to show prior or contemporaneous oral terms of such contract. If any one of these facts is lacking, the parol evidence rule has no application. Accordingly, it is necessary to consider a group of cases where the rule may seem applicable at first glance, but which are on analysis seen to be completely without the very terms of the rule itself.

§ 2151. Incomplete contracts. The parol evidence rule has but a limited application to contracts and memoranda which show upon their face that they are incomplete and which are not required by law to be in writing or to be proved by writing. In contracts of this class, extrinsic evidence is admissible to show the terms of the contract which are not set forth in writing, as far as they are consistent with terms which are in writing.¹ As far as a contract is incomplete on its face, it is not within the meaning of

¹ **United States.** Missouri District Telegraph Co. v. Morris, 243 Fed. 481.

Arkansas. Schneider v. Fairmon, 128 Ark. 425, 194 S. W. 251; Breckenridge v. Hearne Lumber Co., — Ark. —, 204 S. W. 981.

Florida. Chamberlain v. Lesley, 39 Fla. 452, 22 So. 736.

Georgia. Forsyth Mfg. Co. v. Castlen, 112 Ga. 199, 81 Am. St. Rep. 28, 37 S. E. 485; Bond v. Perrin, 145 Ga. 200, 88 S. E. 954.

Indiana. Louisville, etc., Ry. v. Reynolds, 118 Ind. 170, 20 N. E. 711.

Iowa. Dietrich v. Stebbins, 100 Ia. 426, 69 N. W. 564.

Kansas. Clark v. Townsend, 96 Kan. 650, 153 Pac. 555 [rehearing denied,

Clark v. Townsend, 97 Kan. 161, 154 Pac. 1009].

Kentucky. Peneix v. Rodgers (Ky.), 49 S. W. 447.

Maine. Gould v. Excelsior Co., 91 Me. 214, 64 Am. St. Rep. 221, 39 Atl. 554; American Mercantile Exchange v. Blunt, 102 Me. 128, 120 Am. St. Rep. 463, 10 L. R. A. (N.S.) 414, 66 Atl. 212.

Maryland. Courtney v. Mfg. Co., 97 Md. 499, 55 Atl. 614.

Massachusetts. Leavitt v. The Fibroid Co., 196 Mass. 440, 15 L. R. A. (N.S.) 855, 82 N. E. 682.

Michigan. Stahelin v. Sowle, 87 Mich. 124, 49 N. W. 529; Hayes v. Wabash R. Co., 163 Mich. 174, 31 L. R. A. (N.S.) 229, 128 N. W. 217.

the parol evidence rule.² On the other hand, if the law required the contract to be in writing or if it requires it to be proved by writing, a contract or memorandum which is incomplete upon its face can not be supplemented by extrinsic evidence unless this extrinsic evidence itself is in writing and complies with the rule of law which requires such written contract or such written evi-

Minnesota. *Beyerstedt v. Mill Co.*, 49 Minn. 1, 51 N. W. 619; *Nelson v. McElroy*, 140 Minn. 429, 168 N. W. 179.

Missouri. *State v. Cunningham*, 154 Mo. 161, 55 S. W. 282.

Montana. *Brockway v. Blair*, 53 Mont. 531, 165 Pac. 455.

Nebraska. *Bell v. Wiltson* (Neb.), 98 N. W. 1049.

New Mexico. *Strickland v. Johnson*, 21 N. M. 599, 157 Pac. 142.

New York. *Jamestown Business Association v. Allen*, 172 N. Y. 291, 92 Am. St. Rep. 740, 64 N. E. 952.

North Carolina. *Sumner v. Graham County Lumber Co.*, 175 N. Car. 654, 96 S. E. 97.

North Dakota. *Northern Trust Co. v. Bruegger*, 35 N. D. 150, 159 N. W. 359; *Gilbert Manufacturing Co. v. Bryan*, — N. D. —, 166 N. W. 805.

Oklahoma. *Smith v. Bond*, 56 Okla. 112, 155 Pac. 1116; *O. K. Transfer & Storage Co. v. Neill*, — Okla. —, L. R. A. 1917A, 58, 159 Pac. 272; *Rawlings v. Ufer*, — Okla. —, 161 Pac. 183.

South Carolina. *Virginia-Carolina Chemical Co. v. Moore*, 61 S. Car. 166, 39 S. E. 346.

Tennessee. *Waterbury v. Russell*, 67 Tenn. (8 Baxt.) 159.

Texas. *Magnolia Warehouse & Storage Co. v. Davis*, 108 Tex. 422, 195 S. W. 184; *Howell v. Denton* (Tex. Civ. App.), 68 S. W. 1002.

Utah. *Steed v. Harvey*, 18 Utah 367, 72 Am. St. Rep. 789, 54 Pac. 1011.

Virginia. *Lawson v. Hobbs*, 120 Va. 690, 91 S. E. 750.

Washington. *Knowles v. Rogers*, 27 Wash. 211, 67 Pac. 572.

Wisconsin. *Naumann v. Ullman*, 102 Wis. 92, 78 N. W. 159; *Seeger v. Boiler*

Co., 120 Wis. 11, 97 N. W. 485; *Smith v. Pfluger*, 126 Wis. 253, 2 L. R. A. (N.S.) 783, 105 N. W. 476.

"If the written instrument itself shows it to be either ambiguous or incomplete, parol evidence is admissible to show what the real contract was to the extent necessary to remove the ambiguity and to make the contract complete in its terms which show it to be incomplete." *Magnolia Warehouse & Storage Co. v. Davis*, 108 Tex. 422, 195 S. W. 184.

If the memorandum is not complete and is not signed by the buyer, extrinsic evidence is said to be admissible to show that the buyer reserved the power to cancel the order, although the memorandum which was prepared by the seller's agent provides that it is not subject to cancelation. *Becker v. Calmenson*, 102 Minn. 406, 113 N. W. 1014.

An oral contract to furnish cars is not merged in a subsequent written contract for limiting liability in case of transportation. *Clark v. Ulster Ry.*, 189 N. Y. 93, 121 Am. St. Rep. 848, 13 L. R. A. (N.S.) 164, 12 Am. & Eng. Ann. Cas. 883, 81 N. E. 766.

² **United States.** *Dittmar v. Frederick Starr Contracting Co.*, 249 Fed. 437.

Georgia. *Bond v. Perrin*, 145 Ga. 200, 88 S. E. 954.

Maine. *American Mercantile Exchange v. Blunt*, 102 Me. 128, 120 Am. St. Rep. 463, 10 L. R. A. (N.S.) 414, 66 Atl. 212.

Massachusetts. *Glackin v. Bennett*, 226 Mass. 316, 115 N. E. 490.

Michigan. *Stretch v. Stretch*, 191 Mich. 416, 158 N. W. 185.

New Mexico. *Strickland v. Johnson*, 21 N. M. 599, 157 Pac. 142.

dence. In cases of this sort, the extrinsic evidence is not excluded by the parol evidence rule. On the contrary, this rule permits such evidence to be considered in order to show the actual terms of the contract. Such evidence is, however, inadmissible by reason of other rules of law which in this case exclude evidence which the parol evidence rule itself would admit.³

As far as the parol evidence rule itself is concerned, extrinsic evidence of the actual agreement of the parties may be considered, as far as it does not contradict the incomplete written contract or memorandum.⁴

If the ordinary rules of construction, when applied to the contract, show that apparent gaps and omissions can be filled, the contract can not be said to be incomplete.⁵ In determining whether a contract is complete or not the surrounding circumstances may be considered,⁶ as they may be considered for the general purpose of aiding in the construction of a written contract.⁷

A written order for goods which does not purport to set forth the terms of the contract, may be shown to be an order given in pursuance of a prior oral contract by which such goods were consigned to the person by whom such order was sent and which were

New York. *Di Menna v. Copper & Evans Co.*, 220 N. Y. 391, 115 N. E. 993.

North Carolina. *Sumner v. Graham County Lumber Co.*, 175 N. Car. 654, 96 S. E. 97.

North Dakota. *Gilbert Manufacturing Co. v. Bryan*, — N. D. —, 166 N. W. 805.

Oklahoma. *Smith v. Bond*, 56 Okla. 112, 155 Pac. 1116; *O. K. Transfer & Storage Co. v. Neill*, — Okla. —, L. R. A. 1917A, 58, 159 Pac. 272; *Rawlings v. Ufer*, — Okla. —, 161 Pac. 183.

South Carolina. *Sloan v. Courtenay*, 54 S. Car. 314, 32 S. E. 431.

South Dakota. *Inner Shoe Tire Co. v. Brown*, 39 S. D. 100, 163 N. W. 572; *Rosholt v. Woulph*, — S. D. —, 167 N. W. 158.

Texas. *Magnolia Warehouse & Storage Co. v. Davis*, 108 Tex. 422, 195 S. W. 184.

Virginia. *Standard Paint Co. v. Viotor*, 120 Va. 595, 91 S. E. 752.

Wisconsin. *Smith v. Pfluger*, 126

Wis. 253, 2 L. R. A. (N.S.) 783, 105 N. W. 476.

³ See §§ 1333 et seq., 2311 and 2312.

⁴ See notes 1 and 2, this section.

⁵ "If the writing shows on its face a definite and complete contract between the parties, parol evidence will not be received to vary, modify, or contradict its terms. The rule does not apply to cases where the instrument shows incompleteness on its face, and parol evidence is allowed to show an agreement referable to the incompleteness, when not inharmonious with the writing. The question in such cases is whether there is a vacuum to be filled. If the alleged omission of an important detail is lacking which can be supplied by legal presumption, the want of express provision leaves no vacuum." *Pryor v. Ludden & Bates Southern Music House*, 134 Ga. 288, 28 L. R. A. (N.S.) 267, 67 S. E. 654. See §§ 2020 et seq.

⁶ *Sund v. Flagg & Standifer Co.*, 86 Or. 289, 168 Pac. 300.

⁷ See § 2060.

not purchased by him.⁸ Under a contract to install machinery the intention of the parties as to the services to be rendered in performance of such contract may be considered.⁹ An incomplete contract in writing, which provides that a certain sum shall be raised, does not prevent the parties from showing that the actual agreement provided for an arrangement by the party who is to receive such amount for payment of such sum by other parties.¹⁰ Under a written charter of a boat, an oral contract to insure it whenever it was taken away from a specified harbor may be shown.¹¹ If a note which a son gives to his father on receiving a conveyance of realty, shows that a part of the amount of such note is to be regarded as his share of his father's estate, extrinsic evidence is admissible to show that the remaining part of the purchase price of such land was regarded as a debt.¹² Where a written contract was made by a widow to take ten thousand dollars, and the amount given her by will, in lieu of the distributive share of her husband's estate, and the contract was not complete on its face, it was permissible to show additional terms of the contract, and to show what parties had assented thereto.¹³ Where a written assignment of a chose in action is incomplete, the oral contract under which it was given may be shown.¹⁴ Extrinsic evidence is admissible to show the conditions of an escrow;¹⁵ that the vendee knew of the possession by a squatter of the realty sold;¹⁶ that the amount of notes given included not only the purchase price of the realty conveyed, but also other claims;¹⁷ whether a stock option includes dividends or not,¹⁸ and whether in a memorandum for the sale of a quarry, "with all the improvements thereon," the parties had agreed upon the sale of any of the personal property used in connection therewith.¹⁹ If a contract for the sale of personal property is incom-

⁸ *Inner Shoe Tire Co. v. Brown*, 39 S. D. 100, 163 N. W. 572.

⁹ *Missouri District Telegraph Co. v. Morris*, 243 Fed. 481.

¹⁰ *Strickland v. Johnson*, 21 N. M. 599, 157 Pac. 142.

¹¹ *Dittmar v. Frederick Starr Contracting Co.*, 249 Fed. 437.

¹² *Stretch v. Stretch*, 191 Mich. 416, 158 N. W. 185.

¹³ *Baldwin v. Hill*, 97 Ia. 586, 66 N. W. 889.

¹⁴ *Randall v. Turner*, 17 O. S. 262, and see § 2154.

¹⁵ *Smith v. Smith*, 173 Cal. 725, 161 Pac. 495; *Fred v. Fred* (N. J. Eq.), 50 Atl. 776; *Northern Trust Co. v. Bruegger*, 35 N. D. 150, 159 N. W. 849.

See also, §§ 1192 et seq.

¹⁶ *Leonard v. Woodruff*, 23 Utah 494, 65 Pac. 199.

¹⁷ *Brader v. Brader*, 110 Wis. 423, 85 N. W. 681.

¹⁸ *Rivers v. Sugar Co.*, 52 La. Ann. 762, 27 So. 118.

¹⁹ *Crown Slate Co. v. Allen*, 199 Pa. St. 239, 48 Atl. 968.

plete, evidence of an oral warranty is admissible. A written contract for removing earth, which fails to state the distance which it is to be hauled or the points to which it is to be hauled, is incomplete upon its face and may be supplemented by extrinsic evidence.²⁰ A written contract which provides that earth is to be "excavated and loaded on cars," is ambiguous as to the person who is to furnish the cars, and such ambiguity may be removed by extrinsic evidence.²¹ If a contract is one which does not in legal effect impose upon either party definitely the duty of furnishing cars,²² such as a contract for excavating material and for hauling it,²³ extrinsic evidence is admissible to show which party is to furnish the cars. If a contract for the sale of realty contains a provision as to part of the consideration, evidence of the actual agreement of the parties as to the total amount of the consideration may be considered.²⁴ If a contract for an automobile agency does not appear on its face to be complete, the agreement of the parties that the agents of the seller were to assist the purchaser in closing sales with his customers, is admissible.²⁵ If a deed does not specify the area of the realty or the price thereof, extrinsic evidence is admissible to show the agreement between the parties as to the area and the price per acre.²⁶

If the contract is not required to be in writing or to be proved by writing, and it consists of several writings, no one of which is complete in itself, they may be connected by oral evidence.²⁷

Extrinsic evidence is not admissible to show oral terms inconsistent with those reduced to writing.²⁸ Analogous to the rule that an oral provision consistent with an incomplete written memorandum may be proved and enforced, is the rule that if the written

²⁰ *Magnolia Warehouse & Storage Co. v. Davis*, 108 Tex. 422, 195 S. W. 184.

²¹ *Magnolia Warehouse & Storage Co. v. Davis*, 108 Tex. 422, 195 S. W. 184.

²² *Magnolia Warehouse & Storage Co. v. Davis*, 108 Tex. 422, 195 S. W. 184.

²³ *Magnolia Warehouse & Storage Co. v. Davis*, 108 Tex. 422, 195 S. W. 184.

²⁴ *Nelson v. McElroy*, 140 Minn. 429, 168 N. W. 179.

²⁵ *Brockway v. Blair*, 53 Mont. 531, 165 Pac. 455.

²⁶ *Caughron v. Stinespring*, 132 Tenn. 636, L. R. A. 1916C, 403, 179 S. W. 152.

²⁷ *Nelson v. Willey*, 97 Md. 373, 55 Atl. 527.

²⁸ *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 81 Am. St. Rep. 28, 37 S. E. 485; *Bond v. Perrin*, 145 Ga. 200, 88 S. E. 954; *Brosseau v. Jacobs' Pharmacy Co.*, 147 Ga. 185, 93 S. E. 293; *Gilbert Manufacturing Co. v. Bryan*, -- N. D. --, 166 N. W. 805; *Railroad v. Morey*, 47 O. S. 207, 7 L. R. A. 701, 24 N. E. 269.

contract is ambiguous, the parol evidence rule does not prevent the parties from relying on the real contract, though oral, as long as it does not contradict terms of the written contract which are plain and unequivocal.²⁹ So if the provisions of the written contract admit, a similar result is reached by holding that the written contract will be construed as having the same scope as the oral contract, in pursuance of which it is entered into.³⁰

If the written contract is incomplete or ambiguous upon its face, and the extrinsic evidence which is offered leaves the terms of the original contract doubtful, the court will regard the existence and terms of such contract as too indefinite and uncertain to be enforced.³¹ It has been held that the fact that the rate of interest is left blank shows that no rate was agreed upon or that the legal rate was intended, and accordingly extrinsic evidence to show the rate actually agreed upon was held to be inadmissible.³²

§ 2152. Express provision negating extrinsic agreement. A written contract frequently contains an express provision to the effect that all the terms of the contract between the parties are set forth in such writing. Such a term could not prevent a contract which on its face was incomplete from being treated as an incomplete contract. Whether such a provision could preclude the admission of oral evidence to show the remaining terms of such contract, or whether it would require the courts to treat the contract as so incomplete as to be unenforceable, is a question upon which there is little authority. If the contract is clearly complete upon its face, such a provision can, of course, add nothing to the legal effect of such contract. In doubtful cases, however, the insertion of such provision in a written contract strengthens the pre-

²⁹ *Arkansas*. *Merrill v. Syper*, 65 Ark. 51, 44 S. W. 462.

Georgia. *Barrie v. Miller*, 104 Ga. 312, 30 S. E. 840.

Kentucky. *Chapman v. Clements* (Ky.), 56 S. W. 646.

Michigan. *Germain v. Lumber Co.*, 116 Mich. 245, 74 N. W. 644 [same case, 78 N. W. 1007].

Nebraska. *State v. Cass County*, 60 Neb. 566, 83 N. W. 733.

North Carolina. *Doubleday v. Coal Co.*, 122 N. Car. 675, 30 S. E. 21.

Rhode Island. *F. A. Thomas Machine Co. v. Voelker*, 23 R. I. 441, 50 Atl. 838.

³⁰ *Greenfield v. Gilman*, 140 N. Y. 168, 35 N. E. 435; *Bruce v. Moon*, 57 S. Car. 60, 35 S. E. 415.

³¹ *Hoster's Committee v. Zollman*, 122 Va. 41, 94 S. E. 164. See §§ 87 et seq.

³² It was held inadmissible even where the payee had filled in such blank with the legal rate. *Haas v. Commerce Trust Co.*, 194 Ala. 672, 69 So. 894.

sumption that a written contract is complete and that it sets forth the entire contract between the parties.¹ A contract of sale,² or a contract for work and labor,³ which provides expressly that such written contract contains all the terms of the agreement between the parties, will be regarded as complete, at least if it does not show upon its face that the parties have agreed upon terms other than those which are set forth in the written contract. If a written contract provides expressly that no oral agreement has been entered into upon a certain subject, such provision is regarded as conclusive.⁴ A provision in a release of a claim for personal damages, to the effect that no agreement had been made for employment, was held to be conclusive.⁵

§ 2153. What contracts are incomplete. In order that a written contract may be treated as incomplete, so as to make extrinsic evidence of other terms admissible, it must show upon its face that it is incomplete.¹ A written contract, such as a contract of

¹ *Parker v. Law*, 194 Ala. 693, 69 So. 879; *Detroit Trust Co. v. Engel*, 192 Mich. 62, 158 N. W. 123; *A. B. Farquhar Co. v. Hardy Hardware Co.*, 174 N. Car. 369, 93 S. E. 922; *Ridgeway Dynamo & E. Co. v. Pennsylvania Cement Co.*, 221 Pa. St. 160, 18 L. R. A. (N.S.) 613, 70 Atl. 557.

² *Michigan*. *Detroit Trust Co. v. Engel*, 192 Mich. 62, 158 N. W. 123.

North Carolina. *A. B. Farquhar Co. v. Hardy Hardware Co.*, 174 N. Car. 369, 93 S. E. 922.

Pennsylvania. *Ridgeway Dynamo & E. Co. v. Pennsylvania Cement Co.*, 221 Pa. St. 160, 18 L. R. A. (N.S.) 613, 70 Atl. 557.

South Dakota. *Emerson-Brantingham Implement Co. v. Edgar*, 30 S. D. 139, 163 N. W. 575.

³ *Parker v. Law*, 194 Ala. 693, 69 So. 879.

⁴ *Seymour v. Chicago & N. W. Ry. Co.*, 181 Ia. 218, 164 N. W. 352.

⁵ *Seymour v. Chicago & N. W. Ry. Co.*, 181 Ia. 218, 164 N. W. 352.

¹ *Georgia*. *Brosseau v. Jacobs' Pharmacy Co.*, 147 Ga. 185, 93 S. E. 293.

Illinois. *Telluride Power Transmission Co. v. Crane*, 208 Ill. 218, 70 N. E. 319 [affirming, 103 Ill. App. 647].

Massachusetts. *Glackin v. Bennett*, 226 Mass. 316, 115 N. E. 490; *Loveland v. Epstein Drug Co.*, 227 Mass. 311, 116 N. E. 570.

Nebraska. *Roden v. Williams*, 100 Neb. 46, L. R. A. 1917A, 415, 158 N. W. 360.

New York. *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961; *Case v. Bridge Co.*, 134 N. Y. 78, 31 N. E. 254; *Stowell v. Ins. Co.*, 163 N. Y. 298, 57 N. E. 480; *Dady v. O'Rourke*, 172 N. Y. 447, 65 N. E. 273; *Brantingham v. Huff*, 174 N. Y. 53, 95 Am. St. Rep. 545, 66 N. E. 620.

Oregon. *Sund v. Flagg & Standifer Co.*, 86 Or. 289, 168 Pac. 300.

Washington. *Van Doren Roofing & Cornice Co. v. Guardian Casualty & Guaranty Co.*, 99 Wash. 68, 168 Pac. 1124; *Thomson & Stacy Co. v. Evans*, 100 Wash. 277, 170 Pac. 578.

Wisconsin. *John O'Brien Lumber Co. v. Wilkinson*, 117 Wis. 468, 94 N. W. 337; *Foster v. Lowe*, 131 Wis. 54, 110 N. W. 829.

sale,² or an assignment,³ will be assumed to be complete unless it shows upon its face that it does not contain provisions as to certain necessary elements of the contract. The fact that a written contract does not provide for the point at which shipment is to begin, does not render it so incomplete as to justify explanation by extrinsic evidence.⁴ If a written contract contains a specific provision with reference to some subject,⁵ such as a provision for a warranty,⁶ it will be presumed that such written provision contains the entire agreement of the parties upon such topic. The fact that a contract does not provide for all the possible emergencies and contingencies which may arise in the future, is not sufficient to show that such contract is, upon its face, incomplete.⁷

A form of attack on the parol evidence rule, often so disguised as to be difficult of detection, consists in claiming that a written contract, complete on its face, is incomplete, and in offering to establish this by extrinsic evidence of terms not reduced to writing. This evidence is sought to be used both to show that the written contract is incomplete and to establish the terms of the contract not reduced to writing. This can not be done. The use of such evidence violates the spirit and purpose of the parol evidence rule.⁸ So under a complete written contract of sale extrinsic evi-

It has been said that if a contract is bilateral and on its face purports to set out the mutual undertakings of the parties, the presumption that it sets out the entire agreement, and that they had abandoned all their prior negotiations is so strong that if it can be overcome at all this can be done only by the clearest proof. *Foster v. Lowe*, 131 Wis. 54, 110 N. W. 829.

² *Colorado*. *Mackey v. Magnon*, 28 Colo. 100, 62 Pac. 945 [affirming, 54 Pac. 907].

Kentucky. *McKegney v. Widekind*, 69 Ky. (6 Bush.) 107.

Massachusetts. *Loveland v. Epstein Drug Co.*, 227 Mass. 311, 116 N. E. 570.

Nebraska. *Roden v. Williams*, 100 Neb. 46, L. R. A. 1917A, 415, 158 N. W. 360.

Washington. *Fairbanks Steam Shovel*

Co. v. Holt, 79 Wash. 361, L. R. A. 1915B, 477, 140 Pac. 394.

³ *Van Doren Roofing & Cornice Co. v. Guardian Casualty & Guaranty Co.*, 99 Wash. 68, 168 Pac. 1124.

⁴ *Kreitz v. Gallenstein*, 170 Ky. 16, 185 S. W. 132; *Thomson & Stacy Co. v. Evans*, 100 Wash. 277, 170 Pac. 578.

⁵ *Glackin v. Bennett*, 226 Mass. 316, 115 N. E. 490.

⁶ *Glackin v. Bennett*, 226 Mass. 316, 115 N. E. 490.

⁷ *Van Doren Roofing & Cornice Co. v. Guardian Casualty & Guaranty Co.*, 99 Wash. 68, 168 Pac. 1124.

⁸ *United States*. *The Bertha*, 91 Fed. 272, 33 C. C. A. 509.

California. *Harrison v. McCormick*, 89 Cal. 327, 23 Am. St. Rep. 469, 26 Pac. 830.

Georgia. *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 81 Am. St. Rep. 28, 37 S. E. 485.

dence is inadmissible to show sale by sample.⁹ So under a complete written contract for the sale of a boiler of certain specified dimensions for a tug, extrinsic evidence is inadmissible to show that the seller was to examine the tug and furnish the size of boiler necessary.¹⁰ The question of whether a written contract upon which suit is brought is complete or not is for the court.¹¹ A contract may show upon its face that it is incomplete by express reference to written terms in another instrument which do not exist.¹² A contract for the sale of realty, which purports to be "on the terms specified on the back hereof," may be explained by oral evidence if no written terms appear upon the back of such contract.¹³ A contract may show on its face that it is incomplete by express reference to an oral agreement as part thereof without specifying what such oral agreement is.¹⁴ Thus "as per conversation,"¹⁵ "as per your conversation,"¹⁶ or "as per our conversation of yester-

Iowa. *McEnery v. McEnery*, 110 Ia 718, 80 N. W. 1071.

Kentucky. *Kreitz v. Gallenstein*, 170 Ky. 16, 185 S. W. 132.

Michigan. *Ogooshevitz v. Arnold*, 197 Mich. 203, 163 N. W. 946.

New Jersey. *Naumberg v. Young*, 44 N. J. L. 331, 43 Am. Rep. 380; *Church of Holy Communion v. Paterson*, 63 N. J. L. 470, 55 L. R. A. 81, 43 Atl. 696; *Decker v. Smith*, 88 N. J. L. 630, 96 Atl. 915.

South Carolina. *Guimarin v. Southern Life & Trust Co.*, 106 S. Car. 37, 90 S. E. 319.

Virginia. *Slaughter v. Smither*, 97 Va. 202, 33 S. E. 544.

Washington. *Pacific National Bank v. Bridge Co.*, 23 Wash. 425, 63 Pac. 207; *Fairbanks Steam Shovel Co. v. Holt*, 79 Wash. 361, L. R. A. 1915B, 477, 140 Pac. 394; *Van Doren Roofing & Cornice Co. v. Guardian Casualty & Guaranty Co.*, 99 Wash. 68, 168 Pac. 1124. "If we may go outside of the instrument to prove that there was a stipulation not contained in it, and so that only part of the contract was put in writing, and then, because of that fact, enforce the oral stipulation, there will be little value left in the rule it-

self." *Eighmie v. Taylor*, 98 N. Y. 288, 294 [quoted in *Pacific National Bank v. Bridge Co.*, 23 Wash. 425, 430, 63 Pac. 207].

⁹ *Harrison v. McCormick*, 89 Cal. 327, 23 Am. St. Rep. 469, 26 Pac. 830.

¹⁰ *The Bertha*, 91 Fed. 272, 33 C. C. A. 509.

¹¹ *Harrison v. McCormick*, 89 Cal. 327, 23 Am. St. Rep. 469, 26 Pac. 830; *Hirsch v. Mills Co.*, 40 Or. 601, 67 Pac. 949, 68 Pac. 733.

Apparently contra, *Hines v. Willcox*, 96 Tenn. 148, 54 Am. St. Rep. 823, 34 L. R. A. 824, 33 S. W. 914; *Steed v. Harvey*, 18 Utah 367, 72 Am. St. Rep. 789, 54 Pac. 1011.

¹² *Mason v. Griffith*, 281 Ill. 246, 118 N. E. 18.

¹³ *Mason v. Griffith*, 281 Ill. 246, 118 N. E. 18.

¹⁴ *Wolff v. Wells Fargo & Co.*, 115 Fed. 32, 52 C. C. A. 626; *Klueter v. Joseph Schlitz Brewing Co.*, 143 Wis. 347, 32 L. R. A. (N.S.) 383, 128 N. W. 43.

¹⁵ *Selig v. Reh fuss*, 195 Pa. St. 200, 45 Atl. 919.

¹⁶ *Klueter v. Joseph Schlitz Brewing Co.*, 143 Wis. 347, 32 L. R. A. (N.S.) 383, 128 N. W. 43.

day,"¹⁷ or "as hereafter agreed,"¹⁸ shows that the contract is incomplete. If a written contract refers to the "system" under which the work is to be done, and such written contract does not explain what such system is, extrinsic evidence is admissible to show the oral statements of such parties as to the nature of such system.¹⁹ An express reference to a conversation as to one branch of a contract does not authorize the introduction of oral agreements upon another branch of such contract which vary the legal effect of other written provisions of such contract.²⁰ A reference to conversations for purposes of identity does not authorize evidence of an oral agreement by which the seller undertakes to protect the buyer against the sale of articles which are claimed to infringe a patent.²¹ So a contract for advertisements which refers to "our contract price for glass other than we have estimated on, or contracted for, prior to the date hereof," and does not otherwise specify what that contract price is, is on its face incomplete by reason of the reference to such other contract, and such other contract may be enforced, though oral.²² A note which is given in performance of a contract and which does not on its face set forth the terms of the contract under which it is given, is not presumed to be complete, and extrinsic evidence may be admitted to show the remaining terms of such contract.²³ Accordingly, evidence is admissible to show an agreement to pay the debt for which the note was given out of the proceeds of an insurance policy, thereby waiving exemptions as to such policy,²⁴ or to show an oral warranty, by the payee, of the article sold,²⁵ even if the note reserves title to the article until payment.²⁶ A deed does not ordinarily purport to set forth in detail the terms of the contract, in performance of which it is given, and extrinsic evidence of the terms of the actual agree-

¹⁷ *Anderson v. Surety Co.*, 196 Pa. St. 288, 46 Atl. 306.

¹⁸ *Morrison v. Dickey*, 119 Ga. 698, 46 S. E. 863.

¹⁹ *American Mercantile Exchange v. Blunt*, 102 Me. 128, 120 Am. St. Rep. 463, 10 L. R. A. (N.S.) 414, 66 Atl. 212.

²⁰ *American Toy Mfg. Co. v. McLoughlin*, 221 Mass. 567, 109 N. E. 836.

²¹ *American Toy Mfg. Co. v. McLoughlin*, 221 Mass. 567, 109 N. E. 836.

²² *Hand v. Drug Co.*, 63 Minn. 539, 66 N. W. 1081.

²³ *Pryor v. Ludden & B. Southern Music House*, 134 Ga. 288, 28 L. R. A. (N.S.) 267, 67 S. E. 654; *Rosholt v. Woulph*, — S. D. —, 167 N. W. 158.

²⁴ *Murdy v. Skyles*, 101 Ia. 549, 63 Am. St. Rep. 411, 70 N. W. 714.

²⁵ *Pryor v. Ludden & B. Southern Music House*, 134 Ga. 288, 28 L. R. A. (N.S.) 267, 67 S. E. 654; *Hille v. Adair* (Ky.), 58 S. W. 697.

²⁶ *Nauman v. Ullman*, 102 Wis. 92, 78 N. W. 159.

ment is admissible as far as such terms are consistent with the express provisions of such deed.²⁷ If the deed does not set forth the area of the property conveyed or the price to be paid therefor, extrinsic evidence is admissible to show the actual agreement between the parties as to the area agreed upon and the price per acre.²⁸ A railroad ticket does not ordinarily set forth the agreement of the railroad company as to the time at which performance will be made, and accordingly extrinsic evidence of the actual agreement as to the time of performance may be considered.²⁹ If the railway ticket makes no provision for stop-over privileges, oral evidence of the actual agreement as to such provision may be considered.³⁰ A contract of sale which provides that the goods are to be "f. o. b.," is so incomplete upon its face that oral evidence may be offered to show the actual shipping directions.³¹ So a writing intended only to secure a lien,³² or to make the price of a charge,³³ neither of them prevent evidence of an oral warranty. So if a written order for shipping soap is made out by the vendor's agent, the vendee writing on it "accepted," and signing his name, the vendee may show that the contract was that all the soap was to be shipped to him, but that he was to take and pay for only one-half of it, the other half to be delivered by him to another druggist.³⁴ A letter by which a purchaser orders certain goods, together with a bill of the goods, which are delivered, are not so formal as to raise a presumption that all prior negotiations are embodied in such written instrument.³⁵ A letter which is written to authorize A to act as B's agent in purchasing certain property for B, will not be presumed to contain the agreement of the parties as to compensation, and B may show that such letter was written in reliance upon a prior oral arrangement on the part of A to perform such services

²⁷ *Caughron v. Stinespring*, 132 Tenn. 636, L. R. A. 1916C, 403, 179 S. W. 152.

²⁸ *Caughron v. Stinespring*, 132 Tenn. 636, L. R. A. 1916C, 403, 179 S. W. 152.

²⁹ *Hayes v. Wabash R. Co.*, 163 Mich. 174, 31 L. R. A. (N.S.) 229, 128 N. W. 217.

³⁰ *New York, Lake Erie & Western Railroad v. Winter*, 143 U. S. 60, 36 L. ed. 71.

³¹ *Lawson v. Hobbs*, 120 Va. 690, 91 S. E. 750.

³² *Potter v. Easton*, 82 Minn. 247, 84 N. W. 1011.

³³ "Terms cash. Mr. E. P. Putnam to T. F. McDonald, Dr., one bicycle \$47.50. Paid July 27, 1896." *Putnam v. McDonald*, 72 Vt. 4, 47 Atl. 159.

³⁴ *Colgate v. Latta*, 115 N. Car. 127, 26 L. R. A. 321, 20 S. E. 388.

³⁵ *Leavitt v. Fiberloid Co.*, 196 Mass. 440, 15 L. R. A. (N.S.) 855, 82 N. E. 682.

gratuitously.³⁶ A sheriff's return of a sale is so far incomplete that it may be shown that the purchaser bought for another lienholder, and that conveyance was made under such arrangement.³⁷ A memorandum may appear incomplete on its face by showing that a time of payment was fixed, but not showing what the time was,³⁸ or where the memorandum shows only the purchase price and the time of payment.³⁹ The use of "etc." does not of itself show that the contract is incomplete.⁴⁰ If both parties to a written contract or memorandum agree that it is incomplete and that it omits certain terms upon which the parties had agreed expressly, oral evidence of the terms which the parties agree to have been omitted, may be offered, as long as such evidence does not contradict the terms of such contract which are reduced to writing.⁴¹

§ 2154. Purpose of instrument. If the instrument does not show on its face what its purpose was, extrinsic evidence is admissible to show what that purpose was, if such evidence does not contradict the terms of the contract.¹ A mortgage purports upon its face to be a deed upon condition subsequent which by its terms is to become absolute unless a certain event which is usually the payment of a specified debt occurs at a specified time. When

³⁶ *Clark v. Townsend*, 96 Kan. 650, 153 Pac. 555 [rehearing denied, *Clark v. Townsend*, 97 Kan. 161, 154 Pac. 1009].

³⁷ *Emery v. Hanna* (Neb.), 94 N. W. 973.

³⁸ *Aultman v. Clifford*, 55 Minn. 159, 43 Am. St. Rep. 478, 56 N. W. 593. (Evidence allowed to show a contract as to quality of the article sold.)

³⁹ *Perkins v. Brown*, 115 Mich. 41, 72 N. W. 1095. (Evidence admitted to show that vendor was to set out the trees and care for them.)

⁴⁰ *Harrison v. McCormick*, 89 Cal. 327, 23 Am. St. Rep. 469, 26 Pac. 830.

⁴¹ *Di Menna v. Copper & Evans Co.*, 220 N. Y. 391, 115 N. E. 993.

¹ *United States. In re Baird*, 245 Fed. 504.

California. Ruiz v. Dow, 113 Cal. 490, 45 Pac. 867.

Connecticut. Lamkin v. Mfg. Co., 72 Conn. 57, 44 L. R. A. 786, 43 Atl. 593.
Illinois. Strain v. Hinds, 277 Ill. 598, 115 N. E. 563.

Indiana. Bever v. Bever, 144 Ind. 157, 41 N. E. 944; *Citizens' Bank v. Opperman*, — Ind. —, 115 N. E. 55.

Iowa. Hathaway v. Rogers, 112 Ia. 638, 84 N. W. 674; *Rowe v. Rowe*, — Ia. —, 174 N. W. 354.

Louisiana. Hutchinson v. Riggs-Terrell Lumber Co., 138 La. 355, 70 So. 324.

Massachusetts. Raphael v. Mullen, 171 Mass. 111, 50 N. E. 515.

Michigan. Buhl v. Bank, 123 Mich. 591, 82 N. W. 282.

Mississippi. Aetna Insurance Co. v. Smith, 117 Miss. 327, 78 So. 289.

Missouri. Hillman v. Allen, 145 Mo. 638, 47 S. W. 509.

New Hampshire. Downes v. Congregational Society, 63 N. H. 151.

equity treats such instrument as a mortgage and treats the mortgagor as the real owner of such property after breach of condition, and treats such conveyance as merely made for the purpose of securing such debt, it ignores the express provisions of the conveyance in order to enforce the actual intention of the parties as inferred from the entire transaction, rather than from the express language of the conveyance. It is but a slight extension of this principle, if indeed it is any extension at all, to hold that an instrument which conveys title and which on its face appears to be absolute, may be shown by extrinsic evidence to have been given as a mortgage in order to furnish security to the creditor for certain obligations.² If an instrument is executed by joint grantors, extrinsic evidence is admissible to show that it was a mortgage as to one of them.³ The purpose of any contract which purports only to transfer legal title may thus be shown.⁴ If the lessor brings an

Oklahoma. *Weiseham v. Hocker*, 7 Okla. 250, 54 Pac. 464; *Bank of Commerce v. Webster*, — Okla. —, 172 Pac. 943.

Pennsylvania. *Shaeffer v. Sensenig*, 182 Pa. St. 634, 38 Atl. 473.

South Dakota. *Meyer v. Elevator Co.*, 12 S. D. 172, 80 N. W. 189.

Vermont. *Bedell v. Wilder*, 65 Vt. 406, 36 Am. St. Rep. 871, 26 Atl. 589.

Washington. *Marks v. Seattle*, 88 Wash. 61, 152 Pac. 706.

Wisconsin. *Schierl v. Newburg*, 102 Wis. 552, 78 N. W. 761; *Smith v. Pfluger*, 126 Wis. 253, 2 L. R. A. (N.S.) 783, 105 N. W. 470.

Wyoming. *Bachmann v. Hurtt*, — Wyom. —, 184 Pac. 709.

² **United States.** *Morgan v. Shinn*, 82 U. S. (15 Wall.) 105, 21 L. ed. 87.

Arkansas. *Lansdell v. Woods*, 127 Ark. 466, 192 S. W. 715.

Georgia. *Florida, etc., Ry. v. Usina*, 111 Ga. 697, 36 S. E. 928.

Illinois. *Strain v. Hinds*, 277 Ill. 598, 115 N. E. 563.

Iowa. *Zuber v. Johnson*, 108 Ia. 273, 79 N. W. 76; *Mahaffy v. Faris*, 144 Ia. 220, 24 L. R. A. (N.S.) 840, 122 N. W. 934.

Kansas. *Hubbard v. Cheney*, 76 Kan.

222, 123 Am. St. Rep. 129, 15 L. R. A. (N.S.) 877, 91 Pac. 793.

Kentucky. *Hobbs v. Rowland*, 136 Ky. 197, L. R. A. 1916B, 1, 123 S. W. 1185.

Louisiana. *Hutchinson v. Riggs-Terrell Lumber Co.*, 138 La. 355, 70 So. 324.

Michigan. *Buhl v. Bank*, 123 Mich. 591, 82 N. W. 282.

Missouri. *Hillman v. Allen*, 145 Mo. 638, 47 S. W. 509.

North Carolina. *Watkins v. Williams*, 123 N. Car. 170, 31 S. E. 388.

Oklahoma. *Weiseham v. Hocker*, 7 Okla. 250, 54 Pac. 464.

Pennsylvania. *Myerstown Bank v. Roessler*, 186 Pa. St. 431, 40 Atl. 963.

Texas. *Masterson v. Burnett*, 27 Tex. Civ. App. 370, 66 S. W. 90.

Wisconsin. *Schierl v. Newburg*, 102 Wis. 552, 78 N. W. 761; *Smith v. Pfluger*, 126 Wis. 253, 2 L. R. A. (N.S.) 783, 105 N. W. 476.

Contra, *Munford v. Green*, 103 Ky. 140, 44 S. W. 419.

³ *Hubbard v. Cheney*, 76 Kan. 222, 123 Am. St. Rep. 129, 15 L. R. A. (N.S.) 877, 91 Pac. 793.

⁴ *Lease.* *Meyer v. Elevator Co.*, 12 S. D. 172, 80 N. W. 189. *Bill of sale.* *Raphael v. Mullen*, 171 Mass. 111, 50

action for rent against successive assignees of a lease, extrinsic evidence is admissible to show that one of such assignments was made by way of collateral security for an advance made to enable such assignor to purchase such lease from the owner thereof.⁵ The grantee may show that a deed was given to secure certain notes and not in payment of them.⁶ So a mortgage which recites that it is to secure a certain note, may be shown to be an indemnity mortgage.⁷ So a mortgage to A may be shown to be in part for A's benefit and in part in trust for X.⁸ So a bill of sale given by a debtor may be shown to have been given with the consent of creditors and for their benefit.⁹ An assignment of an interest under a contract may be shown by extrinsic evidence to be as security.¹⁰ Thus an assignment of a contract to purchase realty,¹¹ a building contract,¹² an insurance policy,¹³ assignment by orders drawn on a debtor,¹⁴ or an assignment of accounts,¹⁵ may in each case be shown to have been made, not absolutely, but merely as security. An assignment of a claim for damages may be shown to have been made as a security only and not absolutely.¹⁶ An indorsement may

N. E. 515; *Martin v. Martin*, 43 Or. 119, 72 Pac. 639. Assignment of bill of lading. *Walker v. Bank*, 43 Or. 102, 72 Pac. 635. Assignment of note. *Clark v. Ducheneau*, 26 Utah 97, 72 Pac. 331. Power of attorney. *Coldwater National Bank v. Buggie*, 117 Mich. 416, 75 N. W. 1057.

⁵ *Lansdell v. Woods*, 127 Ark. 466, 192 S. W. 715.

⁶ *Loud v. Hamilton* (Tenn. Ch. App.), 45 L. R. A. 400, 51 S. W. 140.

⁷ *Honaker v. Vesey*, 57 Neb. 413, 77 N. W. 1100.

The purpose of a mortgage may be shown by oral evidence if not set forth in the instrument. *Bachmann v. Hurtt*, — *Wyom.* —, 184 Pac. 709.

⁸ *Tapia v. Demartini*, 77 Cal. 383, 11 Am. St. Rep. 288, 19 Pac. 641.

⁹ *Neresheimer v. Smyth*, 167 N. Y. 202, 60 N. E. 449.

¹⁰ *Connecticut*. *Dale v. Gear*, 38 Conn. 15, 9 Am. Rep. 353.

Illinois. *Jones v. Albee*, 70 Ill. 34.

Kansas. *Lovejoy v. Bank*, 23 Kan. 331.

Massachusetts. *Kendall v. Assurance Society*, 171 Mass. 568, 51 N. E. 464.

Missouri. *Ittner v. Hughes*, 154 Mo. 55, 55 S. W. 267.

Ohio. *Hudson v. Wolcott*, 39 O. S. 618.

South Carolina. *Westbury v. Simmons*, 57 S. Car. 467, 35 S. E. 764.

¹¹ *Hieronymus v. Glass*, 120 Ala. 46, 23 So. 674 [disapproving, *Moseley v. Moseley*, 86 Ala. 289, 5 So. 732]; *Gettelman v. Assurance Co.*, 97 Wis. 237, 72 N. W. 627.

¹² *Davis v. Light Co.*, 57 Minn. 402, 47 Am. St. Rep. 622, 59 N. W. 482.

¹³ *In re Baird*, 245 Fed. 504; *Kendall v. Assurance Society*, 171 Mass. 568, 51 N. E. 464; *Aetna Insurance Co. v. Smith*, 117 Miss. 327, L. R. A. 1918D, 1158, 78 So. 289. The evidence however was insufficient in *Reinhardt v. Marks' Administrator* (Ky.), 93 S. W. 32, 29 Ky. Law Rep. 388; *Westbury v. Simmons*, 57 S. Car. 467, 35 S. E. 764.

¹⁴ *Ittner v. Hughes*, 154 Mo. 55, 55 S. W. 267.

¹⁵ *Matthews v. Forslund*, 112 Mich. 501, 70 N. W. 1105.

¹⁶ *Marks v. Seattle*, 88 Wash. 61, 152 Pac. 706.

be shown to have been for the purpose of collection only.¹⁷ As between the immediate parties the endorser may show that he took the note as agent for the endorsee and that he endorsed such note in order to transfer title and not to incur any liability as endorser.¹⁸ A power of attorney and an assignment of stock may be explained by extrinsic evidence.¹⁹ Extrinsic evidence is admissible to show such facts as create an implied trust of realty.²⁰ Thus the recital in a deed that the consideration was paid by A, does not prevent evidence that it was paid by B.²¹ Neither the parol evidence rule nor the Statute of Frauds prevents this. Unless such evidence were admissible, no available remedy would be given for much of the fraud that is thus met. Extrinsic evidence is admissible to prove trusts concerning personal property.²² Thus if A gives a note to B, extrinsic evidence is admissible to show that it is charged with a trust in favor of C.²³ If the instrument shows its purpose on its face, the rule admitting evidence of the intention of the parties to show the purpose of the instrument does not apply, since such intention would be used in such case to contradict the intention as expressed in the writing.²⁴ Thus extrinsic evidence can not be received to show that C is the beneficiary intended in a deed of

¹⁷ *Johnston v. Schnabaum*, 86 Ark. 82, 17 L. R. A. (N.S.) 838, 109 S. W. 1163; *Citizens' State Bank v. Tessman*, 121 Minn. 34, 45 L. R. A. (N.S.) 606, 140 N. W. 178; *Howell v. McCarty*, 77 W. Va. 695, 88 S. E. 181.

¹⁸ *First National Bank v. Reinman*, 93 Ark. 376, 28 L. R. A. (N.S.) 530, 125 S. W. 443.

¹⁹ *Citizens' Bank v. Opperman*, — Ind. —, 115 N. E. 55.

²⁰ *Illinois. Champlin v. Champlin*, 136 Ill. 309, 29 Am. St. Rep. 323, 26 N. E. 526.

Iowa. Burden v. Sheridan, 36 Ia. 125, 14 Am. Rep. 505.

Massachusetts. Livermore v. Aldrich, 59 Mass. (5 Cush.) 431; *Blodgett v. Hildreth*, 103 Mass. 484.

Texas. Neill v. Keese, 5 Tex. 23, 51 Am. Dec. 746; *Smith v. Eckford* (Tex.), 18 S. W. 210.

New Jersey. Depeyster v. Gould, 3 N. J. Eq. 474, 29 Am. Dec. 723.

West Virginia. Deck v. Tabler, 41

W. Va. 332, 56 Am. St. Rep. 837, 23 S. E. 721.

²¹ *Chicago, etc., Ry. v. Bank*, 58 Neb. 548, 78 N. W. 1064. See however, *Edenborn v. Blacksher*, 137 La. 894, 69 So. 737.

²² *Northrop v. Hale*, 72 Me. 275; *Gerish v. New Bedford Institution*, 128 Mass. 159, 35 Am. Rep. 365; *Chace v. Chapin*, 130 Mass. 128; *Barnes v. Traf-ton*, 80 Va. 524.

²³ *Thompson v. Caruthers*, 92 Tex. 530, 50 S. W. 331.

²⁴ *United States. Burnes v. Scott*, 117 U. S. 582, 29 L. ed. 991.

Iowa. Dickson v. Harris, 60 Ia. 727, 13 N. W. 335.

Michigan. Adair v. Adair, 5 Mich. 204, 71 Am. Dec. 779; *Crane v. Bayley*, 126 Mich. 323, 85 N. W. 874.

Minnesota. Gilbert v. Thompson, 14 Minn. 544.

Montana. Ming v. Pratt, 22 Mont. 262, 56 Pac. 279.

trust which names B as beneficiary.²⁵ So under a conveyance which reserves a life estate to the grantor, such reservation can not be shown to be intended only as security for the performance by the grantee of his contract to support the grantor.²⁶ If the written instrument sets forth upon its face the purpose for which it was executed, extrinsic evidence is usually inadmissible to contradict such written provision.²⁷ If a lessor accepts from his lessee a note in which the contract of lease is set forth, the lessor can not avoid the effect of such provision by showing that it was intended for collateral security only.²⁸ If an instrument provides for the execution of a warranty deed for placing it in escrow and for its becoming absolute upon the grantor's failure to perform certain conditions, such provisions show that such instrument was intended as an absolute conveyance and they can not be varied by extrinsic evidence tending to show that such instrument was executed as a mortgage.²⁹ If an express agreement in writing is entered into between the parties under which a deed is given as security, extrinsic evidence is inadmissible to show the purpose for which such deed was given.³⁰ An apparent rather than a real exception to the rule that the purpose of an instrument can not be shown if it contradicts the express provisions of the instrument, is to be found in cases in which an instrument is given as security by way of mortgage, and the parties, in order to cut off the equity of redemption, insert in such instrument express provisions to the effect that it is not given by way of security and that the grantor does not possess any equity of redemption. The rule that the mortgagor can not deprive himself of his equity of redemption by an agreement which is entered into at the same time that he delivered the mortgage, is a rule which rests upon the policy of the law and not upon the intention of the parties. Accordingly, as in other cases,³¹ the parties can not prevent the operation of rules with reference to the subject-matter, which rules are intended to defeat the intention of the parties by inserting in their written contract specific provisions which are intended to prevent the operation of such rules of law.

²⁵ *American National Bank v. Harlan*, 89 Md. 675, 43 Atl. 756. See to the same effect, *Holtheide v. Smith* (Ky.), 74 S. W. 689.

²⁶ *Hall v. Small*, 178 Mo. 629, 77 S. W. 733.

²⁷ *Hoshaw v. Cosgriff*, 247 Fed. 22; *Barfield v. Dwight*, 146 Ga. 824, 92 S.

E. 633; *Wolf v. Lawrence*, 276 Ill. 11, 114 N. E. 567.

²⁸ *Barfield v. Dwight*, 146 Ga. 824, 92 S. E. 633.

²⁹ *Hoshaw v. Cosgriff*, 247 Fed. 22.

³⁰ *Wolf v. Lawrence*, 276 Ill. 11, 114 N. E. 567.

³¹ See § 2183.

§ 2155. Written evidence. Since the parol evidence rule applies solely to written contracts, in actions brought to enforce them, it does not forbid the use of extrinsic evidence to contradict written evidence, as long as the written evidence is not the written contract on which the action is based.¹ Thus if letters written by one of the parties are not a part of a written contract, oral evidence is admissible to contradict the statements made therein.² So extrinsic oral evidence is admissible to rebut evidence tending to show fraud, even if the latter evidence is in writing. Thus where false statements are contained in an application for insurance, extrinsic evidence is admissible to show that the applicant stated the facts correctly to the agent of the insurance company, and that the latter wrote the application.³ In Michigan such evidence is admissible if the application is signed before the agent writes the answers.⁴ A memorandum in lead pencil, made by one party and not intended by both parties as the written contract, may be contradicted.⁵ So a written acknowledgment of a contract,⁶ or a deed,⁷ or a chattel mortgage, prepared by plaintiffs to be executed by

¹ **California.** *Wise v. Collins*, 121 Cal. 147, 53 Pac. 640.

Illinois. *Smith v. Mayfield*, 163 Ill. 447, 45 N. E. 157.

Iowa. *Dean v. Shepard Co.*, 95 Ia. 89, 63 N. W. 582; *Parno v. Ins. Co.*, 114 Ia. 132, 86 N. W. 210; *Mitchell v. Beck* (Ia.), 156 N. W. 428.

Kansas. *People's Gas Co. v. Fletcher*, 81 Kan. 76, 41 L. R. A. (N.S.) 1161, 105 Pac. 34.

Kentucky. *Gully v. Grubbs*, 24 Ky. (1 J. J. Mar.) 387.

Nebraska. *German Ins. Co. v. Frederick*, 57 Neb. 538, 77 N. W. 1106.

New York. *Seeley v. Osborne*, 220 N. Y. 416, 116 N. E. 97.

North Carolina. *Holloman v. Southern Ry. Co.*, 172 N. Car. 372, 90 S. E. 292.

Pennsylvania. *Kister v. Ins. Co.*, 128 Pa. St. 553, 15 Am. St. Rep. 696, 5 L. R. A. 646, 18 Atl. 447.

West Virginia. *Polino v. Keck*, 80 W. Va. 426, 92 S. E. 665.

² *Alexander v. Thompson*, 42 Minn.

498, 44 N. W. 534; *Abrahams v. Swan*, 18 W. Va. 274, 41 Am. St. 692.

See also, *Holloman v. Southern Ry. Co.*, 172 N. Car. 372, 90 S. E. 292.

³ **Iowa.** *Parno v. Ins. Co.*, 114 Ia. 132, 86 N. W. 210.

Nebraska. *German Ins. Co. v. Frederick*, 57 Neb. 538, 77 N. W. 1106.

Mississippi. *Mutual, etc., Association v. Ogletree*, 77 Miss. 7, 25 So. 869.

Pennsylvania. *Kister v. Ins. Co.*, 128 Pa. St. 553, 15 Am. St. Rep. 696, 5 L. R. A. 646, 18 Atl. 447.

Tennessee. *Bennett v. Ins. Co.*, 107 Tenn. 371, 64 S. W. 758.

Virginia. *Virginia, etc., Ins. Co. v. Goode*, 95 Va. 762, 30 S. E. 370.

⁴ *Brown v. Ins. Co.*, 65 Mich. 306, 8 Am. St. Rep. 894, 32 N. W. 610.

⁵ *Pecos Valley Bank v. Evans-Snyder-Buel Co.*, 107 Fed. 654, 46 C. C. A. 534.

⁶ *Burkhart v. Hart*, 36 Or. 586, 60 Pac. 205.

⁷ *People's Gas Co. v. Fletcher*, 81 Kan. 76, 41 L. R. A. (N.S.) 1161, 105 Pac. 34.

defendant, but not in fact executed by him,⁸ may be contradicted, since neither is a written contract within the meaning of this rule. On the same principle, recitals of fact and receipts may be contradicted even if in writing, and even if in an instrument a part of which is a contract.⁹ So A loaned B two hundred and eighty dollars and by mistake B gave his note for two hundred and fifty dollars. B repaid two hundred and eighty dollars and then sued to recover thirty dollars as paid by mistake. It was held that A could show the real transaction, as the action was not on the note.¹⁰ The test which determines the admissibility of extrinsic evidence in such cases is this: Is the written provision a contractual term? In such case the parol evidence rule applies. Or is it merely the written recital of a fact? In such case the parol evidence rule has no application. Illustrations of this distinction will be found in the following sections.

§ 2156. Recital of facts—Receipts. A receipt, if free from contractual terms, is a mere recital of the fact of the payment of money or delivery of property. The parol evidence rule does not apply to such receipts, and they may be contradicted by extrinsic evidence like other recitals of fact if such evidence is not inconsistent with the contractual provisions of such instrument.¹ The receipt of payment which is found in the ordinary form of a deed may be contradicted, and the grantor may maintain an action for recovery of the purchase price, or he may enforce a vendor's lien against

⁸ *Wise v. Collins*, 121 Cal. 147, 53 Pac. 640.

⁹ See §§ 2156 et seq.

¹⁰ *Foster v. Kirby*, 31 Mo. 496.

¹ **Alabama.** *Gravlee v. Lamkin*, 120 Ala. 210, 24 So. 756; *Rarden v. Cunningham*, 136 Ala. 263, 34 So. 26; *Windham v. Hydrick*, 197 Ala. 125, 72 So. 403; *Williams v. Shows*, 197 Ala. 596, 73 So. 99.

Arkansas. *National Trust & Credit Co. v. Polk*, 123 Ark. 24, 183 S. W. 195; *Prescott & N. W. R. Co. v. Davis*, 126 Ark. 366, 191 S. W. 210.

California. *Jenne v. Burger*, 120 Cal. 444, 52 Pac. 706; *Carpenter v. Markham*, 172 Cal. 112, 155 Pac. 644; *Honore v. Lemm*, — Cal. —, 184 Pac. 664.

Colorado. *Colorado, etc., Co. v. Ponick*, 16 Colo. App. 478, 66 Pac. 458.

Illinois. *Merchants' Dispatch Transportation Co. v. Furthmann*, 149 Ill. 66, 41 Am. St. Rep. 265, 36 N. E. 624; *McDonald v. Danahy*, 196 Ill. 133, 63 N. E. 648; *Starkweather v. Maginnis*, 196 Ill. 274, 63 N. E. 692.

Indiana. *Henry v. Henry*, 11 Ind. 236, 71 Am. Dec. 354.

Iowa. *Butler v. Farmers' National Bank*, 173 Ia. 659, 155 N. W. 999.

Kansas. *Missouri-Pacific Ry. v. Lovelace*, 57 Kan. 195, 45 Pac. 590.

Maryland. *Schneider v. Martens*, 127 Md. 547, 96 Atl. 673.

Massachusetts. *Wilkinson v. Scott*, 17 Mass. 240.

the realty.² Thus a receipt for an insurance premium;³ a statement in a contract of sale that a certain amount had been paid under such contract;⁴ the receipt of property by a common carrier shown in the bill of lading,⁵ either as to the fact of the receipt of goods at all,⁶ or as to the quantity of goods received;⁷ or as to the condition in which the property was received;⁸ a receipt of property shown by a load-check;⁹ a check given by a sleeping-car

Minnesota. McCaffery v. Burkhardt, 97 Minn. 1, 114 Am. St. Rep. 688, 105 N. W. 971.

Montana. Hennesay v. Furniture Co., 30 Mont. 264, 76 Pac. 291.

Nebraska. Morse v. Rice, 36 Neb. 212, 54 N. W. 308.

New Jersey. Kenny v. Kane, 50 N. J. L. 562, 14 Atl. 597.

New York. Smith v. Holland, 61 N. Y. 635; Seeley v. Osborne, 220 N. Y. 416, 116 N. E. 97.

Oklahoma. Robertson v. Vandeventer, 51 Okla. 561, 152 Pac. 107; American Home Life Insurance Co. v. Citizens' State Bank, — Okla. —, L. R. A. 1918B, 296, 168 Pac. 437; American National Bank v. Funk, — Okla. —, L. R. A. 1918F, 1137, 172 Pac. 1078; Kuykendall v. Lambert, — Okla. —, 173 Pac. 657.

Tennessee. Kirkpatrick v. Smith, 19 Tenn. (10 Humph.) 188.

Vermont. Jones v. Campbell, — Vt. —, L. R. A. 1918A, 1056, 102 Atl. 102.

Washington. Jones-Rosquist-Killen Co. v. Nelson, 98 Wash. 539, 167 Pac. 1130.

West Virginia. Cushwa v. Building Association, 45 W. Va. 490, 32 S. E. 259; Polino v. Keck, 80 W. Va. 426, 92 S. E. 665.

Wisconsin. Twohy Mercantile Co. v. McDonald's Estate, 108 Wis. 21, 83 N. W. 1107.

² Schneider v. Martens, 127 Md. 547, 96 Atl. 673.

³ Robison v. Wolf, 27 Ind. App. 683, 62 N. E. 74; Sargent v. Ins. Co., 189 Pa. St. 341, 41 Atl. 351.

⁴ Jones-Rosquist-Killen Co. v. Nelson, 98 Wash. 539, 167 Pac. 1130.

⁵ United States. The Lady Franklin, 75 U. S. (8 Wall.) 325, 19 L. ed. 455; Planters' Fertilizer Mfg. Co. v. Elder, 101 Fed. 1001, 42 C. C. A. 130.

Arkansas. Prescott & N. W. R. Co. v. Davis, 126 Ark. 366, 191 S. W. 210.

California. Pereira v. Ry., 66 Cal. 92, 4 Pac. 988.

Illinois. Merchants' Dispatch Co. v. Furthmann, 149 Ill. 66, 41 Am. St. Rep. 265, 36 N. E. 624; Lake Shore, etc., Ry. v. Bank, 178 Ill. 506, 53 N. E. 326.

Iowa. Chapin v. Ry., 79 Ia. 582, 44 N. W. 820.

Massachusetts. Blanchard v. Page, 74 Mass. (8 Gray) 281.

Michigan. Strong v. Ry., 15 Mich. 206, 93 Am. Dec. 184.

New York. Ellis v. Willard, 9 N. Y. 529; Meyer v. Peck, 28 N. Y. 590.

Ohio. Dean v. King, 22 O. S. 118; May v. Babcock, 4 Ohio 334.

South Carolina. Ferebee v. Atlantic Coast Line R. Co., — S. Car. —, 95 S. E. 349.

⁶ Grant v. Norway, 10 C. B. 665; The Lady Franklin, 75 U. S. (8 Wall.) 325, 19 L. ed. 455; National Bank v. Ry., 44 Minn. 224, 20 Am. St. Rep. 566, 9 L. R. A. 263, 46 N. W. 342, 560.

⁷ Hall v. Mayo, 87 Mass. (7 All.) 454; Meyer v. Peck, 28 N. Y. 590; Dean v. King, 22 O. S. 118.

⁸ Ferebee v. Atlantic Coast Line R. Co., — S. Car. —, 95 S. E. 349.

⁹ Anderson v. Flouring Mills Co., 37 Or. 483, 82 Am. St. Rep. 711, 50 L. R. A. 235, 60 Pac. 839.

conductor to a passenger on the surrender of the passenger's ticket to the conductor;¹⁰ a deposit slip or receipt given by a bank;¹¹ an entry by a bank in a pass-book, showing money received by the bank to the credit of the depositor;¹² and a recital in a non-negotiable note that a part of its consideration is for services heretofore rendered,¹³ are each mere receipts and may be contradicted by extrinsic evidence. Memoranda of payments which are endorsed upon the back of a negotiable instrument are receipts and not contracts, and may be contradicted by extrinsic evidence.¹⁴ Even if a memorandum which was delivered at the same time as a check, shows that the check is in part intended as a gift, extrinsic evidence is admissible to show the consideration for the check and to show that the entire amount of such check was for value.¹⁵ Extrinsic evidence is admissible to show that a receipt applies to but one out of several transactions between the parties thereto.¹⁶ The creditor may show that the amount paid, together with the value of property received from the debtor, amounted to the entire debt.¹⁷ The party giving the receipt may show that the party paying

¹⁰ *Mann-Boudoir Sleeping Car Co. v. Dupre*, 54 Fed. 646, 21 L. R. A. 289, 4 C. C. A. 540.

¹¹ *Iowa. Butler v. Farmers' National Bank*, 173 Ia. 659, 155 N. W. 999.

New York. First National Bank v. Clark, 134 N. Y. 368, 17 L. R. A. 580, 32 N. E. 38.

Oklahoma. American Home Life Insurance Co. v. Citizens' State Bank, — Okla. —, L. R. A. 1918B, 296, 168 Pac. 437; *American National Bank v. Funk*, — Okla. —, L. R. A. 1918F, 1137, 172 Pac. 1078.

Pennsylvania. Pool v. White, 175 Pa. St. 459, 34 Atl. 801.

South Carolina. Fort v. First National Bank, 82 S. Car. 427, 64 S. E. 405.

Apparently contra, see *Long v. Straus*, 107 Ind. 94, 57 Am. Rep. 87, 6 N. E. 123.

¹² *Scotland. Commercial Bank v. Rhind*, 3 Macq. H. L. Cas. 643.

Alabama. Anniston National Bank v. Howell, 116 Ala. 375, 22 So. 471.

Iowa. Anderson v. Leverich, 70 Ia. 741.

Kansas. Talcott v. Bank, 53 Kan. 480, 24 L. R. A. 737, 36 Pac. 1066.

Massachusetts. Union Bank v. Knapp, 20 Mass. (3 Pick.) 96, 15 Am. Dec. 182.

Michigan. Davis v. Bank, 53 Mich. 163, 18 N. W. 629.

Missouri. Quattrochi v. Bank, 89 Mo. App. 500.

New York. Mechanics' & Farmers' Bank v. Smith, 19 Johns. (N. Y.) 115.

Contra, *Manhattan Co. v. Lydig*, 4 Johns. (N. Y.) 377, 4 Am. Dec. 289.

¹³ *Mulligan v. Smith*, 13 Colo. App. 231, 57 Pac. 731.

¹⁴ *McCaffery v. Burkhardt*, 97 Minn. 1, 114 Am. St. Rep. 688, 105 N. W. 971.

¹⁵ *Foxworthy v. Adams*, 136 Ky. 403, 27 L. R. A. (N.S.) 308, 124 S. W. 381.

¹⁶ *Robertson v. Vandeventer*, 51 Okla. 561, 152 Pac. 107.

¹⁷ *Williams v. Shows*, 197 Ala. 596, 73 So. 99.

money to him did so as agent for another person.¹⁸ A receipt does not prevent the parties thereto from showing by whom the purchase was really made.¹⁹ A receipt which sets forth the payment of a certain amount and which also sets forth the application of such payment, may be contradicted by extrinsic evidence.²⁰

A matter which is ordinarily a recital of fact,²¹ such as the condition of certain property at a specified time,²² may by express agreement be made a contractual term, and in such case under the principle subsequently discussed,²³ such provision can not be contradicted. If a lease of certain property provides that a schedule as to the condition of such property upon which the parties had agreed should be attached to the lease and made a part thereof, such agreement as to the condition of such property is conclusive and can not be contradicted.²⁴

§ 2157. Receipts and releases containing contractual terms.

An instrument which is in part a receipt may also contain contractual terms. In such case, while the part of it which is a receipt may be contradicted by extrinsic evidence, the contractual terms are within the operation of the parol evidence rule.¹ A bill of lading,² a storage receipt,³ or a warehouse receipt,⁴ often con-

¹⁸ *Rand v. Scofield*, 43 Ill. 167; *McKinney v. Harvie*, 38 Minn. 18, 8 Am. St. Rep. 640, 35 N. W. 668.

¹⁹ *French v. Newberry*, 124 Mich. 147, 82 N. W. 840.

²⁰ *National Trust & Credit Co. v. Polk*, 123 Ark. 24, 183 S. W. 195.

²¹ *East Sioux Falls Quarry Co. v. Wisconsin Granite Co.*, 39 S. D. 301, 164 N. W. 77.

²² *East Sioux Falls Quarry Co. v. Wisconsin Granite Co.*, 39 S. D. 301, 164 N. W. 77.

²³ See § 2157.

²⁴ *East Sioux Falls Quarry Co. v. Wisconsin Granite Co.*, 39 S. D. 301, 164 N. W. 77.

¹ *Georgia. Hill v. Terrell*, 123 Ga. 49, 51 S. E. 81.

New York. Coon v. Knap, 8 N. Y. 402, 59 Am. Dec. 502.

North Dakota. Knapp v. Minneapolis, St. P. & S. S. M. Ry. Co., 34 N. D. 466, 159 N. W. 81.

Oklahoma. Robertson v. Vandeventer, 51 Okla. 561, 152 Pac. 107.

Oregon. Milos v. Covacevich, 40 Or. 239, 66 Pac. 914.

Wisconsin. Kammermayer v. Hilz, 107 Wis. 101, 82 N. W. 689.

² *Georgia. McElveen v. Ry.*, 109 Ga. 249, 77 Am. St. Rep. 371, 34 S. E. 281.

Indiana. Louisville R. R. v. Wilson, 119 Ind. 352, 4 L. R. A. 244, 21 N. E. 341.

Louisiana. Sonia Cotton-Oil Co. v. The Red River, 106 La. 42, 87 Am. St. Rep. 294, 30 So. 303.

Massachusetts. Porter v. Oceanic S. S. Co., 223 Mass. 224, 111 N. E. 864.

Minnesota. Bank v. R. R., 44 Minn. 224, 20 Am. St. Rep. 566, 9 L. R. A. 263, 46 N. W. 342, 560.

New York. Van Etten v. Newton, 134 N. Y. 143, 30 Am. St. Rep. 630, 31 N. E. 334.

North Dakota. Knapp v. Minneapolis, St. P. & S. S. M. Ry. Co., 34 N. D. 466, 159 N. W. 81.

³ *Thompson v. Thompson*, 78 Minn. 379, 384, 81 N. W. 204, 81 N. W. 543.

⁴ *Union Storage Co. v. Speck*, 194 Pa. St. 126, 45 Atl. 48.

tained contractual terms which come within the operation of the parol evidence rule. Thus a shipper can not introduce evidence of an oral contract to show that the clause in the written bill of lading, limiting the carrier's liability, was not to be operative,⁵ or to show that the contract was made with the consignee and not with the consignor.⁶ So where a bill of lading recited the delivery of fifty-four thousand bushels of wheat, and provided "all the deficiency in cargo to be paid by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee," the statement as to the amount of wheat received was thereby made a contractual term, and not a mere receipt; and accordingly the carrier was liable for any deficiency, though he did not receive the amount stipulated.⁷ A certificate of deposit is a contract and not merely a receipt.⁸ Accordingly, if signed, "A, manager," and A was manager of a private bank, an oral agreement that the deposit was with another bank of which A was president can not be enforced.⁹ If a lease recites that the consideration consists of "the covenants and agreements hereafter mentioned," and one of such covenants is a covenant by the lessee to maintain a specified manufacturing plant upon the leased premises, extrinsic evidence is inadmissible to show that the covenant to maintain such manufacturing plant was not intended as the consideration of such lease.¹⁰

§ 2158. Consideration recited as fact. If the consideration is not recited in the written contract, or if recited appears only as a recital of fact and not as a contractual term, extrinsic evidence is admissible to show what the real consideration is, if such evidence is not inconsistent with the contractual provisions of such contract.¹ Such a recital at most raises only a presumption that the consid-

⁵ *Davis v. R. R.*, 66 Vt. 290, 44 Am. St. Rep. 852, 29 Atl. 313.

⁶ *Van Etten v. Newton*, 134 N. Y. 143, 30 Am. St. Rep. 630, 31 N. E. 334.

⁷ *Rhodes v. Newhall*, 126 N. Y. 574, 22 Am. St. Rep. 859, 27 N. E. 947.

⁸ *Bickley v. Bank*, 39 S. Car. 281, 39 Am. St. Rep. 721, 17 S. E. 977.

⁹ *Bickley v. Bank*, 39 S. Car. 281, 39 Am. St. Rep. 721, 17 S. E. 977.

¹⁰ *Jones v. Epstein*, — Ark. —, 204 S. W. 217.

¹ *Arkansas. Hockaday v. Warmack*, 121 Ark. 518, 182 S. W. 263.

California. Royer v. Kelly, 174 Cal. 70, 161 Pac. 1148.

Georgia. Stone v. Minter, 111 Ga. 45, 50 L. R. A. 356, 36 S. E. 321; *Bond v. Perrin*, 145 Ga. 200, 88 S. E. 954.

Illinois. Ryan v. Hamilton, 205 Ill. 191, 68 N. E. 781 [reversing, 103 Ill. App. 212]; *Brosseau v. Louy*, 209 Ill. 405, 70 N. E. 901 [affirming, 116 Ill. App. 16].

eration thus recited as a fact is the true consideration,² and such recital is not conclusive as between the parties,³ and it does not operate as an estoppel.⁴ If the consideration is recited in a contract of sale as a fact, extrinsic evidence is admissible to show the true consideration,⁵ and it is not necessary to resort to equity for reformation.⁶ "The language with reference to the consideration is not contractual—it is merely by way of recital of a fact, viz., the amount of such consideration, and not an agreement to pay it, and hence such recitals may be contradicted."⁷ A provision which

Indiana. *Pickett v. Green*, 120 Ind. 584, 22 N. E. 737; *Stewart v. R. R.*, 141 Ind. 55, 40 N. E. 67; *Lake Erie, etc., Ry. v. Holland*, 162 Ind. 406, 69 N. E. 138; *Moore v. Harrison*, 26 Ind. App. 408, 59 N. E. 1077; *Citizens' Street Ry. v. Heath*, 29 Ind. App. 395, 62 N. E. 107.

Iowa. *Farmers' Savings Bank v. Hansmann*, 114 Ia. 49, 86 N. W. 31; *Allen v. Rees*, 136 Ia. 423, 8 L. R. A. (N.S.) 1137, 110 N. W. 583.

Kentucky. *Price v. Price*, 111 Ky. 771, 64 S. W. 746, 66 S. W. 529; *Poor's Executor v. Scott (Ky.)*, 68 S. W. 397; *Chrisman v. Quick*, 174 Ky. 845, 193 S. W. 13.

Maryland. *Hieatzman v. Braecklein*, 131 Md. 482, 102 Atl. 917.

Michigan. *Stotts v. Stotts*, 198 Mich. 605, 165 N. W. 761.

Minnesota. *Jensen v. Crosby*, 80 Minn. 158, 83 N. W. 43.

New Hampshire. *Aldrich v. Whitaker*, 70 N. H. 627, 47 Atl. 591.

New Mexico. *Pople v. Orekar*, 22 N. M. 307, 161 Pac. 1110.

New York. *Keuka College v. Ray*, 167 N. Y. 96, 60 N. E. 325; *Medical College Laboratory v. University*, 178 N. Y. 153, 70 N. E. 467.

North Carolina. *Walters v. Walters*, 172 N. Car. 328, 90 S. E. 304.

North Dakota. *Forester v. Van Auken*, 12 N. D. 175, 96 N. W. 301; *Erickson v. Wiper*, 33 N. D. 193, 157 N. W. 592.

Utah. *Miller v. Livingston*, 22 Utah 174, 61 Pac. 569.

Virginia. *Blose v. Blose*, 118 Va. 16, 86 S. E. 911.

Washington. *Williams v. Blumenthal*, 27 Wash. 24, 67 Pac. 393; *Jones-Rosquist-Killen Co. v. Nelson*, 98 Wash. 539, 167 Pac. 1130; *Roberts v. Stiltner*, 101 Wash. 397, 172 Pac. 738.

West Virginia. *Flannigan v. Monongahela Tie & Lumber Co.*, 77 W. Va. 158, 87 S. E. 165; *Monongahela Tie & Lumber Co. v. Flannigan*, 77 W. Va. 162, 87 S. E. 161.

Wisconsin. *Butt v. Smith*, 121 Wis. 566, 99 N. W. 328; *Perkins v. McAuliffe*, 105 Wis. 582, 81 N. W. 645; *Cuddy v. Foreman*, 107 Wis. 519, 83 N. W. 1103.

² *Flannigan v. Monongahela Tie & Lumber Co.*, 77 W. Va. 158, 87 S. E. 165; *Monongahela Tie & Lumber Co. v. Flannigan*, 77 W. Va. 162, 87 S. E. 161.

³ *Chapman v. Schroeder*, 166 Wis. 330, 165 N. W. 295.

⁴ *Royer v. Kelly*, 174 Cal. 70, 161 Pac. 1148.

⁵ *Bond v. Perrin*, 145 Ga. 200, 88 S. E. 954; *Jones-Rosquist-Killen Co. v. Nelson*, 98 Wash. 539, 167 Pac. 1130; *Chapman v. Schroeder*, 166 Wis. 330, 165 N. W. 295.

⁶ *Chapman v. Schroeder*, 166 Wis. 330, 165 N. W. 295.

⁷ *Royer v. Kelly*, — Cal. —, 161 Pac. 1148; *Pickett v. Green*, 120 Ind. 584, 588, 22 N. E. 737.

fixes the price of the article and which acknowledges receipt of a certain amount, may be contradicted by showing that a certain amount had been added both to the statement of the price and to the statement of the amount paid, thus leaving unaffected the balance actually due.⁸ The recital of a consideration in the ordinary form of promissory note, is a recital of a consideration as a fact, and such recital does not prevent extrinsic evidence tending to show the true consideration.⁹ An oral contract of employment may be shown to be a part of the consideration for a release of damages.¹⁰ So it may be shown that a settlement of suit for money loaned in a criminal action included also a settlement of suit for a breach of promise.¹¹ A note which on its face recites that it is for services rendered by a payee as attorney may be shown to be supported by a promise of the payee to attend to the interests of the maker of a note in a specified estate.¹² The consideration of a note may be shown to be a renewal of a prior note.¹³ The fact that a check is given together with a written memorandum, showing in part that it is a gift, does not preclude the introduction of extrinsic evidence tending to show that the face of such check did not exceed the actual value of the consideration for which it was given.¹⁴

⁸ *Jones-Rosquist-Killen Co. v. Nelson*, 98 Wash. 539, 167 Pac. 1130.

⁹ *Alabama. Booth v. Fire Engine Co.*, 118 Ala. 369, 24 So. 405; *Folmar v. Siler*, 132 Ala. 297, 31 So. 719.

Arkansas. Hockaday v. Warmack, 121 Ark. 518, 182 S. W. 263.

Georgia. Burke v. Napier, 106 Ga. 327, 32 S. E. 134; *Thrower v. Baker*, 144 Ga. 372, 87 S. E. 301.

Illinois. Mason v. Griffith, 281 Ill. 246, 118 N. E. 18.

Iowa. Allen v. Rees, 136 Ia. 423, 8 L. R. A. (N.S.) 1137, 110 N. W. 583.

Kansas. Rice v. Rice, 101 Kan. 20, 165 Pac. 799.

Kentucky. Chrisman v. Quick, 174 Ky. 845, 193 S. W. 13.

Nebraska. Gifford v. Fox (Neb.), 95 N. W. 1066.

North Carolina. Walters v. Walters, 172 N. Car. 328, 90 S. E. 304; *International Harvester Co. v. Parham*, 172 N. Car. 389, 90 S. E. 503.

North Dakota. Erickson v. Wiper, 33 N. D. 193, 157 N. W. 592.

Oklahoma. Bank of Commerce v. Webster, — Okla. —, 172 Pac. 943.

Oregon. Savage v. Scroggin, 83 Or. 51, 162 Pac. 1061.

Virginia. Blose v. Blose, 118 Va. 16, 86 S. E. 911.

¹⁰ *Galvin v. Ry.*, 180 Mass. 587, 62 N. E. 961.

Contra, on the theory that this is a contractual term. *Atchison, etc., Ry. v. Vanordstrand*, 67 Kan. 386, 73 Pac. 113.

¹¹ *Schubkagel v. Dierstein*, 131 Pa. St. 46, 6 L. R. A. 481, 18 Atl. 1059.

¹² *Jones v. Rhea*, 122 N. Car. 721, 30 S. E. 346.

¹³ *Merchants' National Bank v. Vandiver*, 104 Ga. 165, 30 S. E. 650.

¹⁴ *Foxworthy v. Adams*, 136 Ky. 403, 27 L. R. A. (N.S.) 308, 124 S. W. 381.

The recital of a consideration in a deed is a recital of fact and may be contradicted.¹⁵ The consideration for a conveyance may be shown to be the permission by the grantee to the grantor to grow wheat on a part of the land conveyed.¹⁶ So the real consideration may be shown to be the release of a guarantor,¹⁷ or of an obligor upon a note.¹⁸ Where A conveyed realty to B in payment of a debt, but A, in order to prevent trouble with his relatives, inserted a money consideration of two thousand, eight hundred dollars, and induced B to advance him that amount by a promise to refund it later, B may show the real transaction.¹⁹ If an instrument purports to be "for value received," the actual consideration may be shown. Thus a written guaranty of a note, purporting to be "for value received," may be shown to be in consideration of an agreement to forbear suit.²⁰ If a nominal valuable consideration is shown in the instrument, the real consideration may be shown, as where the consideration is one dollar,²¹ or one dollar and other considerations.²² If an assignment of a right is made in consideration of one dollar and other good and valuable considerations, extrinsic evidence is admissible to show that such consideration is still due and unpaid.²³ The recital in a deed of a substantial consideration and other valuable considerations, does not prevent evidence tending to show the amount of the consideration,²⁴ or five dollars and love and affection.²⁵ So if a written contract shows on its face that it is divisible, it may be shown that the actual consideration was for one of the promises only.²⁶ This rule has been extended to a case where an aggregate sum as consideration for several covenants may be shown to be made up of a separate amount for each, and thus failure of consideration for a note given may be shown.²⁷

¹⁵ *London v. G. L. Anderson Brass Works*, 197 Ala. 16, 72 So. 359. See § 2161.

¹⁶ *Breitenwischer v. Clough*, 111 Mich. 6, 66 Am. St. Rep. 372, 69 N. W. 88.

¹⁷ *Martin v. Grocery Co.* (Tex. Civ. App.), 66 S. W. 212 [writ of error denied (Tex.), 67 S. W. 883].

¹⁸ *Timmier v. Liles*, 58 S. Car. 284, 36 S. E. 652.

¹⁹ *Stone v. Minter*, 111 Ga. 45, 50 L. R. A. 356, 36 S. E. 321.

²⁰ *Citizens', etc., Co. v. Babbitt*, 71 Vt. 182, 44 Atl. 71.

²¹ *Wolf v. Haslach*, 65 Neb. 303, 91 N. W. 283.

²² *Hieatzman v. Braecklein*, 131 Md. 482, 102 Atl. 917; *Wright v. Stewart*, 19 Wash. 179, 52 Pac. 1020.

²³ *Hieatzman v. Braecklein*, 131 Md. 482, 102 Atl. 917.

²⁴ *Klump v. Howcott*, 139 La. 163, 71 So. 353.

²⁵ *Barnes v. Black*, 193 Pa. St. 447, 74 Am. St. Rep. 694, 44 Atl. 550.

²⁶ *Platt v. Scribner*, 18 Ohio C. C. 452.

²⁷ *Field v. Austin*, 131 Cal. 379, 63 Pac. 692.

§ 2159. Receipts in full. Whether an instrument which acknowledges a receipt in full of obligations is to be regarded as contractual in its character, so that extrinsic evidence can not be used to show the amount paid or the claims which it was intended to release, or whether it is a mere recital of a fact which may be contradicted, is a question upon which there is some conflict, at least, in obiter, although the greater number of adjudications can be reconciled by distinguishing between contractual provisions and statements of fact. The recital in a receipt that it is in full of accounts is a statement of fact, and as such it may be contradicted by extrinsic evidence of the amount due and the amount paid.¹ The amount which is due in fact may be shown in spite of such a recital.² A receipt in full for payment of wages under a prior written contract does not prevent extrinsic evidence of a subsequent oral contract for the payment of an additional compensation in consideration of continuing in such employment.³ An instrument which shows that an employe has "settled up to date * * * for all work," and which shows that a certain amount has been paid, is a recital of fact and not a contract; and accordingly the true amount of the obligation and of the amount paid may be shown.⁴ If the attorney for plaintiffs endorses "fully satisfied" upon an execution, extrinsic evidence is admissible to show the amount which was actually received.⁵ Even if an instrument purports to be a release, recitals of fact,⁶ such as a recital that payment is made "in full as per contract for house,"⁷ does not pre-

¹ *United States. Fire Insurance Association v. Wickham*, 141 U. S. 564, 35 L. ed. 860.

Alabama. Williams v. Shows, 197 Ala. 596, 73 So. 99.

Arkansas. National Trust & Credit Co. v. Polk, 123 Ark. 24, 183 S. W. 195.

California. Jersey Island Dredging Co. v. Whitney, 149 Cal. 269, 86 Pac. 691; *Carpenter v. Markham*, 172 Cal. 112, 155 Pac. 644.

Iowa. Mounce v. Kurtz, 101 Ia. 192, 70 N. W. 119; *Meginnes v. McChesney*, 179 Ia. 563, 160 N. W. 50 [sub nomine, *Meginnes v. Copeland*, L. R. A. 1917E, 1061].

Massachusetts. Lait v. Sears, 226 Mass. 119, 115 N. E. 247.

New York. Komp v. Raymond, 175 N. Y. 102, 67 N. E. 113.

Vermont. Jones v. Campbell, — Vt. —, L. R. A. 1918A, 1056, 102 Atl. 102.

Wisconsin. Twohy Mercantile Co. v. McDonald, 108 Wis. 21, 83 N. W. 1107.

² *Williams v. Shows*, 197 Ala. 596, 73 So. 99.

³ *Meginnes v. McChesney*, 179 Ia. 563, 160 N. W. 50 [sub nomine, *Meginnes v. Copeland*, L. R. A. 1917E, 1060].

⁴ *Jones v. Campbell*, — Vt. —, L. R. A. 1918A, 1056, 102 Atl. 102.

⁵ *Lait v. Sears*, 226 Mass. 119, 115 N. E. 247.

⁶ *Carpenter v. Markham*, 172 Cal. 112, 155 Pac. 644.

⁷ *Carpenter v. Markham*, 172 Cal. 112, 155 Pac. 644.

clude the use of extrinsic evidence. If the instrument which purports to be a receipt in full or a release of claims, contains provisions which are contractual in their nature, such provisions can not be contradicted by extrinsic evidence of the intention of the parties.⁸ A contract which recites in detail that one party thereto waives and releases claims of every sort, can not be contradicted by showing that certain claims were not included.⁹ An instrument which purports to be a release of claims of a receipt in full, is contractual in its nature as far as it provides for the discharge of one party thereto from liability.¹⁰ Accordingly, where a receipt in full is given in the settlement of all the claims of a certain class, extrinsic evidence can not be introduced to show that the parties had, when such receipt was given, agreed that some specified claim should not be affected by the receipt.¹¹ Thus an instrument acknowledging the receipt of a certain sum of money, in consideration of which one party releases all interest in a given estate, is a written contract, and the party thus releasing her interest can not show an oral agreement that she should receive a greater sum than that mentioned in the receipt, in case another party interested in the estate received a greater sum.¹² So an instrument as follows: "\$15.50. Wooster, Ohio, May 13, 1890. This is to certify that I have this day settled with John Ely, and he has paid me all he owed me, up to this date, and I have no claims or demands against him of any kind whatsoever. Mrs. Wm. Jackson," is not merely a receipt but also a contract; and extrinsic evidence can not be used to show that outstanding items of indebtedness were omitted.¹³ So if an action for personal injuries is settled by the

⁸ *Jensen v. McConnell*, 31 Ida. 87, 169 Pac. 292.

⁹ *Jensen v. McConnell*, 31 Ida. 87, 169 Pac. 292.

¹⁰ *United States. Green v. Ry.*, 92 Fed. 873, 35 C. C. A. 68.

Connecticut. Bull v. Bull, 43 Conn. 455; *Allen v. Ruland*, 79 Conn. 405, 118 Am. St. Rep. 146, 65 Atl. 138.

Massachusetts. Squires v. Amherst, 145 Mass. 192, 13 N. E. 609.

Minnesota. Morris v. Ry., 21 Minn. 91.

New Jersey. Church v. Ry., 63 N. J. L. 470, 43 Atl. 696.

Ohio. Jackson v. Ely, 57 O. S. 450, 49 N. E. 792.

Rhode Island. Vaughan v. Mason, 23 R. I. 348, 50 Atl. 390.

Wisconsin. Conant v. Kimball, 95 Wis. 550, 70 N. W. 74.

Contra, French v. Arnett, 15 Ind. App. 674, 44 N. E. 551; *Mounce v. Kurtz*, 101 Ia. 192, 70 N. W. 119; *Allen v. Mill Co.*, 18 Wash. 216, 51 Pac. 372.

¹¹ *Seeman v. Mining Co.*, 22 Ohio C. C. 311, 12 Ohio C. D. 206.

¹² *Cassilly v. Cassilly*, 57 O. S. 582, 49 N. E. 795.

¹³ *Jackson v. Ely*, 57 O. S. 450, 49 N. E. 792.

parties, and a written instrument is executed which purports to be a full settlement and discharge of all damages in consideration of a certain sum of money, extrinsic evidence is inadmissible to show a promise by the party liable for damages to pay a further sum in settlement of such action.¹⁴ So where a creditor gives a release of a joint debtor, and surrenders a note executed by the joint debtors, extrinsic evidence is inadmissible to show an oral agreement that the other debtor should not be released.¹⁵ However, a receipt given "in full settlement of all claims and demands for all logs contained" in a specified raft of logs, has been held to be a mere receipt, and not a contract, and hence not within the parol evidence rule.¹⁶

§ 2160. Extrinsic evidence as to consideration contradicting legal effect of instrument. If the extrinsic evidence which is offered for the purpose of showing the true consideration is inconsistent with the contractual provisions of the instrument or with its legal effect, such extrinsic evidence is inadmissible for that reason and not because it contradicts the recital of the consideration.¹ If a deed recites the consideration as a specified amount of money, and such deed is sufficient in law to pass the property without exceptions or reservations, extrinsic evidence is inadmissible to show that a part of the consideration was the reservation of an easement across such realty.² If a conveyance purports upon its face to be absolute, extrinsic evidence is inadmissible to show that the consideration of such conveyance was that the grantee should permit the grantor to reside upon the premises thus conveyed and that the grantee should devise such property to grantor upon the death of the grantee.³ Under a conveyance of realty in the ordinary form, extrinsic evidence is inadmissible to show a contract by which the grantee agrees to divide with the grantor profits which may arise upon a resale of such realty.⁴ Whether the

¹⁴ *Milich v. Packing Co.*, 60 Kan. 229, 56 Pac. 1; *Jackowski v. Steel Co.*, 103 Wis. 448, 79 N. W. 757.

¹⁵ *Clark v. Mallory*, 185 Ill. 227, 56 N. E. 1099 [affirming, 83 Ill. App. 488].

¹⁶ *Allen v. Mill Co.*, 18 Wash. 216, 51 Pac. 373.

¹ *Trout v. Norfolk & W. R. Co.*, 107 Va. 576, 17 L. R. A. (N.S.) 702, 59 S.

E. 394; *Erfurth v. Erfurth*, 90 Wash. 521, 156 Pac. 523.

² *Trout v. Norfolk & W. R. Co.*, 107 Va. 576, 17 L. R. A. (N.S.) 702, 59 S. E. 394.

³ *Erfurth v. Erfurth*, 90 Wash. 521, 156 Pac. 523.

⁴ *Pfeiffer v. Nienaber*, 143 La. 601, 78 So. 977.

See also, § 1286.

grantor may show that an agreement on the part of the grantee to support the grantor was a part of the consideration for the conveyance in addition to that expressed in the deed, is a question upon which there is a conflict of authority. In some cases such evidence is held to be admissible on the ground that the consideration may be inquired into,⁵ and in other cases it is held that such evidence is inadmissible as tending to vary the consideration expressed in the deed,⁶ especially if the deed recites a substantial consideration in money.⁷ Under a contract for the sale of realty, which recites the receipt of a specified amount of money as the consideration in part for such contract, extrinsic evidence is held to be admissible to show that the real consideration was the right of the vendor to retain part of the realty.⁸ The fact that the deed does not show that the parties had agreed upon a certain price per acre, does not prevent them from showing such price in order to recover for a deficiency in the area.⁹ If a contract appears to be absolute on its face, extrinsic evidence is not admissible to add a condition subsequent,¹⁰ and this rule can not be evaded by calling the condition subsequent a part of the consideration.¹¹ If a note recites that it is given for a specified consideration, extrinsic evidence is admissible to show that other considerations were to be furnished for the purpose of showing a partial failure of consideration,¹² although such evidence can not be shown to add an express condition to such note.¹³

§ 2161. Recital of consideration in deeds and in contracts for deeds. The purpose of a deed is primarily to convey title to realty,¹ and under the ordinary form of a deed the consideration is recited as a fact and is not stated as a contractual term. Accordingly, the real consideration may be shown under the ordinary

⁵ *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730; *Furst v. Galloway*, 56 W. Va. 246, 49 S. E. 146.

⁶ *Wilson v. Highley*, 98 Kan. 154, 157 Pac. 411.

⁷ *Wilson v. Highley*, 98 Kan. 154, 157 Pac. 411.

⁸ *Roberts v. Stiltner*, 101 Wash. 397, 172 Pac. 738.

⁹ *Caughron v. Stinespring*, 132 Tenn. 636, 179 S. W. 152.

¹⁰ See § 2179.

¹¹ *International Harvester Co. v. Parham*, 172 N. Car. 389, 90 S. E. 503; *Union Machinery & Supply Co. v. Darnell*, 89 Wash. 226, 154 Pac. 183; *Stickney v. Hughes*, 12 Wyo. 397, 75 Pac. 945.

¹² *International Harvester Co. v. Parham*, 172 N. Car. 389, 90 S. E. 503.

¹³ *International Harvester Co. v. Parham*, 172 N. Car. 389, 90 S. E. 503.

¹ *Union Machinery & Supply Co. v. Darnell*, 89 Wash. 226, 154 Pac. 183.

form of a deed,² at least as long as such evidence is not introduced for the purpose of contradicting the effect and operation of the deed.³ In an action to recover the consideration recited in the deed, extrinsic evidence is admissible to show that the consideration which is set forth in the deed is greater than the consideration actually agreed upon and that the consideration actually agreed upon has been paid.⁴ On the other hand, extrinsic evidence is admissible to show that the real consideration was greater than the consideration recited in the deed.⁵ If the deed recites the consideration at a specified amount in money, extrinsic evidence is admissible to show that the consideration was not only the payment of such amount, but was the payment of the obligation against the grantor.⁶ Extrinsic evidence is admissible to show that the consideration recited in a deed was intended as an advancement.⁷

² **Alabama.** *Hamaker v. Coons*, 117 Ala. 603, 23 So. 655; *Harraway v. Harraway*, 136 Ala. 490, 34 So. 836; *London v. G. L. Anderson Brass Works*, 197 Ala. 16, 72 So. 359.

Arkansas. *Lay v. Gaines*, 130 Ark. 167, 196 S. W. 919.

California. *Anthony v. Chapman*, 65 Cal. 73, 2 Pac. 889.

Florida. *Herrin v. Abbe*, 55 Fla. 769, 18 L. R. A. (N.S.) 907, 46 So. 183.

Georgia. *Leggett v. Patterson*, 114 Ga. 714, 40 S. E. 736; *Martin v. White*, 115 Ga. 866, 42 S. E. 279; *Harkless v. Smith*, 115 Ga. 350, 41 S. E. 634; *Coles v. Mozley*, 148 Ga. 21, 95 S. E. 963.

Indiana. *Stewart v. R. R.*, 141 Ind. 55, 40 N. E. 67.

Iowa. *Coleman v. Gammon (Ia.)*, 83 N. W. 898; *Wauke Savings Bank v. Jones*, 179 Ia. 261, 159 N. W. 691.

Kentucky. *Menser v. Lea*, 176 Ky 391, 195 S. W. 813.

Michigan. *Ford v. Savage*, 111 Mich. 144, 69 N. W. 240.

Minnesota. *Langan v. Iverson*, 78 Minn. 209, 80 N. W. 1051; *Le May v. Brett*, 81 Minn. 506, 84 N. W. 339.

Nebraska. *Columbia National Bank v. Baldwin*, 64 Neb. 732, 90 N. W. 890.

New York. *Baird v. Baird*, 145 N. Y. 659, 28 L. R. A. 375, 40 N. E. 222

North Carolina. *Price v. Harrington*, 171 N. Car. 132, 87 S. E. 986.

Ohio. *Carter v. Day*, 59 O. S. 96, 69 Am. St. Rep. 757, 51 N. E. 967; *Shehy v. Cunningham*, 81 O. S. 289, 25 L. R. A. (N.S.) 1194, 90 N. E. 805.

Pennsylvania. *In re Edmundson's Estate*, 259 Pa. St. 429, 103 Atl. 277.

South Carolina. *Alexander v. McDaniel*, 56 S. Car. 252, 34 S. E. 405; *Lenhardt v. Ponder*, 64 S. Car. 354, 42 S. E. 169.

Tennessee. *Caughron v. Stinespring*, 132 Tenn. 636, 179 S. W. 152.

Washington. *Union Machinery & Supply Co. v. Darnell*, 89 Wash. 226, 154 Pac. 183.

Wisconsin. *Halvorsen v. Halvorsen*, 120 Wis. 52, 97 N. W. 494.

See however, *Campbell v. Sigmon*, 170 N. Car. 348, 87 S. E. 116.

³ See § 2160.

⁴ *Coles v. Mozley*, — Ga. —, 95 S. E. 963.

⁵ *Lay v. Gaines*, 130 Ark. 167, 196 S. W. 919; *Price v. Harrington*, 171 N. Car. 132, 87 S. E. 986.

⁶ *Price v. Harrington*, 171 N. Car. 132, 87 S. E. 986.

⁷ *Shehy v. Cunningham*, 81 O. S. 289, 25 L. R. A. (N.S.) 1194, 90 N. E. 805.

The admissibility of extrinsic evidence to show the true consideration is exceptionally clear where the deed recites a nominal consideration,⁸ such as "one dollar and other valuable considerations."⁹ Under such a written instrument it may be shown that the real consideration was the assumption of the debt of another person,¹⁰ as where in a deed the grantee assumes as a part of the consideration the payment of the debts of the grantor, which have become liens upon the property,¹¹ or is to pay the vendor one-half the proceeds of the minerals on the realty conveyed.¹² So where a deed is given an oral contract whereby the grantor agrees to pay certain street assessments may be enforced.¹³ So it may be shown even where a covenant against encumbrances is inserted in a deed that the grantee retained the purchase price to pay the encumbrances, and subsequently settled with the grantor, the latter relying on the statement of the grantee that the encumbrances were paid.¹⁴ The agreement by the grantee to assume a mortgage may be shown even if the deed contains a covenant against encum-

⁸ *Herrin v. Abbe*, 55 Fla. 769, 18 L. R. A. (N.S.) 907, 46 So. 183.

⁹ *Herrin v. Abbe*, 55 Fla. 769, 18 L. R. A. (N.S.) 907, 46 So. 183.

¹⁰ *California. Arp v. Ferguson*, 175 Cal. 646, 166 Pac. 803.

District of Columbia. Main v. Aukam, 12 D. C. App. 375.

Illinois. Harts v. Emery, 184 Ill. 560, 56 N. E. 865 [affirming, 84 Ill. App. 317].

Iowa. Senninger v. Rowley, 138 Ia. 617, 18 L. R. A. (N.S.) 223, 116 N. W. 695.

Oregon. Savage v. Scroggin, 83 Or. 51, 162 Pac. 1061.

¹¹ *California. Arp v. Ferguson*, 175 Cal. 646, 166 Pac. 803.

Georgia. Carter v. Griffin, 114 Ga. 321, 40 S. E. 290; *Thrower v. Baker*, 144 Ga. 372, 87 S. E. 301.

Indiana. McDill v. Gunn, 43 Ind. 315; *Lowery v. Downey*, 150 Ind. 364, 50 N. E. 79.

Iowa. Lamb v. Tucker, 42 Ia. 118; *Logan v. Miller*, 106 Ia. 511, 76 N. W.

1005; *Senninger v. Rowley*, 138 Ia. 617, 18 L. R. A. (N.S.) 223, 116 N. W. 695.

Kansas. Hopper v. Calhoun, 52 Kan. 703, 39 Am. St. Rep. 363, 35 Pac. 816.

Michigan. Ford v. Savage, 111 Mich. 144, 69 N. W. 240; *Clark v. Lowe*, 113 Mich. 352, 71 N. W. 638.

Missouri. Bensick v. Cook, 110 Mo. 173, 33 Am. St. Rep. 422, 19 S. W. 642.

New Jersey. Ketcham v. Brooks, 27 N. J. Eq. 347.

Ohio. Society v. Haines, 47 O. S. 423, 25 N. E. 119.

Pennsylvania. Merriman v. Moore, 90 Pa. St. 78.

South Dakota. Miller v. Kennedy, 12 S. D. 478, 81 N. W. 906.

Texas. Johnson v. Elmen, 94 Tex. 168, 86 Am. St. Rep. 845, 52 L. R. A. 162, 59 S. W. 253.

¹² *Michael v. Foil*, 100 N. Car. 178, 6 Am. St. Rep. 577, 6 S. E. 264.

¹³ *Post v. Gilbert*, 44 Conn. 9.

¹⁴ *Herrin v. Abbe*, 55 Fla. 769, 18 L. R. A. (N.S.) 907, 46 So. 183; *Becker v. Knudson*, 86 Wis. 14, 56 N. W. 192.

brances.¹⁵ If the deed excepts a prior mortgage from a covenant of warranty, oral evidence is admissible to show that the grantee was to assume the principal of the mortgage, but not the interest thereon.¹⁶ So under a deed which recites a certain sum of money as a consideration, it may be shown that the transfer of title to certain horses was also a part of the consideration.¹⁷ If the deed recites the consideration and recites the payment thereof, and extrinsic evidence is introduced tending to show that such consideration has in fact been paid, the grantee may introduce extrinsic evidence tending to show that such conveyance was in fact gratuitous and that the recital of payment was inserted to prevent him from being obliged to pay such amount.¹⁸

§ 2162. Recital of consideration in mortgages. If the mortgage recites the consideration, such recital does not prevent the parties from showing the true consideration.¹ The recital of a consideration in a mortgage does not preclude extrinsic evidence of an oral agreement that as part of the transaction under which the mortgage was given, the mortgagee had agreed to bequeath the notes to the mortgagor.² Extrinsic evidence is admissible to show that the true amount of the debt which a mortgage is given to secure, although such evidence contradicts the amount of the debt, recited on the face of the mortgage,³ or to show that such mortgage is given to secure future advances,⁴ or to show that a part of the debt secured by the mortgage was a debt of another person which was assumed by the mortgagor.⁵ On the other hand,

¹⁵ *Johnson v. Elmer*, 94 Tex. 168, 52 L. R. A. 162.

Contra, where the oral agreement to assume a mortgage would contradict a covenant of general warranty. *Rooney v. Koenig*, 80 Minn. 483, 83 N. W. 399.

¹⁶ *Ford v. Savage*, 111 Mich. 144, 60 N. W. 240.

¹⁷ *Lathrop v. Humble*, 120 Wis. 331, 97 N. W. 905.

¹⁸ *Koogle v. Cline*, 110 Md. 587, 24 L. R. A. (N.S.) 413, 73 Atl. 672.

¹ *Alabama*. *Manchuria S. S. Co. v. Donald*, — Ala. —, 77 So. 12.

Arkansas. *McClintock v. Skinner*, 126 Ark. 591, 191 S. W. 230.

Iowa. *Ball v. James*, 176 Ia. 647, 158 N. W. 684.

Pennsylvania. *Galligan v. Heath*, 260 Pa. St. 457, 103 Atl. 878.

Vermont. *Bean v. Parker*, 89 Vt. 532, 96 Atl. 17.

Wisconsin. *Glander v. Glander*, 167 Wis. 12, 166 N. W. 446.

² *Ball v. James*, 176 Ia. 647, 158 N. W. 684.

³ *Galligan v. Heath*, 260 Pa. St. 457, 103 Atl. 878; *Bean v. Parker*, 89 Vt. 532, 96 Atl. 17.

⁴ *Manchuria S. S. Co. v. Donald*, — Ala. —, 77 So. 12.

Contra, *Union Machinery & Supply Co. v. Darnell*, 89 Wash. 226, 154 Pac. 188.

⁵ *McClintock v. Skinner*, 126 Ark. 591, 191 S. W. 230.

the fact that the mortgage recites the notes which it is given to secure, is said to preclude evidence to show that another debt was thus secured.⁵

§ 2163. Recital of consideration in leases. In the same way the recital of a consideration in a lease is presumed to be a recital of the true consideration, but extrinsic evidence may be offered to show the true consideration,¹ and it is not necessary to show that the party who offers such evidence is entitled to reformation in equity.² The admissibility of such evidence is exceptionally clear in cases in which the consideration recited in the lease is evidently a nominal consideration.³ If the instrument recites a consideration which is apparently nominal,⁴ such as "one dollar and other considerations,"⁵ extrinsic evidence is admissible to show what the true consideration is.

§ 2164. Recital of consideration contradicted to render transaction inoperative or defeat legal effect. It is often said that the rule which permits the introduction of extrinsic evidence to contradict the recital of a consideration is limited to cases in which such contradiction of such recitals will not defeat the legal effect and operation of the contract. The authorities which are cited in support of this proposition are cases which involve deeds or other conveyances, sealed contracts, and executory covenants, as well as recitals of the consideration as a fact to support executory covenants on the part of the adversary party. These cases are governed by different principles and should be considered separately. The recital of a valuable consideration in a deed or other conveyance can not be contradicted for the purpose of destroying the legal effect and operation of the deed.¹ This principle, however, is limited to cases in which the only attack upon the validity of the

⁵ *Union Machinery & Supply Co. v. Darnell*, 89 Wash. 226, 154 Pac. 183.

¹ *Stotts v. Stotts*, 198 Mich. 605, 165 N. W. 761.

Contra, *Cheda v. Bodkin*, 173 Cal. 7, 158 Pac. 1025; *Chapman v. Schroeder*, 166 Wis. 330, 165 N. W. 295.

² *Chapman v. Schroeder*, 166 Wis. 330, 165 N. W. 295.

³ *Stotts v. Stotts*, 198 Mich. 605, 165 N. W. 761.

⁴ *Boise Valley Construction Co. v. Kroeger*, 17 Ida. 384, 28 L. R. A. (N.S.) 968, 105 Pac. 1070.

⁵ *Boise Valley Construction Co. v. Kroeger*, 17 Ida. 384, 28 L. R. A. (N.S.) 968, 105 Pac. 1070.

¹ *United States. Lindlay v. Raydure*, 239 Fed. 928.

Arkansas. Davis v. Jernigan, 71 Ark. 494, 76 S. W. 554; *Hampton v. Haneline*, 125 Ark. 441, 189 S. W. 40.

deed or other conveyance is the want of consideration. It has no application to cases in which it is sought to have the deed set aside in equity on the ground of fraud or undue influence and in which it is sought to show the lack of consideration or of the inadequacy of consideration for the purpose of establishing such fraud or undue influence.² This principle has sometimes been applied so as to exclude extrinsic evidence which tends to show that a valuable consideration which is recited in a deed was not the real consideration intended by the parties, but that the consideration was love and affection, in order to cause the deed, which purports to be a deed upon a valuable consideration, to operate as a deed of gift.³ In other jurisdictions, however, the general principle that the recital of a consideration in a deed can not be so contradicted as to destroy its legal effect, is regarded as not preventing the introduction of extrinsic evidence to show that such a deed is really a deed of gift and not a deed for value,⁴ although the fact of such evidence may be to change the line of descent of such realty.⁵ The principle that extrinsic evidence can not be introduced to contradict a recital in a conveyance of realty, so as to contradict its legal effect, applies in equity as well as in law, as long as such evidence is not offered for the purpose of establishing fraud or undue influence.⁶ The correctness of the rule that a recital of a consideration in a conveyance can not be contradicted so as to defeat the instrument, is especially clear where the realty has

California. *Feeney v. Howard*, 79 Cal. 525, 12 Am. St. Rep. 162, 4 L. R. A. 826, 21 Pac. 984.

Georgia. *Anderson v. Continental Ins. Co.*, 112 Ga. 532, 37 S. E. 766.

Illinois. *Stannard v. Aurora E. & C. Ry. Co.*, 220 Ill. 469, 77 N. E. 254; *Redmond v. Cass*, 226 Ill. 120, 80 N. E. 708; *Fleming v. Reheis*, 275 Ill. 132, 113 N. E. 923.

Iowa. *Luckhart v. Luckhart*, 120 Ia. 248, 94 N. W. 461; *Maxwell v. McCall*, 145 Ia. 687, 124 N. W. 760; *Shelangowski v. Schrack*, 162 Ia. 176, 143 N. W. 1081.

Massachusetts. *Trafton v. Hawes*, 102 Mass. 533, 3 Am. Rep. 494.

Missouri. *Strong v. Whybark*, 204 Mo. 341, 12 L. R. A. (N.S.) 240, 102

S. W. 968; *Weissengels v. Cable*, 208 Mo. 515, 106 S. W. 1028.

Washington. *Grubb v. House*, 93 Wash. 200, 160 Pac. 421.

² See §§ 2180 et seq.

³ *Brown v. Whaley*, 58 O. S. 654, 65 Am. St. Rep. 793, 49 N. E. 479; *Groves v. Groves*, 65 O. S. 442, 62 N. E. 1044; *Latimer v. Latimer*, 53 S. Car. 483, 31 S. E. 304.

⁴ *Rockill v. Spraggs*, 9 Ind. 30, 68 Am. Dec. 607; *Harman v. Fisher*, 90 Neb. 688, 39 L. R. A. (N.S.) 157, 134 N. W. 246; *Bradley v. Love*, 60 Tex. 472.

⁵ *Harman v. Fisher*, 90 Neb. 688, 39 L. R. A. (N.S.) 157, 134 N. W. 246.

⁶ *Lindlay v. Raydure*, 239 Fed. 928.

been conveyed to a bona fide purchaser for value.⁷ The principles which apply to the contradiction of the recital of consideration of a deed or other conveyance are radically different from those which apply to the contradiction of a similar recital in a simple executory contract. The term "consideration," if applicable to a deed, represents in many respects a different idea from the term "consideration" as applied to simple executory contracts. A common-law deed was under seal and in the classic period of the common law did not require a valuable consideration, although at an earlier period it was probably felt that something of value should be given by the grantee to the grantor, and even at a very early period to the prospective heirs of the grantor. In deeds which, like the bargain and sale, operated under the Statute of Uses, the recital of a consideration was necessary to rebut the presumption of a resulting trust. The presumption is that a gratuitous conveyance creating a resulting trust in favor of the grantor could be rebutted by any kind of evidence tending to establish that fact, as far as the principles of equity were concerned; and, accordingly, the recital of a valuable consideration in a deed was regarded as conclusive in the absence of fraud, undue influence, mistake, and the like, of the fact that the grantor did not intend a resulting trust in his own favor. In addition the principles of estoppel have been invoked to prevent the grantor or those who claim under him from denying such a recital of consideration, especially if the deed is under seal.⁸

Probably at modern law a deed needs no expressed consideration, although most courts avoid deciding this question wherever it is possible. In any event, all that is necessary is the recital of a valuable consideration, and since this is all that is necessary, extrinsic evidence to contradict such recital is immaterial in the absence of fraud, undue influence or mistake, and accordingly it is inadmissible. The validity of a deed can not be affected by the fact that the consideration is inadequate in the absence of fraud, undue influence, or mistake.⁹

In some cases in which it is said that extrinsic evidence is inadmissible to contradict the recital of a valuable consideration in a contract so as to render it inoperative in law, the contract was

⁷ *Dill v. Frazee*, 169 Ind. 53, 79 N. E. 971.

⁸ *Weissenfels v. Cable*, 208 Mo. 515, 106 S. W. 1028.

⁹ *Haslam v. Jordan*, 104 Me. 49, 70 Atl. 1066.

under seal.¹⁰ Contracts of this sort are governed by principles different from those which apply to simple executory contracts. At common law in the classic period a contract under seal was valid and enforceable without a valuable consideration.¹¹ The recital of a valuable consideration was unnecessary to its validity, and accordingly evidence which tended to show there was in fact no valuable consideration was inadmissible as being immaterial. In addition to this reason, the doctrine of estoppel is invoked to prevent a party to a sealed instrument from denying recitals therein.¹²

Other cases which are cited as authority for the proposition that the recital of a consideration in a contract can not be contradicted for the purpose of defeating the legal effect of the contract, are cases in which the provision with reference to the consideration which it is sought to contradict is a contractual provision and not the recital of a fact;¹³ or are cases in which a specific consideration is set forth in the written contract and it is attempted to show that an additional consideration was agreed upon,¹⁴ thus contradicting the provisions of the contract and adding new terms thereto.¹⁵ If a lease appears to be complete upon its face, extrinsic evidence is inadmissible to show that a part of the consideration therefor was an agreement to build up the business of the hotel for which the lease was given, at least if such agreement would change the legal effect of the lease.¹⁶

If the contract is a simple executory contract and the consideration appears as the recital of a fact, the right of the promisor to contradict such recital for the purpose of rendering the instrument invalid depends in part upon the question whether the real intention of the parties was to pay such consideration or whether such consideration was recited as a mere form in order to turn a gratuitous promise, if possible, into a legal obligation. If the real intention of the parties was that the consideration should be paid on performance, a recital of the payment or performance of such consideration may be contradicted for the purpose of recovering such consideration,¹⁷ but it can not be contradicted for the purpose

¹⁰ *Illinois Central Insurance Co. v. Wolf*, 37 Ill. 355; *Hebbard v. Haughian*, 70 N. Y. 54.

¹¹ See § 1166.

¹² See §§ 1164 et seq.

¹³ *Wellmaker v. Wheatley*, 123 Ga. 201, 51 S. E. 436. See § 2166.

¹⁴ *Eggleston v. Pantages*, 93 Wash. 221, 160 Pac. 425.

¹⁵ See §§ 2145, 2193 and 2194.

¹⁶ *Grubb v. House*, 93 Wash. 200, 160 Pac. 421.

¹⁷ *Britton v. Metropolitan Life Insurance Co.*, 165 N. Car. 149, Ann. Cas.

of rendering the contract invalid,¹⁸ unless the failure to pay or perform is such a breach as will operate as a discharge.¹⁹ If the parties have entered into an ante-nuptial contract by which the prospective wife agrees to release her claims upon her husband's estate, in consideration of marriage and a certain sum of money, a receipt for the payment of which appears in the contract, the legal effect of such receipt may be contradicted for the purpose of enabling the wife to collect such amount of money if not paid, but it can not be contradicted for the purpose of rendering the ante-nuptial contract invalid.²⁰ The recital of the payment of the first premium in a contract of insurance can not be contradicted for the purpose of showing that the policy has not taken effect, if it was the real intention of the parties that such premium should be paid.²¹

1915D, 363, 80 S. E. 1072; *Southern Life Insurance Co. v. Booker*, 56 Tenn. (9 Heisk.) 606, 24 Am. Rep. 344; *Bibelhausen v. Bibelhausen*, 159 Wis. 365, 150 N. W. 516.

¹⁸ *England*. *Roberts v. Security Co.* [1897], 1 Q. B. 111.

California. *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 17 Am. St. Rep. 233, 23 Pac. 869.

Indiana. *Home Insurance Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118.

Missouri. *Dobyns v. Bay State Beneficiary Co.*, 144 Mo. 95, 45 S. W. 1107.

North Carolina. *Britton v. Metropolitan Life Ins. Co.*, 165 N. Car. 149, Ann. Cas. 1915D, 363, 80 S. E. 1072.

Wisconsin. *Bibelhausen v. Bibelhausen*, 159 Wis. 365, 150 N. W. 516.

"The general doctrine as to such unilaterally executed documents as the one before us, will be found stated, frequently in substance, that the mention of a consideration in an instrument executed by the party to whom it purports to have moved for the thing conveyed, and the formal receipt are mere recitals not contractual in character, and may be explained or varied; but not so as to vary or defeat the instrument for the purpose for which it was given. As to such pur-

pose, and that only, in the absence of efficient fraud, the person executing the paper is estopped from contradicting the recital."

Contra, *Christopherson v. Metropolitan Life Insurance Co.*, 199 Mich. 634, 165 N. W. 793; *Sheldon v. Atlantic Fire & Marine Insurance Co.*, 26 N. Y. 460, 84 Am. Dec. 213; *Bibelhausen v. Bibelhausen*, 159 Wis. 365, 150 N. W. 516.

¹⁹ See ch. LXXXIV.

²⁰ *Bibelhausen v. Bibelhausen*, 159 Wis. 365, 150 N. W. 516.

²¹ *England*. *Roberts v. Security Co.* [1897], 1 Q. B. 111.

California. *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 17 Am. St. Rep. 233, 23 Pac. 869.

Indiana. *Home Insurance Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118.

Missouri. *Dobyns v. Bay State Beneficiary Association*, 144 Mo. 95, 45 S. W. 1107.

North Carolina. *Kendrick v. Mutual Benefit Insurance Co.*, 124 N. Car. 315, 70 Am. St. Rep. 592, 32 S. E. 728; *Britton v. Metropolitan Life Ins. Co.*, 165 N. Car. 149, Ann. Cas. 1915D, 363, 80 S. E. 1072.

"The language in reference to the consideration in the policy in question is not contractual, but merely by way of recit-

This principle has been enacted in some jurisdictions in statutory form with reference to certain classes of contracts, such as insurance contracts.²² Under such a statute the insurer may show that the premium was not in fact paid for the purpose of recovering the premium, but he can not show that it was not in fact paid for the purpose of showing that the contract of insurance had not yet taken effect.²³

al. 'In consideration of the warranties and agreements in the application and of \$25,' is no part of the written contract, in the sense that it embodies any of the engagements or agreements of the parties. It is a mere recital of a consideration, which is always open to contradiction by parol. The recital of a given consideration is not a promise to pay it. If it were, parol evidence could not be received to contradict the recital. It has been held in many cases in this state, and is the settled law, that a recital of a given consideration may be contradicted by parol evidence for all purposes except to destroy the legal effect of the instrument. (Illinois Central Ins. Co. v. Wolf, 37 Ill. 354; Morris v. Tillson, 81 id. 607; Koch v. Roth, 150 id. 212.) The effect, and the only effect, of the recital in the policy is to show that the company acknowledged a valuable consideration, which is so far binding as to preclude either party from destroying the legal effect of the policy by showing that no consideration was, in fact, given. Certainly a mere recital such as the one in this policy falls far short of an expressed stipulation that the application is made a part of the policy, which, under the law, is necessary before it can be so treated. The application itself can not be considered in determining the preliminary question whether it is a part of the policy. This fact must affirmatively appear from the policy itself. It is only after it is determined, from a consideration of the language of the policy, that the

two papers constitute the contract that the application can be resorted to. The application not being a part of the contract, any statements contained therein are mere representations, and not warranties. (May on Insurance, section 158.) As such, they may avoid the policy if found to be false and material within the legal meaning of these terms. The materiality of a representation is sometimes a question of law, where the statement is made in response to a direct inquiry or where by the contract the parties have settled the materiality by agreement." *Spence v. Central Accident Ins. Co.*, 236 Ill. 444, 19 L. R. A. (N.S.) 88, 86 N. E. 104.

Contra, *Equitable Fire & Accident Office v. Ching Wo Hong* [1907], A. C. 96; *Christopherson v. Metropolitan Life Insurance Co.*, 199 Mich. 634, 165 N. W. 793; *Sheldon v. Atlantic Fire & Marine Insurance Co.*, 26 N. Y. 460, 84 Am. Dec. 213.

²² *Harrington v. Mutual Life Insurance Co.*, 21 N. D. 447, 34 L. R. A. (N.S.) 373, 131 N. W. 246; *Donahue v. Mutual Life Insurance Co.*, 37 N. D. 203, L. R. A. 1918A, 300, 164 N. W. 50.

²³ *Palmer v. Continental Insurance Co.*, 132 Cal. 68, 64 Pac. 97; *Peever Mercantile Co. v. State Mutual Fire Association*, 23 S. D. 1, 19 Am. & Eng. Ann. Cas. 1236, 119 N. W. 1008 [same result on rehearing, 25 S. D. 406, 127 N. W. 559]; *Harrington v. Mutual Life Insurance Co.*, 21 N. D. 447, 34 L. R. A. (N.S.) 373, 131 N. W. 246; *Donahue*

If a simple executory contract contains the recital of a consideration as a fact, and the parties did not intend that such consideration should be paid, but inserted such recital for the purpose of making a gratuitous promise operative in law if possible, the weight of authority is that such recital of a consideration may be contradicted for the purpose of showing that such apparent contract was in reality a gratuitous, unenforceable promise.²⁴ Such a recital as "for value received,"²⁵ or "one dollar,"²⁶ or "one dollar and other valuable considerations,"²⁷ may be contradicted for the purpose of showing that the promise was without consideration, although it is said that such evidence should be clear and convincing, inasmuch as the writing itself imports a consideration.²⁸ The recital of a consideration, such as one dollar in an

v. Mutual Life Insurance Co., 37 N. D. 203, L. R. A. 1918A, 300, 164 N. W. 50.

²⁴ Colorado. Rude v. Levy, 43 Colo. 482, 24 L. R. A. (N.S.) 91, 96 Pac. 560.

Kansas. Rice v. Rice, 101 Kan. 20, 165 Pac. 799; Moon v. Moon, 103 Kan. 179, 173 Pac. 9.

Kentucky. Farmers' Bank v. Birk, 179 Ky. 761, 201 S. W. 315.

Michigan. Brown v. Smedley, 136 Mich. 65, 98 N. W. 856.

Minnesota. Northern National Bank v. Douglas, 135 Minn. 81, 160 N. W. 193.

South Dakota. Rosholt v. Woulph, — S. D. —, 167 N. W. 158.

"Why is a person estopped to deny a recital in a contract? The old law was that a contract reduced to writing and sealed was the best evidence of the truth of its recitals. Estoppel was essentially a matter of evidence, and solemnity of form was the controlling consideration. This is no longer true. Estoppel is now a matter of substantive law, and a recital in a contract is not conclusive unless it operated as a representation or warranty inducing the formation of the contract, or was itself of the essence of the contract, or, having been ac-

cepted and acted on in good faith, resulted in consequences which it would be inequitable and unjust to disturb * * *. There remains the contract itself, considered as a contract, as an estoppel. If purely voluntary on the part of the persons sought to be held, it lacks engaging quality. Unless there were adjustment, or compromise, or settlement of doubtful or conflicting or unsettled claims respecting title and possession, mutual concessions or promises, or giving on one side and receiving on the other—unless there were consideration—there was no binding obligation. As a matter of fact, properly interpreted, the contract is a concatenated instrument, the various portions of which are dependent on each other, and consequently subject as an entirety to the defense of want of consideration." Moon v. Moon, 102 Kan. 737, 173 Pac. 9.

²⁵ Rosholt v. Woulph, — S. D. —, 167 N. W. 158.

²⁶ Rude v. Levy, 43 Colo. 482, 24 L. R. A. (N.S.) 91, 96 Pac. 560.

²⁷ Farmers' Bank v. Birk, 179 Ky. 761, 201 S. W. 315; Northern National Bank v. Douglas, 135 Minn. 81, 160 N. W. 193.

²⁸ Farmers' Bank v. Birk, 179 Ky. 761, 201 S. W. 315.

option to purchase realty, may be contradicted for the purpose of showing that such offer was not for value.²⁹ A recital of a consideration such as "one dollar and other valuable considerations" in a contract of guaranty, may be contradicted for the purpose of showing that such promise was gratuitous.³⁰ A recital of a valuable consideration in a negotiable instrument may be contradicted for the purpose of showing that the promise was without valuable consideration,³¹ as long as such negotiable instrument has not been transferred to a bona fide holder,³² or to one who has paid value therefor in reliance upon the obligation of an accommodation party. The recital of a valuable consideration in a negotiable instrument may be contradicted for the purpose of showing a partial want of consideration.³³ An indorsement may be shown to have been without valuable consideration.³⁴ A recital of consideration in a note and mortgage may be contradicted.³⁵ A recital that A owns an interest in certain realty which B agrees to purchase, may be contradicted by showing that A did not own such an interest and that the real transaction contemplated a gift.³⁶

In other jurisdictions it is held that the recital of a valuable consideration in simple executory contracts can not be contradicted by extrinsic evidence for the purpose of showing that such promise was gratuitous.³⁷ It has been held that this principle applies even

²⁹ *Rude v. Levy*, 43 Colo. 482, 24 L. R. A. (N.S.) 91, 96 Pac. 560.

³⁰ *Northern National Bank v. Douglas*, 135 Minn. 81, 160 N. W. 193.

³¹ *Georgia. Hawkins v. Collier*, 101 Ga. 145, 28 S. E. 632.

Iowa. First National Bank v. Felt, 100 Ia. 680, 60 N. W. 1057; *Beatty v. Carr*, 109 Ia. 183, 80 N. W. 326.

Kansas. Rice v. Rice, 101 Kan. 20, 165 Pac. 799.

Maine. Bigelow v. Bigelow, 93 Me. 439, 45 Atl. 513.

Minnesota. State Bank v. Pangerl, 139 Minn. 19, 165 N. W. 479.

New York. Kramer v. Kramer, 181 N. Y. 477, 74 N. E. 474.

Oklahoma. Holland Banking Co. v. Dicks, — Okla. —, 170 Pac. 253.

South Dakota. Rosholt v. Woulph, — S. D. —, 167 N. W. 158.

³² See §§ 2346 et seq.

³³ *Holland Banking Co. v. Dicks*, — Okla. —, 170 Pac. 253.

³⁴ *State Bank v. Pangerl*, 139 Minn. 19, 165 N. W. 479.

³⁵ *Baird v. Baird*, 145 Ill. 659, 28 L. R. A. 375; *Anderson v. Lee*, 73 Minn. 397, 76 N. W. 24.

³⁶ *Moon v. Moon*, 102 Kan. 737, 173 Pac. 9.

³⁷ *United States. Lawrence v. McCalmont*, 43 U. S. (2 How.) 426, 11 L. ed. 326; *United States Light & Heating Co. v. J. B. M. Electric Co.*, 189 Fed. 382.

Connecticut. Redfield v. Haight, 27 Conn. 31.

Georgia. Southern Bell Telephone & Telegraph Co. v. Harris, 117 Ga. 1001, 44 S. E. 885.

Illinois. Schneider v. Turner, 130 Ill. 28, 6 L. R. A. 164, 22 N. E. 497.

Massachusetts. Drury v. Fay, 31 Mass. (14 Pick.) 326.

where the consideration which is recited is a mere nominal consideration.³⁸ A guarantor has not been permitted to show that a consideration of one dollar was not intended as a consideration, but was inserted as a mere form.³⁹ An offer which by its terms was to remain open for a certain space of time, in consideration of "one dollar and other considerations," has been held to be binding upon the offeror and not to be rendered invalid by reason of the offer of evidence tending to show that the recited consideration was not intended as the real consideration.⁴⁰ Where an assignment of a patent contains a recital of a valuable consideration, it was said that the parties are "concluded * * * to challenge by parol evidence" the existence of such consideration.⁴¹ If A ac-

Virginia. *Watkins v. Robertson*, 105 Va. 269, 115 Am. St. Rep. 880, 5 L. R. A. (N.S.) 1194, 54 S. E. 33.

"The argument in support of the eighth amended count admits that such is its effect on its face, but it is insisted it is competent to vary its terms by allegation and proof that no consideration was in fact paid by appellants, or received by appellee, for the agreement to sell, and thus show the transaction a mere offer on the part of appellee, without consideration, which became an agreement only upon the acceptance and offer to perform on the part of appellants. The general rule excluding parol evidence offered for the purpose of contradicting or varying the terms of a written instrument is not questioned. The validity of this count is based exclusively on the provisions of section 9, chapter 98, Rev. Statutes, entitled 'Negotiable Instruments.' That section provides that a defendant may plead want or failure of consideration to a suit on a note or other contract, for the purpose of defeating a recovery in whole or in part, where the same was given without consideration, or where the consideration has failed. No authority is found in this section for permitting a plaintiff to prove a want of consideration for the purpose of varying the terms of his contract. This proposition is too clear for argu-

ment. The parties must be held bound by the contract as they wrote it. 1 Greenl. Ev., section 275. The right to vary or explain the consideration expressed in a written contract, or to prove that it was never paid, does not authorize the introduction of such testimony to affect the terms or validity of the contract. *O'Brien v. Palmer*, 49 Ill. 72; *Morris v. Tillson*, 81 Ill. 607." *Schneider v. Turner*, 130 Ill. 28, 6 L. R. A. 164, 22 N. E. 497.

³⁸ **United States.** *Lawrence v. McCalmont*, 43 U. S. (2 How.) 426, 11 L. ed. 326.

Connecticut. *Redfield v. Haight*, 27 Conn. 31.

Georgia. *Southern Bell Telephone & Telegraph Co. v. Harris*, 117 Ga. 1001, 44 S. E. 885.

Illinois. *Schneider v. Turner*, 130 Ill. 28, 6 L. R. A. 164, 22 N. E. 497.

Virginia. *Watkins v. Robertson*, 105 Va. 269, 115 Am. St. Rep. 880, 5 L. R. A. (N.S.) 1194, 54 S. E. 33.

³⁹ *Lawrence v. McCalmont*, 43 U. S. (2 How.) 426, 11 L. ed. 326. (Possibly in this case there was another consideration which was sufficient to support the contract.)

⁴⁰ *Schneider v. Turner*, 130 Ill. 28, 6 L. R. A. 164, 22 N. E. 497.

⁴¹ *United States Light & Heating Co. v. J. B. M. Electric Co.*, 189 Fed. 382.

knowledges in writing that he has received a certain sum of money from B, which A agrees to apply to saving C harmless from liability as surety on B's bond, it is said that A can not deny such consideration as against C, and A can not show that, in fact, he did not receive such money.⁴²

This principle has been extended so as to prevent the parties to a contract from contradicting other recitals,⁴³ such as the recital that a child was adopted.⁴⁴ In jurisdictions which deny the right of the promisor to contradict the recital of a consideration for the purpose of showing that his promise was without consideration, the doctrine of consideration has ceased to have any legal significance. The recital alone is all that is necessary. This recital has turned into a meaningless form which of itself is sufficient to make the promise enforceable. This form lacks the artistic beauty of the seal and lacks its historical justification. It practically amounts to discarding the entire doctrine of consideration and to substitute therefor a fictitious recital. Whether we believe in the doctrine of consideration, this result is unquestionably wrong. If a consideration is necessary we should insist upon a consideration and not merely upon the recital of one. If the consideration is to be regarded as unnecessary we should concede that fact frankly and enforce deliberate promises which are intended by the promisor to impose an obligation upon him without regard to the existence of a consideration. We should not, however, refuse to enforce a deliberate promise which contains no recital of a consideration and at the same time regard the recital of a consideration as conclusive for the purpose of rendering enforceable a promise which is really gratuitous.

⁴² *Drury v. Fay*, 31 Mass. (14 Pick.) 326 (possibly C's forbearance to sue was the consideration in this case).

"But we think it was not competent to the defendant to offer evidence to contradict the writing on which the action is founded. Lawson Valentine therein acknowledges the receipt of a sum of money, and promises to apply it in a particular manner, for the benefit of the plaintiffs. Whether he had received it or not, they could not know, as the transaction was between him

and Henry Valentine, but they might well presume that he had received it, and he could not be permitted to say that he had deceived them." *Drury v. Fay*, 31 Mass. (14 Pick.) 326.

⁴³ *Dawley v. Dawley's Estate*, 60 Colo. 73, 152 Pac. 1171.

⁴⁴ *Dawley v. Dawley's Estate*, 60 Colo. 73, 152 Pac. 1171.

Such recital was said to be a "substantive part of the contract." *Dawley v. Dawley's Estate*, 60 Colo. 73, 152 Pac. 1171.

§ 2165. Oral contract as inducement. The principle that the consideration may be shown has been extended to cases where an oral contract has been proved as a consideration for the written contract, or as the courts sometimes put it, as an inducement for the written contract.¹ If a written contract is entered into as performance of an oral contract, evidence of the existence and

¹ **California.** *Langley v. Rodriguez*, 122 Cal. 580, 68 Am. St. Rep. 70, 55 Pac. 406.

New Mexico. *Locke v. Murdoch*, 20 N. M. 522, L. R. A. 1917B, 267, 151 Pac. 298.

North Dakota. *Erickson v. Wiper*, 33 N. D. 193, 157 N. W. 592.

Oklahoma. *Rex Petroleum Co. v. Black Panther Oil & Gas Co.*, — Okla. —, 166 Pac. 1083.

Pennsylvania. *Ferguson v. Rafferty*, 128 Pa. St. 337, 6 L. R. A. 33, 18 Atl. 484; *Huckestein v. Kelly, etc., Co.*, 152 Pa. St. 631, 25 Atl. 747; *Clinch Valley, etc., Co. v. Willing*, 180 Pa. St. 165, 57 Am. St. Rep. 626, 36 Atl. 737; *In re Sutch's Estate*, 201 Pa. St. 305, 50 Atl. 943; *Noel v. Kessler*, 252 Pa. St. 244, 97 Atl. 446.

In Pennsylvania it is well settled "that parol evidence is admissible to show that at the execution of a written instrument a stipulation was entered into, a condition annexed, or a verbal promise made upon the faith of which the writing was executed, though it may vary materially the terms of the contract." *Noel v. Kessler*, 252 Pa. St. 244, 97 Atl. 446 [citing, *Greenawalt v. Kohne*, 85 Pa. St. 369, — Atl. —, and *Machin v. Prudential Trust Co.*, 210 Pa. St. 253, 59 Atl. 1073].

For the Pennsylvania rule, see *The Admissibility of Evidence to Establish Oral Contemporaneous Inducing Promises to Affect Written Instruments in Pennsylvania*, by Stanley Folz, 43 American Law Register (N.S.), 601.

"This provision of our Code embodies the common-law rule upon the subject

of written contracts, and while 'the execution of a contract in writing, whether the law requires it to be written or not, supersedes all of the oral negotiations or stipulations concerning its matter, which preceded or accompanied the execution of the instrument,' nevertheless, as contended by the appellant, there are exceptions to the rule, and one of the exceptions seems to be that agreements or representations made prior to the written contract under which the party was induced to sign the contract may be shown; in other words, where the parol contemporaneous agreement was the inducing and moving cause of the written contract, or where the parol agreement forms part of the consideration for a written contract, and where he executed the written contract upon the faith of the parol contract or representations, such evidence is admissible. *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. Rep. 512; *Thomas v. Loose*, 114 Pa. 35, 6 Atl. 326; *Dicken v. Morgan*, 54 Iowa 684, 7 N. W. 145; *Cullmans v. Lindsay*, 114 Pa. 166, 6 Atl. 332; *Bannett v. Pratt*, 37 Neb. 352, 55 N. W. 1050; *Ayer v. R. W. Bell Mfg. Co.*, 147 Mass. 46, 16 N. E. 754; *Davis v. Cochran*, 71 Iowa 369, 32 N. W. 445, 9 Ency. Evid. 350; *Ferguson v. Rafferty*, 128 Pa. 337, 18 Atl. 484, 6 L. R. A. 33; *Hines v. Willcox*, 96 Tenn. 148, 33 S. W. 914, 34 L. R. A. 824, 832, 54 Am. St. Rep. 823; *Walker v. France*, 112 Pa. 203, 5 Atl. 208." *De Rue v. McIntosh*, 26 S. D. 42, 127 N. W. 532 [quoted in *Erickson v. Wiper*, 33 N. D. 193, 157 N. W. 592].

terms of such oral contract is admissible.² A written contract by which A agrees to collect claims for B in accordance with A's "system," does not prevent evidence of A's oral explanation to B of such system of collection as an inducement to such contract.³ On this theory an oral contract to advance money may be shown as an inducement for a written contract to gather, cure and deliver a crop of raisins at a certain price; and breach of the oral contract may discharge the written contract.⁴ A written contract for work may be shown to have been entered into in reliance upon an oral contract that the promisor should not be required to do work of a certain kind,⁵ at least if such oral contract does not contradict the terms of the written contract. In an action on a note an oral contract to enforce payment by exhausting security in the form of a conveyance of realty in trust before proceeding against the maker of the note, may be shown.⁶ The holding in this case rests on the theory that it is fraud to obtain a note under such an agreement and then enforce it literally. The parol evidence rule has a peculiar meaning in Pennsylvania, however,⁷ being at law substantially the same as in suits in equity for reformation.⁸ So an oral contract to give certain logs as security may be shown as inducement for a written contract of sale of such logs.⁹ So an oral contract by an owner of realty to put in a side track, may be shown as an inducement for a written contract to build.¹⁰ So in Pennsylvania, an oral contract giving vendee the right to countermand a written order may be shown.¹¹ So if A becomes surety for B to C, an oral contract of agency may be shown as consideration for the written bond, no consideration being expressed.¹² So where a contract for judgment and stay of execution until the next term of court was entered into, an oral agreement that all matters in

² *Rex Petroleum Co. v. Black Panther Oil & Gas Co.*, — Okla. —, 166 Pac. 1083.

³ *American Mercantile Exchange v. Blunt*, 102 Me. 128, 120 Am. St. Rep. 463, 10 L. R. A. (N.S.) 414, 66 Atl. 212. See § 2189.

⁴ *Langley v. Rodriguez*, 122 Cal. 580, 68 Am. St. Rep. 70, 55 Pac. 406.

⁵ *Noel v. Kessler*, 252 Pa. St. 244, 97 Atl. 446.

⁶ *Clinch Valley, etc., Co. v. Willing*, 180 Pa. St. 165, 57 Am. St. Rep. 626, 36 Atl. 737.

⁷ See cases cited in notes 5 to 9 this section.

⁸ *Thomas v. Loose*, 114 Pa. St. 35, 6 Atl. 626.

⁹ *Ferguson v. Rafferty*, 128 Pa. St. 337, 6 L. R. A. 33, 18 Atl. 484.

¹⁰ *Huckestein v. Kelly, etc., Co.*, 152 Pa. St. 631, 25 Atl. 747.

¹¹ *Thomas v. Loose*, 114 Pa. St. 35, 6 Atl. 626.

¹² *Singer Mfg. Co. v. Forsyth*, 108 Ind. 334, 9 N. E. 372.

litigation up to the date of the contract were included and that a rent for the future was agreed upon, may be shown.¹³ So under a deed an oral contract that the grantor should have the right to sow a crop of grain on the land conveyed may be shown.¹⁴ So an oral contract to bequeath a certain amount may be shown as consideration for a written release.¹⁵ So under a written contract to donate rent of a building to be used by a corporation to be formed, an oral contract that rent in arrears should be paid before the corporation was formed may be shown.¹⁶ Evidence of an oral contract by way of inducement must be clear.¹⁷ Many of the cases which rest on this principle may be explained on other theories. In some the written memorandum is incomplete. In others the consideration is recited as a fact. After eliminating these cases, however, there are a number left which really support the principle laid down. If these cases are correctly decided there is little left of the parol evidence rule. It does not apply to recitals of fact. If, further, it is held not to apply to contractual terms which form part of the consideration, it is hard to imagine any term of an oral contract to which it would apply. The principle seems contrary to that which forbids oral evidence of the consideration to vary contractual terms,¹⁸ or to add to a complete contract.¹⁹ If a contract which appears to be complete upon its face provides for different rates of payment for different classes of excavation, extrinsic evidence is inadmissible to show that the oral contract which was the inducement for the written contract contained a provision to the effect that the determination of the engineer of one of the parties as to the kind of excavation should be final.²⁰ If a written contract for the sale of a chattel appears to be complete upon its face, an oral agreement can not be shown as an inducement for such written contract, to the effect that the seller agreed to keep such chattel in repair for a year.²¹ Under a contract by which A agrees to construct certain paving for a city, and by which A

¹³ *Bonney v. Morrill*, 57 Me. 368.

¹⁴ *Breitenwischer v. Clough*, 111 Mich. 6, 66 Am. St. Rep. 372, 69 N. W. 88 [distinguishing, *Addams v. Watkins*, 103 Mich. 431, 61 N. W. 774, as a contract for the reservation of a crop already growing, and hence inconsistent with the deed].

¹⁵ *Andrews v. Brewster*, 124 N. Y. 433, 26 N. E. 1024.

¹⁶ *Chase v. Creamery Co.*, 12 S. D. 529, 81 Pac. 951.

¹⁷ *In re Sutch's Estate*, 201 Pa. St. 305, 50 Atl. 943.

¹⁸ See § 2166.

¹⁹ See §§ 2137 et seq.

²⁰ *Sund v. Flagg & Standifer Co.*, 86 Or. 289, 168 Pac. 300.

²¹ *MacAlman v. Gleason*, 228 Mass. 454, 117 N. E. 795.

agrees to buy rock from the city, an oral contract can not be shown by which the city agreed to furnish to A all the rock that he should need.²²

§ 2166. Consideration as contractual term. If the consideration appears in the written contract as a contractual term thereof, an oral agreement whereby an additional or other consideration is provided for violates the parol evidence rule and is unenforceable.¹ The fact that the consideration is set forth as a contractual term implies that no other consideration exists.² Thus in a contract for the sale of land, if it specifies the amount which the vendee agrees to pay, an oral contract whereby he agrees to pay more is unenforceable.³ If a deed provides that the grantee assumes and agrees to pay a mortgage, the effect of such covenant can not be varied by evidence tending to show the actual consideration for the deed.⁴ A contract which requires two persons to execute a mortgage as consideration precludes extrinsic evidence tending to show that one of such parties was not to be liable personally.⁵ So in other

²² *Elliott Contracting Co. v. Portland*, 88 Or. 150, 171 Pac. 760.

¹ *United States. Watkins Salt Co. v. Mulkey*, 225 Fed. 739, 141 C. C. A. 11.

Arkansas. *Jones v. Epstein*, — Ark. —, 204 S. W. 217.

California. *Cameron v. Ayres*, 175 Cal. 662, 166 Pac. 801; *Harding v. Robinson*, 175 Cal. 534, 166 Pac. 808.

Georgia. *Brosseau v. Jacobs' Pharmacy Co.*, 147 Ga. 185, 93 S. E. 293.

Illinois. *Schneider v. Turner*, 130 Ill. 28, 6 L. R. A. 164.

Indiana. *Indianapolis Union Ry. v. Houlihan*, 157 Ind. 494, 60 N. E. 943.

Iowa. *Larson v. Smith*, 174 Ia. 619, 156 N. W. 813.

Kentucky. *Paris v. Lilleston (Ky.)*, 60 S. W. 919.

Maryland. *Cassard v. McGlannan*, 88 Md. 168, 40 Atl. 711.

Minnesota. *Kramer v. Gardner*, 104 Minn. 370, 22 L. R. A. (N.S.) 492, 116 N. W. 925.

North Carolina. *Grier v. Ins. Co.*, 132 N. Car. 542, 44 S. E. 28; *Woodson*

v. Beck, 151 N. Car. 144, 31 L. R. A. (N.S.) 235, 65 S. E. 751.

Oregon. *Muir v. Morris*, 80 Or. 378, 157 Pac. 785 [denying rehearing, *Muir v. Morris*, 80 Or. 378, 154 Pac. 117].

South Dakota. *Emerson-Brantingham Implement Co. v. Edgar*, 39 S. D. 139, 163 N. W. 575; *Rosholt v. Woulph*, — S. D. —, 167 N. W. 158.

Texas. *Kahn v. Kahn*, 94 Tex. 114, 58 S. W. 825.

Washington. *Eggleston v. Pantages*, 93 Wash. 221, 160 Pac. 425; *Kelley v. Smith*, 101 Wash. 475, 172 Pac. 542.

West Virginia. *Buena Vista Co. v. Billmyer*, 48 W. Va. 382, 37 S. E. 583.

² *Muir v. Morris*, 80 Or. 378, 157 Pac. 785 [denying rehearing, *Muir v. Morris*, 80 Or. 378, 154 Pac. 117].

³ *Trice v. Yeoman*, 60 Kan. 742, 57 Pac. 955.

⁴ *Lamoille County Savings Bank & Trust Co. v. Belden*, 90 Vt. 535, 98 Atl. 1002.

⁵ *Rhodes v. Owens*, 101 Wash. 324, 172 Pac. 241.

contracts of sale, where the amount to be paid is agreed upon as a contractual term, oral contracts for the assumption of the vendor's debts in addition to the amounts specified in the contract, are unenforceable.⁶ So where A agreed to sell B quinine at fifty-nine cents an ounce, an oral agreement whereby A agreed to advance the price to sixty-one cents per ounce, and to send out trade circulars announcing such advance, is unenforceable.⁷ Under a written agreement to pay an additional price for property upon the extension of an option on such property for a year, extrinsic evidence is inadmissible to show that a corresponding increase was to be made in each successive year, in consideration of an additional extension of time.⁸ Where an injured employe signs a release of damages in consideration of payment to him of twenty-five dollars and all the expenses of physicians and hospital, an oral agreement that the twenty-five dollars was a mere gratuity, and that, accordingly, the only consideration was the payment of the expenses for physicians and hospital, is unenforceable.⁹ So in an agreement for the sale of stock at a certain price per share, an oral agreement that the vendee should pay only one-fourth of the amount set forth in the written contract is unenforceable.¹⁰ So where a bill of sale sets forth the price to be paid for stock, an oral contract to furnish such certificates and proofs of pedigree of such stock as would enable the vendee to have them registered is unenforceable.¹¹ So where a written contract shows that the consideration was to be determined in the future according to the amount of work done, but was "not to exceed five hundred dollars per week," an oral contract fixing the amount of compensation is unenforceable.¹² Under a contract by which A agreed to employ B as superintendent of a building in payment of B's securing a loan for A, extrinsic evidence is inadmissible to show that A had also agreed to pay a commission to B for securing such loan.¹³ So where a contract and conveyance of a right of way shows the considera-

⁶ *Thompson v. Bryant*, 75 Miss. 12, 21 So. 655; *Walter v. Dearing* (Tex. Civ. App.), 65 S. W. 380.

⁷ *Engelhorn v. Reitlinger*, 122 N. Y. 76, 9 L. R. A. 548, 25 N. E. 297.

⁸ *Samuelson v. Palmer*, 96 Kan. 587, 152 Pac. 627.

⁹ *Indianapolis Union R. R. v. Houlihan*, 157 Ind. 494, 54 L. R. A. 787, 60 N. E. 943.

¹⁰ *Libby v. Spring & Land Co.*, 67 N. H. 587, 32 Atl. 772.

¹¹ *McFarland v. McGill*, 16 Tex. Civ. App. 298, 41 S. W. 402 [citing, *Pickett v. Green*, 120 Ind. 584; *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109].

¹² *United Press v. Press Co.*, 164 N. Y. 406, 53 L. R. A. 288, 58 N. E. 527.

¹³ *Cameron v. Ayres*, 175 Cal. 662, 166 Pac. 801.

tion, an oral contract for an under-crossing, as an additional consideration, is unenforceable.¹⁴ If a note shows on its face that it is given in consideration of the location of a railroad at a certain point, extrinsic evidence is inadmissible to show that the payee had also agreed to build a station at a certain point.¹⁵ Under a written contract which releases damages for the location of a railway crossing, in consideration of the payment of a specified sum of money, extrinsic evidence is inadmissible to show that in addition to the consideration recited in such contract, the railway company had agreed to restore a certain stream of water to its original condition.¹⁶ And so where A sold certain patents to B, and guaranteed their validity, and B was to pay A certain royalties thereon, a subsequent written contract whereby, in lieu of such royalties, A is to receive a lump sum, can not be shown to rest in part upon an oral contract whereby B releases A from his contract, guaranteeing the validity of such patents.¹⁷ So oral evidence can not be considered to show a lower rent than that specified in a lease.¹⁸ If the lessee covenants to construct and maintain a factory upon the leased premises, extrinsic evidence is inadmissible to show that such covenant was not intended as a part of the consideration for the lease.¹⁹ A contract by which A agrees to subscribe to certain stock in a corporation, and B agrees to convey a certain building to such corporation, can not be varied by evidence that B had agreed to expend a specified amount in remodeling such building.²⁰ A contract for the dissolution of a partnership which specifies the amount of liability which each partner is to assume, can not be varied by evidence of an oral agreement.²¹ If a lease contains a provision giving an option to the lessee and it appears that such option is a part of the consideration for the lessee's covenant to pay rent, extrinsic evidence is inadmissible to show that such option was inserted after the other terms of the lease had been agreed upon and that accordingly such option was without consideration.²²

¹⁴ *Schrimper v. Ry. (Ia.)*, 82 N. W. 916.

¹⁵ *Rosholt v. Woulph*, — S. D. —, 167 N. W. 158.

¹⁶ *Evans v. Northern Pacific Ry.*, 117 Minn. 4, 134 N. W. 294.

¹⁷ *Sandage v. Mfg. Co.*, 142 Ind. 148, 51 Am. St. Rep. 165, 34 L. R. A. 363, 41 N. E. 380.

¹⁸ *Merchants' State Bank v. Ruet-tell*, 12 N. D. 519, 97 N. W. 853.

¹⁹ *Jones v. Epstein*, — Ark. —, 204 S. W. 217.

²⁰ *Eggleston v. Pantages*, 93 Wash. 221, 160 Pac. 425.

²¹ *Muir v. Morris*, 80 Or. 378, 157 Pac. 785 [denying rehearing, *Muir v. Morris*, 80 Or. 378, 154 Pac. 117].

²² *Larson v. Smith*, 174 Ia. 619, 156 N. W. 813.

If A gives a due bill for a premium upon a life insurance policy, extrinsic evidence is inadmissible to show that the amount which A agrees to pay was not to be paid, but that he was to pay a smaller amount and surrender another policy.²³

§ 2167. Rule does not apply to actions between parties to contract, but not involving contract. In the cases which have been discussed in the preceding sections, the question of the scope and extent of the parol evidence rule has risen in actions upon the contracts in question between the parties to such contracts. The question of the application of the parol evidence rule is also presented in actions between parties to the contract which, however, are not based upon the contract as well as in actions between a party to the contract and a stranger who does not claim under such contract in which case, of course, the action is not upon the contract. By the great weight of authority the parol evidence rule applies only to actions upon the written contract which it is sought to contradict, vary, or modify by extrinsic evidence. It has no application in an action between the parties to a written contract which action is not itself based upon the written contract.¹ If the written contract is involved collaterally in an action between the parties thereto, the parol evidence rule does not apply.² If A has sold property to B under a written contract, and subsequently A institutes criminal proceedings against B for breaking into such building and removing part of such property, and B on acquittal brings an action against A for malicious prosecution, the fact that the contract was in writing does not exclude evidence of the oral agreement between the parties by the terms of which certain property was excepted from the operation of the contract of sale.³ If a tenant brings an action against a landlord for negligence in

²³ Woodson v. Beck, 151 N. Car. 144, 31 L. R. A. (N.S.) 235, 65 S. E. 751.

¹ District of Columbia. O'Hanlon v. Grubb, 38 D. C. App. 251, 37 L. R. A. (N.S.) 1213.

Indiana. Noble v. Epperly, 6 Ind. 468.

Iowa. Dean v. Nichols & Shepard Co., 95 Ia. 89, 63 N. W. 582.

Minnesota. Pope v. Hoefs, 140 Minn. 443, 168 N. W. 584.

South Dakota. Elliott v. Chicago,

M. & St. P. Ry. Co., 38 S. D. 371, 161 N. W. 347.

New Jersey. Le Pichard v. George N. Thurber Co., 84 N. J. L. 193, 86 Atl. 953.

Pennsylvania. Green v. Green, 255 Pa. St. 224, 99 Atl. 801.

Washington. Low v. McDonald, 90 Wash. 122, 155 Pac. 748.

² Green v. Green, 255 Pa. St. 224, 99 Atl. 801.

³ Low v. McDonald, 90 Wash. 122, 155 Pac. 748.

the management of a steam heating plant over which the landlord kept control, the admission of evidence of oral representations made by the landlord as to the condition of the heating plant is not erroneous, although the written contract of lease contained a provision to the effect that no repairs would be done or paid for by the landlord except those agreed to in writing at the time of rental.⁴ If A and B enter into a written contract of sale under which A gives notes which B converts, A may show in an action for such wrongful conversion that the notes were given under an oral agreement that B's agent should hold them until A was satisfied with the operation of the machinery for which they were given, although such provision contradicts the written contract of sale.⁵ If the action is not brought upon a contract of membership in a stock exchange, extrinsic evidence is admissible to show that one of the parties was a member if such evidence is material to the issue.⁶ Evidence of prior or contemporaneous oral negotiations may be admissible for the purpose of showing that notice was given to the adversary party, although they may not be admissible to vary the terms of the contract.⁷

§ 2168. Rule does not apply to strangers to contract. The parol evidence rule applies only between the parties to the contract and those claiming under them, and is limited to actions upon the contract.¹ In many cases where the rule is not applied, as between a party to a written contract and a stranger thereto, the contract was so drawn as to operate as a fraud against such stranger, and it has been suggested that this is the case in which

⁴ *Le Pichard v. George N. Thurber Co.*, 84 N. J. L. 193, 86 Atl. 953. See to the same effect, *O'Hanlon v. Grubb*, 38 D. C. App. 251, 37 L. R. A. (N.S.) 1213.

⁵ *Dean v. Nichols & Shepard Co.*, 95 Ia. 89, 63 N. W. 582.

⁶ *Gwathmey v. Burgiss*, 104 S. Car. 280, 88 S. E. 816.

⁷ *Elliott v. Chicago, M. & St. P. Ry. Co.*, 38 S. D. 371, 161 N. W. 347.

¹ *United States. Central, etc., Co. v. Good*, 120 Fed. 793, 57 C. C. A. 161.

Alabama. *Coleman v. Pike County*, 83 Ala. 326, 3 Am. St. Rep. 746, 3 So. 755; *Walker v. State*, 117 Ala. 42, 23

So. 149; *British, etc., Co. v. Cody*, 135 Ala. 602, 33 So. 832.

California. *Dunn v. Price*, 112 Cal. 46, 44 Pac. 354; *Budd v. Hughes*, — Cal. —, 171 Pac. 287.

Georgia. *Dickey v. Grice*, 110 Ga. 315, 35 S. E. 291.

Indiana. *White v. Woods*, 183 Ind. 500, 109 N. E. 761.

Iowa. *Hamlin v. Simpson*, 105 Ia. 125, 44 L. R. A. 397, 74 N. W. 906; *Livingston v. Stevens*, 122 Ia. 62, 94 N. W. 925; *Livingston v. Heck*, 122 Ia. 74, 94 N. W. 1098; *In re Shields*, 134 Ia. 559, 10 L. R. A. (N.S.) 1061, 111 N. W. 963; *In re Lamb*, 140 Ia. 89, 18

the rule should not be applied.² While cases of this sort present the best illustrations of the evils that would result from applying the parol evidence rule against a stranger to the contract, the reasons for refusing to apply the rule to a stranger are by no means limited to fraud. Since the stranger did not assent to the contract and since he does not claim under it, there is no reason for applying the rule as against him, and, accordingly, there is no reason for applying the rule in his favor.³

Accordingly, a stranger to the instrument may introduce extrinsic evidence to contradict it, or to show the real intention of

L. R. A. (N.S.) 226, 117 N. W. 1118; **Lanz v. Schumann**, 175 Ia. 542, 154 N. W. 911; **Moore v. St. Paul Fire & Marine Insurance Co.**, 176 Ia. 549, 156 N. W. 676; **Dilenbeck v. Herrold**, — Ia. —, 164 N. W. 869; **Wheeler v. Schilder**, — Ia. —, 167 N. W. 534.

Kentucky. **Edwards v. Ballard**, 53 Ky. (14 B. Mon.) 289; **Provident, etc., Society v. Johnson**, 115 Ky. 84, 72 S. W. 754; **Commonwealth v. Starks**, 179 Ky. 582, 200 S. W. 939.

Massachusetts. **Baker v. Briggs**, 25 Mass. (8 Pick.) 122, 19 Am. Dec. 311; **Wilson v. Mulloney**, 185 Mass. 430, 70 N. E. 448; **Cohen v. Edinberg**, 225 Mass. 177, 114 N. E. 294 (obiter, as stipulation made at trial had effect of rendering evidence inadmissible). **O'Neil v. National Oil Co.**, 231 Mass. 20, 120 N. E. 107.

Minnesota. **Pfeifer v. Ins. Co.**, 62 Minn. 536, 64 N. W. 1018; **Witzel v. Zuel**, 90 Minn. 340, 96 N. W. 1124.

Nebraska. **Crockett v. Miller (Neb.)**, 96 N. W. 401; **First National Bank v. Tolerton (Neb.)**, 97 N. W. 248; **Fitzgerald v. Union Stock Yards Co.**, 89 Neb. 393, 33 L. R. A. (N.S.) 983, 131 N. W. 612; **Hauth v. Sambo**, 100 Neb. 160, 158 N. W. 1036.

North Dakota. **Roberts v. Bank**, 8 N. D. 474, 79 N. W. 993.

Ohio. **Clapp v. Banking Co.**, 50 O. S. 528, 35 N. E. 308.

Pennsylvania. **Simon v. Emery**, 254 Pa. St. 569, 99 Atl. 78.

South Carolina. **Gwathmey v. Bur-giss**, 104 S. Car. 280, 88 S. E. 816.

South Dakota. **Schuler v. Bank**, 13 S. D. 188, 82 N. W. 389.

Tennessee. **Myers v. Taylor**, 107 Tenn. 364, 64 S. W. 719.

Texas. **Kahle v. Stone**, 95 Tex. 106, 65 S. W. 623; **Oriental Investment Co. v. Barclay**, 25 Tex. Civ. App. 543, 64 S. W. 80.

Utah. **Olmstead v. Ry.**, 27 Utah 515, 76 Pac. 557; **Plant v. Ritter**, 47 Utah 506, 155 Pac. 426.

Washington. **Elliott v. S. S. Co.**, 22 Wash. 220, 60 Pac. 410; **Ransom v. Wickstrom**, 84 Wash. 419, L. R. A. 1916A, 588, 146 Pac. 1041.

² **Barreda v. Silsbee**, 62 U. S. (21 How.) 146, 16 L. ed. 96.

³ **California.** **Dunn v. Price**, 112 Cal. 46, 44 Pac. 354; **Budd v. Hughes**, — Cal. —, 171 Pac. 287.

Indiana. **White v. Woods**, 183 Ind. 500, 109 N. E. 761.

Iowa. **Lanz v. Schumann**, 175 Ia. 542, 154 N. W. 911; **Wheeler v. Schilder**, — Ia. —, 167 N. W. 534.

Kentucky. **Williams v. National Cash Register Co.**, 157 Ky. 836, 164 S. W. 112.

Minnesota. **Rupley v. Frazer**, 132 Minn. 311, 156 N. W. 350.

New York. **McMaster v. Ins. Co.**, 55 N. Y. 222, 14 Am. Rep. 239.

Pennsylvania. **Simon v. Emery**, 254 Pa. St. 569, 99 Atl. 78.

the parties,⁴ and so may a party to the contract in an action between himself and a stranger thereto.⁵ A stranger to the instrument can not invoke the rule to prevent the other party to the action from introducing extrinsic evidence to contradict the written contract.⁶ If A and B enter into a contract by which B is to act as an independent contractor, B may contradict the provisions of a written contract between A and X.⁷ In like manner, X is not bound by the written contract between A and B,⁸ and X may show that B is the agent of A and not an independent contractor.⁹ If A enters into a written contract to sell property to B, and B purchases material from X for the improvement of such property, X is not bound by the written contract between A and B,¹⁰ and X may show that B was authorized to incur liabilities on behalf of A for the improvement of such property.¹¹ A third person suing for personal injuries due to negligence may show by extrinsic evidence that the relation between the parties to a written contract is that of master and servant, though on the face of the written

⁴ *United States*. *Sigua Iron Co. v. Greene*, 98 Fed. 207, 31 C. C. A. 477.

Iowa. *Wheeler v. Schilder*, — Ia. —, 167 N. W. 534.

Pennsylvania. *Simon v. Emery*, 254 Pa. St. 569, 99 Atl. 78.

Tennessee. *Nashville Interurban Ry. v. Gregory*, 137 Tenn. 422, 193 S. W. 1053.

Virginia. *Bruce v. Lumber Co.*, 87 Va. 381, 24 Am. St. Rep. 657, 13 S. E. 153.

Washington. *Ransom v. Wickstrom*, 84 Wash. 419, L. R. A. 1916A, 588, 146 Pac. 1041.

⁵ *United States*. *Sigua Iron Co. v. Greene*, 98 Fed. 207, 31 C. C. A. 477.

Alabama. *Coleman v. Pike County*, 83 Ala. 326, 3 Am. St. Rep. 746, 3 So. 755.

Minnesota. *Rupley v. Fraser*, 132 Minn. 311, 156 N. W. 350.

New York. *Tyson v. Post*, 108 N. Y. 217, 2 Am. St. Rep. 409, 15 N. E. 316.

Pennsylvania. *Imperial Ins. Co. v. Dunham*, 117 Pa. St. 460, 2 Am. St. Rep. 686.

⁶ *Iowa*. *Aultman Engine & Thresher Co. v. Greenlee*, 134 Ia. 368, 111 N. W. 1007; *In re Shields Bros.*, 134 Ia. 559, 10 L. R. A. (N.S.) 1061, 111 N. W. 963.

Kentucky. *Marks v. Hardy's Admr.*, 117 Ky. 663, 4 Am. & Eng. Ann. Cas. 814, 78 S. W. 864, 1105.

North Dakota. *Roberts v. Bank*, 8 N. D. 474, 79 N. W. 993.

Oregon. *Pacific Biscuit Co. v. Dugger*, 42 Or. 513, 70 Pac. 523; *Smith v. Farmers' & Merchants' National Bank*, 57 Or. 82, 110 Pac. 410.

Washington. *Carmack v. Drum*, 32 Wash. 236, 73 Pac. 377, 785.

Contra, *Lawson v. Mullinix*, 104 Md. 156, 64 Atl. 938.

⁷ *O'Neil v. National Oil Co.*, 231 Mass. 20, 120 N. E. 107.

⁸ *Scales v. First State Bank*, 88 Or. 490, 172 Pac. 499.

⁹ *Scales v. First State Bank*, 88 Or. 490, 172 Pac. 499.

¹⁰ *Belnap v. Condon*, 34 Utah 213, 23 L. R. A. (N.S.) 601, 97 Pac. 111.

¹¹ *Belnap v. Condon*, 34 Utah 213, 23 L. R. A. (N.S.) 601, 97 Pac. 111.

contract the latter is an independent contractor.¹² Thus as between a bank and an attaching sheriff, the bank may show an oral agreement with the depositor, whose funds are sought to be attached, that such deposits should be applied to the payment of a note of the depositor's not yet due.¹³ In a suit to set aside a conveyance on the ground that it is in fraud of creditors, extrinsic evidence is admissible to vary or contradict the consideration expressed in the conveyance.¹⁴ In an action for fraud in which the exchange of realty for certain property is involved, extrinsic evidence is admissible to contradict a conveyance of such realty to the party who was injured by such fraud and to show that one of the grantees named therein had in fact no interest.¹⁵ In an action between a party to an instrument which purports to be a sale and a stranger thereto, extrinsic evidence is admissible to show that such instrument was intended as an assignment of a tax lien and not as a sale.¹⁶ One who has purchased a negotiable instrument and has accepted it with an endorsement that indicates that it is paid, may show in an action against the maker thereof, that the transaction was really a sale and not a payment of such instrument.¹⁷ If A has leased certain jewelry to B under a written contract, and B pledges such jewelry to C, C may show an oral agreement between A and B, by which B was empowered to pledge such jewelry.¹⁸ As between an execution creditor of grantor and the grantee, evidence of the real character of the consideration may be received.¹⁹ If A has executed and delivered a written bill of sale to B, under which he has transferred certain property to B, extrinsic evidence to the effect that such bill of sale was executed and delivered in order to enable B to transfer title to C, may be shown as against X, who is B's judgment creditor and who has levied execution upon such property.²⁰ A gave a check on a bank in which he had no funds subject to check. The holder of the check neglected to present it for payment, and the bank failed

¹² *Powell v. Construction Co.*, 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S. W. 691.

¹³ *Schuler v. Bank*, 13 S. D. 188, 82 N. W. 389.

¹⁴ *Deal v. Ford*, — Mo. —, 204 S. W. 181; *Plant v. Ritter*, 47 Utah 506, 155 Pac. 426.

¹⁵ *White v. Woods*, 183 Ind. 500, 109 N. E. 761.

¹⁶ *Rupley v. Fraser*, 132 Minn. 311, 156 N. W. 350.

¹⁷ *Dilenbeck v. Herrold*, — Ia. —, 164 N. W. 869.

¹⁸ *Simon v. Emery*, 254 Pa. St. 569, 99 Atl. 78.

¹⁹ *Thompson v. Cody*, 100 Ga. 771, 28 S. E. 669.

²⁰ *Ransom v. Wickstrom*, 84 Wash. 419, L. R. A. 1916A, 588, 146 Pac. 1041.

soon after. In an action between the holder of the check and A, A was allowed to show that he had made a special deposit for which he had received a certificate of deposit, and that by oral agreement between himself and the bank, checks drawn by him were to be paid out of such special deposit, though not ordinarily subject to check.²¹ In an action between an agent of one of the parties to a written contract and his principal,²² such as a broker,²³ or the adversary party to the contract,²⁴ or a third person,²⁵ extrinsic evidence may be admitted to show the real understanding. A contract for the transfer of an interest in realty may be explained or contradicted by extrinsic evidence as between the state and one whom the state contends is the owner of such realty or of an interest therein for the purpose of taxation.²⁶ So if an agent is a defendant in a criminal action in which he is charged with embezzlement, he may introduce extrinsic evidence to show the real contract between himself and his principal, and thus show that the money appropriated by him was not taken with criminal intent, though in an action between himself and his principal, upon the contract of employment, such evidence would have been inadmissible.²⁷

On the other hand, it has been held that the parol evidence rule operates in favor of a third person in the same way and to the same extent that it operates between the parties to the instrument.²⁸ Where this view is taken, an injured party who has given a release to one of two joint wrongdoers can not contradict the legal effect of such release in an action between himself and another of such joint wrongdoers.²⁹ A grantor has not been permitted

²¹ *Hamlin v. Simpson*, 105 Ia. 125, 44 L. R. A. 397, 74 N. W. 906.

Contra, *Baer's Appeal*, 127 Pa. St. 360, 4 L. R. A. 609, where an administrator who had deposited money of the estate in a bank, taking a certificate of deposit, was not allowed to show a contract between himself and the bank permitting him to withdraw the money at any time to relieve himself from liability after the bank had failed.

²² *Folinsbee v. Sawyer*, 157 N. Y. 196, 51 N. E. 994; *Godefroy v. Hupp*, 93 Wash. 371, 160 Pac. 1056.

²³ *Cohen v. Edinberg*, 225 Mass. 177, 114 N. E. 294 (obiter, as stipulation at trial rendered evidence inadmissible);

Godefroy v. Hupp, 93 Wash. 371, 160 Pac. 1056.

²⁴ *Harvey v. Henry*, 108 Ia. 168, 78 N. W. 850.

²⁵ *Elliott v. S. S. Co.*, 22 Wash. 220, 60 Pac. 410.

²⁶ *In re Shields*, 134 Ia. 559, 10 L. R. A. (N.S.) 1061, 111 N. W. 963; *In re Lamb*, 140 Ia. 89, 18 L. R. A. (N.S.) 226, 117 N. W. 1118; *Commonwealth v. Starks*, 179 Ky. 582, 200 S. W. 939.

²⁷ *Walker v. State*, 117 Ala. 42, 23 So. 149.

²⁸ *Allen v. Ruland*, 79 Conn. 405, 118 Am. St. Rep. 146, 65 Atl. 138.

²⁹ *Allen v. Ruland*, 79 Conn. 405, 118 Am. St. Rep. 146, 65 Atl. 138.

to contradict the provisions of a deed or the legal effect thereof in litigation between himself and a third person involving his ownership in such realty.³⁰ If A has conveyed realty to B under a deed which contains no reservation of certain buildings, and such buildings are destroyed by X's negligence, it is held that A can not show in an action against X that such buildings were reserved orally.³¹

§ 2169. Who are strangers to contract. The fact that the person who attempts to contradict the written contract was not a party thereto, when such contract was entered into, is not sufficient of itself to show that he is such a stranger to the instrument that he can introduce extrinsic evidence to contradict it. A subsequent holder or assignee of a written contract is, of course, as much bound by the parol evidence rule as the original party thereto, under whom he claims, as far as the original contract, which has been assigned, is concerned.¹ Since the adversary party to the original contract other than the assignor is not a party to the assignment, the assignee may show that the assignment was by way of security only, so as to avoid a provision in the original contract to the effect that it should be void in case of assignment.²

If a third person bases his claim upon a contract, and is seeking to enforce it,³ as where he is seeking to show that the written contract was made between the parties thereto for his benefit,⁴ the parol evidence rule applies. If A and B have dissolved a partnership under an agreement by which A is to pay certain specified claims, including one which is due to X, and X is suing upon such

³⁰ *Mahaffey v. J. L. Rumbarger Lumber Co.*, 61 W. Va. 571, 8 L. R. A. (N. S.) 1263, 56 S. E. 893.

³¹ *Mahaffey v. J. L. Rumbarger Lumber Co.*, 61 W. Va. 571, 8 L. R. A. (N. S.) 1263, 56 S. E. 893.

See § 2170.

¹ *Andrus v. Blazzard*, 23 Utah 233, 54 L. R. A. 354, 63 Pac. 888.

² *Aetna Insurance Co. v. Smith*, 117 Miss. 327, L. R. A. 1918D, 1158, 78 So. 289.

Such evidence would have been admissible as between the original parties. See § 2154.

³ *Sayre v. Burdick*, 47 Minn. 367, 50 N. W. 245; *Schneider v. Kirkpatrick*, 80 Mo. App. 145; *Muir v. Morris*, 80

Or. 378, 157 Pac. 785 [denying rehearing, *Muir v. Morris*, 80 Or. 378, 154 Pac. 117]; *Union Machinery & Supply Co. v. Darnell*, 89 Wash. 226, 154 Pac. 183.

⁴ *Schultz v. Bank*, 141 Ill. 116, 33 Am. St. Rep. 290, 30 N. E. 346; *Kupferschmidt v. Agricultural Insurance Co.*, 80 N. J. L. 441, 34 L. R. A. (N.S.) 503, 78 Atl. 225; *Muir v. Morris*, 80 Or. 378, 157 Pac. 785 [denying rehearing, *Muir v. Morris*, 80 Or. 378, 154 Pac. 117]; *Traders' National Bank v. Water Power Co.*, 22 Wash. 467, 61 Pac. 152; *Union Machinery & Supply Co. v. Darnell*, 80 Wash. 226, 154 Pac. 183.

contract as a beneficiary thereunder, X can not introduce extrinsic evidence to contradict such contract and to show that the agreement between A and B was to pay him a compensation in addition to that specified in such contract.⁵ A second mortgagee who is suing upon a standard mortgage clause as a beneficiary thereunder, can not contradict the provisions of such clause by showing in an action at law that such provision was intended for his benefit as well as for the benefit of the first mortgagee, who is the beneficiary named therein.⁶ If A and B are partners, and A brings an action against B for the conversion of B's interest in certain leases, B can not contradict the provisions of such leases in order to show that they were of greater value than the provisions of such leases would indicate.⁷ An attorney who is bringing an action to enforce a lien under a contract of compromise between his client and the adversary party, can not contradict the written contract of settlement by showing that although it purports to be a settlement of his client's entire cause of action, it was a settlement of an undivided half interest in such cause of action.⁸ If A, a railway company, insures only its own liability for C's property which is in A's possession as warehouseman, and by the terms of the written contract between A and C, A is not liable for loss by fire, A can not, in an action against the insurance company, contradict such terms by showing that A had agreed to insure C's interest.⁹

§ 2170. Application of foregoing principles to releases and covenants not to sue. If a release which is not under seal has been given to one of two joint wrongdoers, the other wrongdoer is a stranger thereto, within the meaning of the parol evidence rule, though the effect of such release may be to discharge him.¹ If the instrument does not show whether or not the sum received was in full satisfaction, extrinsic evidence is admissible to show what the

⁵ *Muir v. Morris*, 80 Or. 378, 157 Pac. 785 [denying rehearing, *Muir v. Morris*, 80 Or. 378, 154 Pac. 117].

⁶ *Kupferschmidt v. Agricultural Insurance Co.*, 80 N. J. L. 441, 34 L. R. A. (N.S.) 503, 78 Atl. 225.

⁷ *Frith v. Thomson*, 103 Kan. 395, 173 Pac. 915.

⁸ *Foley v. Grand Rapids & Indiana Ry.*, 168 Mich. 496, 134 N. W. 446.

⁹ *Minneapolis, St. Paul & Sault Ste.*

Marie Ry. v. Home Ins. Co., 55 Minn. 236, 22 L. R. A. 390, 56 N. W. 815.

¹ *O'Shea v. Ry.*, 105 Fed. 559, 44 C. A. 601; *Ryan v. Becker*, 136 Ia. 273, 14 L. R. A. (N.S.) 329, 111 N. W. 426; *Fitzgerald v. Union Stock Yards Co.*, 89 Neb. 393, 33 L. R. A. (N.S.) 983, 131 N. W. 612; *Hauth v. Sambo*, 100 Neb. 160, 158 N. W. 1036; *Randall v. Gerrick*, 93 Wash. 522, L. R. A. 1918D, 179, 161 Pac. 357.

fact was.² If the release is under seal, a stranger can not contradict its legal effect.³ This result, however, does not depend on the parol evidence rule alone.⁴

If A and B have jointly committed a tort against X, A may show by extrinsic evidence that an instrument which was in form a covenant by X not to sue B was really intended as a release.⁵ A stranger to a consent judgment may contradict the stipulation under which it was taken and show the real agreement of the parties.⁶ If X takes judgment against A under a stipulation that such judgment is to be in full satisfaction of X's claim set forth in his petition which he has filed against A, X may contradict the provisions of such stipulation and of such petition in a subsequent action against B, by showing that A was not in fact liable and that the consideration for such stipulation consisted in A's saving the expenses of a journey to defend such action.⁷ It may be shown that it was assumed that no liability existed against the joint tort-feasor, who was released on payment of a nominal consideration to save the expense of a trial.⁸

§ 2171. Parol evidence rule does not apply where existence or validity of contract is in issue. The parol evidence rule presupposes an action based on a valid contract, and between the parties thereto or those claiming under them or those claiming under such contract as beneficiaries. If the issue is as to the existence or validity of the contract, the rule by its very terms has no application and extrinsic evidence is necessarily admitted to determine such issue, whether such evidence tends to establish the validity,¹ or the invalidity,² of the contract in question. Specific instances

Contra, that such joint wrongdoer is not a stranger to the instrument. *Allen v. Ruland*, 79 Conn. 405, 118 Am. St. Rep. 146, 65 Atl. 138; *Goss v. Ellison*, 136 Mass. 503.

If the release is given to one who is not a wrongdoer at all, the real wrongdoer can not take advantage thereof. *Kentucky & Indiana Bridge Co. v. Hall*, 125 Ind. 220, 25 N. E. 219.

² *Matheson v. O'Kane*, 211 Mass. 91, 39 L. R. A. (N.S.) 475, 97 N. E. 638.

³ *Ellis v. Esson*, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518.

⁴ See § 1169 et seq.

⁵ *Nashville Interurban Ry. v. Gregory*, 137 Tenn. 422, 193 S. W. 1053.

⁶ *Ryan v. Becker*, 136 Ia. 273, 14 L. R. A. (N.S.) 329, 111 N. W. 426.

⁷ *Ryan v. Becker*, 136 Ia. 273, 14 L. R. A. (N.S.) 329, 111 N. W. 426.

⁸ *Randall v. Gerrick*, 93 Wash. 522, L. R. A. 1918D, 179, 161 Pac. 357.

¹ *Verzon v. McGregor*, 23 Cal. 339; *Black v. Ry.*, 111 Ill. 351, 53 Am. Rep. 628; *Uhl v. Moorhous*, 137 Ind. 445, 37 N. E. 366; *Safranski v. Ry.*, 72 Minn. 185, 75 N. W. 17.

² *Arkansas. Little v. Arkansas National Bank*, 105 Ark. 281, 152 S. W. 281.

of the application of this principle will be given in the following sections.

§ 2172. Facts of execution in general. A written contract can not prove itself. The genuineness of the signatures and the execution and delivery of the contract, which are essential to its validity,¹ must be proved by extrinsic evidence, and if all extrinsic evidence of the facts of execution were to be excluded, a written contract could not be shown to be valid. The so-called parol evidence rule has, therefore, no application where the issue is whether or not the contract sued upon was entered into, and the evidence is offered for the purpose of showing that no contract was in fact made.² Extrinsic evidence is admissible to show what took place at the execution of the instrument, as far as such facts affect its validity.³

Iowa. *Brennecke v. Heald*, 107 Ia. 376, 77 N. W. 1063.

Michigan. *Church v. Case*, 110 Mich. 621, 68 N. W. 424.

Washington. *Reiner v. Crawford*, 23 Wash. 669, 83 Am. St. Rep. 848, 63 Pac. 516.

Wisconsin. *Manufacturers' & Merchants' Inspection Bureau v. Everwear Hosiery Co.*, 152 Wis. 73, 42 L. R. A. (N.S.) 847, 138 N. W. 624.

¹ See §§ 1173 et seq.

² *Northern Trust Co. v. Bruegger*, 35 N. D. 150, 159 N. W. 859.

³ **United States.** *Beach v. Nevins*, 162 Fed. 129, 89 C. C. A. 129, 18 L. R. A. (N.S.) 288.

Alabama. *Tumlin v. Tumlin*, 195 Ala. 457, 70 So. 254.

Illinois. *Jordan v. Davis*, 108 Ill. 336; *Shipley v. Shipley*, 274 Ill. 506, 113 N. E. 906.

Iowa. *Garner v. Kratzer*, 173 Ia. 292, 155 N. W. 296; *Franke v. Kelsheimer*, 180 Ia. 251, 163 N. W. 239.

Kansas. *Morris v. Blazer*, 96 Kan. 466, 152 Pac. 767.

Kentucky. *Williams v. Hall*, 32 Ky. (2 Dana) 97.

Massachusetts. *Bowes v. Christian*,

222 Mass. 359, 110 N. E. 1034; *Hindelang v. Mahon*, 225 Mass. 445, 114 N. E. 684.

Michigan. *Wilbur v. Stoepel*, 82 Mich. 344, 21 Am. St. Rep. 568, 46 N. W. 724; *Woodard v. Walker*, 192 Mich. 188, 158 N. W. 846.

Minnesota. *Grimes v. Minneapolis, St. Paul, Rochester & Dubuque Electric Traction Co.*, 133 Minn. 442, L. R. A. 1916F, 687, 158 N. W. 710.

Oklahoma. *Rutherford v. Holbert*, 42 Okla. 735, L. R. A. 1915B, 221, 142 Pac. 1099; *Waggener Bank & Trust Co. v. Doak*, — Okla. —, 172 Pac. 61; *J. M. Hoard, Jr., Co. v. Grand Rapids Showcase Co.*, — Okla. —, 173 Pac. 844.

Pennsylvania. *Johnson v. Smith*, 165 Pa. St. 195, 30 Atl. 675; *Excelsior Saving Fund & Loan Association v. Fox*, 253 Pa. St. 257, 98 Atl. 593.

Texas. *McCartney v. McCartney*, 93 Tex. 359, 55 S. W. 310 [reversing, 53 S. W. 388].

Washington. *Hindle v. Holcomb*, 34 Wash. 336, 75 Pac. 873; *Garring v. Stephens*, — Wash. —, 184 Pac. 314.

West Virginia. *Flowers v. Fletcher*, 40 W. Va. 103, 20 S. E. 870.

Since a deed does not prove its own execution or delivery, extrinsic evidence of the facts of execution and delivery is admissible, as such evidence does not contradict the terms of the instrument, but on the contrary, tends to show whether or not the instrument ever took effect.⁴ If the real question in issue is whether the offer was accepted in a reasonable time or not, the purpose for which the written offer was made may be shown in order to determine whether the acceptance was made within a reasonable time.⁵

If the real question in dispute is as to the time at which the contract was made, prior written negotiations are admissible for the purpose of proving such fact.⁶ If a written contract was delivered in escrow, extrinsic evidence is admissible to show the terms of the escrow agreement, and whether the contract was delivered in accordance with the terms of such escrow agreement.⁷ Evidence which bears on the genuineness and authenticity of the signature of a party to a written contract is admissible.⁸ If A signs a contract by his mark, and the name which is written by such mark is not A's real name, extrinsic evidence is admissible to explain such form of signature.⁹ Extrinsic evidence is admissible to show whether terms which are not written in the body of the contract,¹⁰ such as terms which are written under the signature of one of the parties,¹¹ were intended by the parties as terms of the contract. If A denies that he ever assented to the written contract alleged by B, A may show the oral contract which, as he claims, was the only contract entered into.¹² If a written contract is in form an offer by A, accepted by B in writing, it may be shown that B accepted it in writing before A agreed to it or signed it, and hence that it was really B's offer.¹³ If a clause in a written contract executed by an agent makes it subject to the approval of the

Wisconsin. *Curry v. Colburn*, 99 Wis. 319, 67 Am. St. Rep. 860, 74 N. W. 778.

⁴ *Tumlin v. Tumlin*, 195 Ala. 457, 70 So. 254; *Shipley v. Shipley*, 274 Ill. 506, 113 N. E. 906; *Morris v. Blazer*, 96 Kan. 466, 152 Pac. 767; *Garry v. Stephens*, — Wash. —, 184 Pac. 314.

⁵ *Philips v. Newoe Co.*, 101 Wash. 234, 172 Pac. 355.

⁶ *Hamilton Iron & Steel Co. v. Groveland Mining Co.*, 233 Fed. 388, 147 C. C. A. 324.

⁷ *Northern Trust Co. v. Bruegger*, 35 N. D. 150, 159 N. W. 859.

⁸ *Bachinsky v. Federal Coal & Coke Co.*, 78 W. Va. 721, 90 S. E. 227.

⁹ *Bachinsky v. Federal Coal & Coke Co.*, 78 W. Va. 721, 90 S. E. 227.

¹⁰ *Leahmer v. McCollough*, 99 Kan. 451, 162 Pac. 297.

¹¹ *Leahmer v. McCollough*, 99 Kan. 451, 162 Pac. 297.

¹² *Brennecke v. Heald*, 107 Ia. 376, 77 N. W. 1063.

¹³ *Elastic Tip Co. v. Graham*, 174 Mass. 507, 55 N. E. 315.

principal, it may be shown that the principal assented to such contract in advance.¹⁴

§ 2173. Genuineness of signature and intent of signer. Extrinsic evidence is admissible to show the genuineness of the signature and the intent with which such signature was affixed. Evidence is admissible to show that one who is alleged to have signed an assignment of an insurance policy by mark did not sign it, was unable to read and did not know the contents of the assignment.¹

Evidence is admissible to show whether a person whose name appears upon an instrument in a place customary for a witness signs as a witness or as a maker;² to show whether one signing a negotiable note on the bank did so before or after delivery, where, if the note were signed before delivery, he would be liable as a co-maker;³ to show that a signature was by mistake misplaced upon a bond;⁴ to show whether a person writing his initials upon a contract does so merely to witness an interlineation, or whether he intends his initials to be incorporated in the instrument as a part of the interlineation;⁵ to show that one who had signed a promissory note on the back thereof had, before delivery, ordered that his endorsement be erased, and that the transferee knew of such order;⁶ to show that a contract which on its face was signed by A on behalf of B, was in fact signed by A on behalf of B and in B's presence, thus satisfying the Statute of Frauds, which in that jurisdiction requires the authority of an agent, who signs a memorandum to be in writing,⁷ or that a witness signed after the instrument was delivered.⁸ So if a vote of a corporation is relied on as a written contract, oral evidence is admissible, and indeed necessary, to show whether the adversary party ever knew of or accepted such vote.⁹ So it may be shown where a bond which recites that it is the obligation of a specified principal and sureties, is

¹⁴ *Davis v. Furniture Co.*, 41 W. Va. 717, 24 S. E. 630.

¹ *Wienecke v. Arbin*, 88 Md. 182, 44 L. R. A. 142, 40 Atl. 709.

² *Aultman & Taylor Co. v. Gunder-son*, 6 S. D. 226, 55 Am. St. Rep. 837, 60 N. W. 859.

³ *Bank v. Jefferson*, 92 Tenn. 537, 36 Am. St. Rep. 100, 22 S. W. 211.

⁴ *Craig v. Spencer*, 56 Okla. 259, 156 Pac. 172.

⁵ *Isham v. Cooper*, 56 N. J. Eq. 398, 39 Atl. 760, 37 Atl. 462.

⁶ *Gregg v. Groesbeck*, 11 Utah 310, 32 L. R. A. 266, 40 Pac. 202.

⁷ *Morton v. Murray*, 176 Ill. 54, 43 L. R. A. 529, 51 N. E. 767. (Contract for the sale of realty.)

⁸ *Webster v. Smith*, 72 Vt. 12, 47 Atl. 101.

⁹ *Sears v. R. R.*, 152 Mass. 151, 9 L. R. A. 117, 25 N. E. 98.

signed by the sureties, but not by the principal, that the sureties intended it to take effect without the principal's signature.¹⁰

If the execution of a negotiable instrument is denied and if evidence is offered tending to show that the maker's signature thereto is a forgery, it is error to instruct the jury that execution is presumed,¹¹ and this error is not cured by another charge to the effect that the burden of proving execution is on the plaintiff, since it is impossible to determine which instruction the jury followed.¹²

§ 2174. Contents of written instrument. If the issue is in part as to the words of the instrument at the time of execution, extrinsic evidence is not only admissible but necessary to show such fact.¹ Extrinsic evidence on the part of the grantor is admissible to show that a certain provision was not contained in a deed when he delivered it.² If a waiver of protest and notice and a guarantee of payment appear over the signature of an endorser, extrinsic evidence is admissible to show whether such provision was written over his signature before or after he endorsed and delivered such instrument.³ If, however, the alteration does not modify the legal effect of the instrument, extrinsic evidence is inadmissible to show that a different provision was in fact agreed upon.⁴ If the rate of interest is omitted the legal effect is that the legal rate of interest is intended and extrinsic evidence is inadmissible to show that a lower rate was agreed upon, even though such blank is subsequently filled by inserting the legal rate.⁵

Evidence is admissible to show when certain interlineations were made,⁶ as to show that such interlineations were inserted without authority and amounted to a forgery,⁷ or to show when and by

¹⁰ *Safranski v. Ry.*, 72 Minn. 185, 75 N. W. 17.

¹¹ *Sears v. Daly*, 43 Or. 346, 73 Pac. 5.

¹² *Sears v. Daly*, 43 Or. 346, 73 Pac. 5.

¹ *White Sewing Machine Co. v. Atkinson*, 126 Ark. 204, 190 S. W. 111; *Forbes v. Madden*, 98 Kan. 559, 158 Pac. 850; *Grimes v. Minneapolis, St. Paul, Rochester & Dubuque Electric Traction Co.*, 133 Minn. 442, L. R. A. 1916F, 687, 158 N. W. 719.

² *Grimes v. Minneapolis, St. Paul, Rochester & Dubuque Electric Traction*

Co., 133 Minn. 442, L. R. A. 1916F, 687, 158 N. W. 719.

³ *Forbes v. Madden*, 98 Kan. 559, 158 Pac. 850.

⁴ *Haas v. Commerce Trust Co.*, 194 Ala. 672, 69 So. 894.

⁵ *Haas v. Commerce Trust Co.*, 194 Ala. 672, 69 So. 894.

⁶ *Bradbury v. Nethercutt*, 95 Wash. 670, 164 Pac. 194; *Pancake v. Campbell County*, 44 W. Va. 82, 28 S. E. 719.

⁷ *Bradbury v. Nethercutt*, 95 Wash. 670, 164 Pac. 194.

whom grantee's name was changed,⁸ or to show of what words the real contract consisted where certain terms are found to be crossed out and marked, "Not agreed to."⁹ In an action upon a written contract which is made by the acceptance of an order, extrinsic evidence is admissible to show that the purchaser had attached to such written order an additional written stipulation reserving certain rights of revocation to himself,¹⁰ even though the written order provides that no agreement except such as is contained therein shall be a part of the contract.¹¹

§ 2175. Extrinsic evidence as to date. If the instrument is not dated, extrinsic evidence is admissible to show the true date.¹ If the date of the contract is the question at issue, evidence of prior written negotiations is admissible to show the actual date of the instrument.² Extrinsic evidence is admissible to show the date at which the certificate of the notary to the acknowledgment was signed.³ The parol evidence rule does not prevent one of the parties to a written contract from showing the true date thereof, even if such evidence contradicts the recitals of the written instrument.⁴ Thus extrinsic evidence is admissible to show that a sealed contract

⁸ *Goodwin v. Norton*, 92 Me. 532, 43 Atl. 111.

⁹ *Tate v. Torcutt*, 100 Mich. 308, 58 N. W. 993.

¹⁰ *White Sewing Machine Co. v. Atkinson*, 126 Ark. 204, 190 S. W. 111.

¹¹ *White Sewing Machine Co. v. Atkinson*, 126 Ark. 204, 190 S. W. 111.

¹ *Ehrman v. Stitzel*, 121 Ky. 751, 123 Am. St. Rep. 224, 90 S. W. 275; *Lewis Hubbard & Co. v. Morton*, 80 W. Va. 137, 92 S. E. 252.

² *Hamilton Iron & Steel Co. v. Groveland Mining Co.*, 233 Fed. 388, 147 C. C. A. 324.

³ *South Penn Oil Co. v. Blue Creek Development Co.*, 77 W. Va. 682, 88 S. E. 1029.

⁴ *England*. *Oshey v. Hicks*, Cro. Jac. 263; *Jayne v. Hughes*, 10 Exch. 430; *Steele v. Mart*, 4 Barn. & C. 272; *Hall v. Cazenove*, 4 East 477.

United States. *United States v. Le Baron*, 60 U. S. (19 How.) 73, 15 L. ed. 525; *District of Columbia v. Iron*

Works, 181 U. S. 453, 45 L. ed. 948 [affirming, 15 D. C. App. 198].

Arkansas. *Merrill v. Sypert*, 65 Ark. 51, 44 S. W. 462; *Breitzke v. Tucker*, 129 Ark. 401, 196 S. W. 462.

California. *Gately v. Irvine*, 51 Cal. 172.

Indiana. *Lake Erie, etc., Ry. v. Charman*, 161 Ind. 95, 67 N. E. 923.

Kentucky. *Tribble v. Oldham*, 28 Ky. (5 J. J. Mar.) 137.

Massachusetts. *Shaugnessey v. Lewis*, 130 Mass. 355.

Mississippi. *Lexington v. Bank*, 75 Miss. 1, 22 So. 291; *Hinson v. Forsdick* (Miss.), 25 So. 353.

Nebraska. *State v. Moore*, 46 Neb. 590, 50 Am. St. Rep. 626, 65 N. W. 193.

Ohio. *Fisher v. Butcher*, 19 Ohio 406, 53 Am. Dec. 436.

Pennsylvania. *Parke v. Neeley*, 90 Pa. St. 52.

Tennessee. *Alexander v. Bland*, *Cooke* (Tenn.) 431.

was delivered at a time subsequent to its date.⁵ On the other hand, where an instrument has been antedated intentionally by agreement between the parties, extrinsic evidence has been said to be inadmissible to show the true date.⁶ If an insurance policy is antedated by mutual agreement, extrinsic evidence is inadmissible to show that the party had agreed that the policy would remain in force for the stipulated time after the true date.⁷

§ 2176. Extrinsic evidence that contract never was to take effect. Whether extrinsic evidence is admissible to show that a written contract which on its face appears to be a valid obligation was intended as between certain or all of the parties thereto to be a mere form, and never to take effect under any circumstances, is a question upon which there is some conflict of authority. If it were not for the application of the parol evidence rule it would be clear that a simulated contract which the parties did not intend to be operative and which was entered into as a joke, a mere form, and the like, is not a valid contract.¹ If extrinsic evidence is to be excluded in cases of this sort, the operation of the rules which require the actual consent of the parties to the contract may be precluded by the device of putting the contract in writing. On the other hand, this would seem to be the kind of a case which most clearly calls for the application of the parol evidence rule. The outward form of the contract is conceded together with the extrinsic acts which appear to indicate execution and delivery. No claim is made that the contract is to take effect upon the happening of some event in the future.² It is contended that in spite of its outward form, the contract should never have any effect at all. For these reasons there is a division of authority upon this question.

The weight of authority is in favor of the proposition that such instrument never had any legal effect and that extrinsic evidence is admissible to prove that fact.³ If A, B and C enter into a contract by which A and B are to retire from the business in which

⁵ Vermont. *Vermont Marble Co. v. Eastman*, 91 Vt. 425, 101 Atl. 151.

⁶ *District of Columbia v. Iron Works*, 181 U. S. 453, 45 L. ed. 948 [affirming, 15 D. C. App. 198].

⁷ *New York Life Insurance Co. v. Franklin*, 118 Va. 418, 87 S. E. 584.

¹ *New York Life Insurance Co. v. Franklin*, 118 Va. 418, 87 S. E. 584.

² See § 80.

³ See § 2178.

⁴ *United States. Olmstead v. Michaels*, 36 Fed. 455, 1 L. R. A. 840.

⁵ *Maryland. Southern Street Railway Advertising Co. v. Metropole Shoe Mfg.*

all were engaged, extrinsic evidence is admissible to show that as between A and C it was agreed that such contract should have no effect and that it was entered into solely for the purpose of inducing B to believe that A was also retiring from such business.⁴ Extrinsic evidence is admissible to show that a written contract of sale was not intended by the parties as an actual obligation, but that it was entered into in order that the vendor might mislead the monopoly from whom he had purchased goods as to the price at which he was selling such goods.⁵ A contract for the sale of realty may be shown not to have been intended by the parties as an actual obligation, but to have been entered into "for selling purposes only."⁶ Extrinsic evidence is admissible to show that a written contract of sale was really intended as a gift and that the consideration was inserted to avoid bad feeling on the part of the grantor's children other than the grantee,⁷ or that a mortgage was given for the same purpose.⁸ Extrinsic evidence is admissible to show that a written contract which fixes compensation for collecting a claim was never intended to take effect, but that it was signed to avoid the debtor's disinclination to pay the debt so that any of the proceeds should go to enrich the creditor.⁹ Where A had signed a contract, agreeing to take a certain amount of street-car advertising from B at certain rates, and had delivered it to B's agent, A could show in an action on the contract that the real contract was an oral agreement for a less amount at a lower rate, and that A signed the written contract merely to enable B to show A's order to other prospective customers, and yet conceal the fact that B had been given an especially low rate.¹⁰ If the written instrument is executed after the oral contract is entered into, and it is not intended by the parties to be a substitute therefor, the

Co., 91 Md. 61, 46 Atl. 513; *Birely v. Dodson*, 107 Md. 229, 68 Atl. 488.

Michigan. *Woodward v. Walker*, 192 Mich. 188, 158 N. W. 846.

Nebraska. *Coffman v. Malone*, 98 Neb. 819, L. R. A. 1917B, 258, 154 N. W. 726.

New Jersey. *Oak Ridge Co. v. Toole*, 82 N. J. Eq. 541, 88 Atl. 827.

Wisconsin. *Lepley v. Andersen*, 142 Wis. 668, 33 L. R. A. (N.S.) 836, 125 N. W. 433.

⁴ *Coffman v. Malone*, 98 Neb. 819, L. R. A. 1917B, 258, 154 N. W. 726.

⁵ *Birely v. Dodson*, 107 Md. 229, 68 Atl. 488.

⁶ *Oak Ridge Co. v. Toole*, 82 N. J. Eq. 541, 88 Atl. 827.

⁷ *Woodward v. Walker*, 192 Mich. 188, 158 N. W. 846.

⁸ *Church v. Case*, 110 Mich. 621, 68 N. W. 424.

⁹ *Lepley v. Anderson*, 142 Wis. 668, 33 L. R. A. (N.S.) 836, 125 N. W. 433.

¹⁰ *Southern Street Railway Advertising Co. v. Metropole Shoe Mfg. Co.*, 91 Md. 61, 46 Atl. 513.

right of the parties to the instrument to show that it was not intended to take effect is clearer than in the case in which there is no prior valid oral contract.¹¹ If an oral contract of sale is entered into between the parties, the subsequent execution of a blank form of a written contract which contains terms different from the oral agreement and which is not intended by the parties as a substitute therefor, does not prevent the use of parol evidence to show the actual agreement between the parties.¹² If A and B enter into a written contract and some time thereafter, at B's request, A gives to him a written memorandum setting forth different terms from those agreed upon in order that B may show such memorandum to his banker, the existence of such memorandum does not prevent oral evidence of the actual contract.¹³

In other jurisdictions it is held that extrinsic evidence of this sort is inadmissible.¹⁴ In addition to the reasons already given, it has been urged that in some of these cases the instrument was intended as a fraud upon third persons and that for this reason the parties ought not to be allowed to set up their fraud.¹⁵ While it is true that neither party is in a position to claim any additional advantage by reason of his fraud, the suggestion that the addition of fraud to the mutual understanding of the parties that the instrument should have no legal effect, would make it operative in law, while without such added element of fraud it would be operative in law, differs radically from the ordinary effect of fraud in executory contracts which are entered into for the purpose of operating as a fraud upon third persons.¹⁶ A contract of agency between A and B, in which B's compensation is fixed, can not under this theory be shown to have been intended as a sham for the purpose of deceiving A's other agents and of making them believe that they were receiving as great a compensation as B.¹⁷ If A and B enter into a contract by which A is to secure land for B from the United States Government for a certain sum, and by

¹¹ *Bouchet v. Oregon Motor Car Co.*, 78 Or. 230, 152 Pac. 888; *In re Crim's Estate*, 89 Wash. 395, 154 Pac. 811.

¹² *Rittenhouse-Winterson Auto Co. v. Kissner*, 129 Md. 102, 98 Atl. 361; *Bouchet v. Oregon Motor Car Co.*, 78 Or. 230, 152 Pac. 888.

¹³ *In re Crim's Estate*, 89 Wash. 395, 154 Pac. 811.

¹⁴ *Graham v. Savage*, 110 Minn. 510, 136 Am. St. Rep. 527, 19 Am. & Eng. Ann. Cas. 1022, 126 N. W. 394.

¹⁵ *Graham v. Savage*, 110 Minn. 510, 136 Am. St. Rep. 527, 19 Am. & Eng. Ann. Cas. 1022, 126 N. W. 394.

¹⁶ See § 873.

¹⁷ *Graham v. Savage*, 110 Minn. 510, 136 Am. St. Rep. 527, 19 Am. & Eng. Ann. Cas. 1022, 126 N. W. 394.

which the receipt of a part of such sum is recited, and A agrees to repay such amount if he can not secure title, and B has paid such amount in part in cash and in part in services in securing other locators, A can not, in an action by B, to recover such amount on failure of A to secure such title, show that such contract was not intended to take effect as between A and B, and that the real purpose was to defraud third persons by making them believe that B had paid cash.¹⁸ The reason assigned for this result, however, is that A can not assert his own wrong as against B, who denies the legal character of the contract.¹⁹ In some of the cases in which this principle is invoked the party who is to be misled by the contract will be prejudiced if the contract is shown to be a mere sham. In cases of this sort the rights of such parties should undoubtedly be protected, whether upon the theory of estoppel,²⁰ or upon the theory that the undisclosed intention of a party to a legal transaction, to the effect that he shall not be bound thereby, can not be considered as having any legal effect.²¹ Such a contract may be upheld if it would violate the established policy of the state to enforce the transaction as it would exist if such contract were not enforced.²²

§ 2177. Extrinsic evidence that party to instrument was not to be liable. An attempt is sometimes made to show an extrinsic agreement by which a party to a negotiable instrument which was delivered for value is not to be held liable upon such instrument or by which he is not to be held liable under certain specified circumstances. By the great weight of authority such evidence is inadmissible.¹ Evidence is inadmissible to show that accommodation makers are not to be obliged to pay if the real debtor is unable

¹⁸ *Hunter v. Byron*, 92 Wash. 469, 159 Pac. 703.

¹⁹ "He is estopped thus brazenly to assert his own covinous purpose." *Hunter v. Byron*, 92 Wash. 469, 159 Pac. 703.

²⁰ See §§ 80 et seq.

²² See §§ 80 et seq.

²² *Grand Isle v. Kinney*, 70 Vt. 381, 41 Atl. 130.

¹ *Kansas*. *Stevens v. Inch*, 98 Kan. 306, 158 Pac. 43; *German-American State Bank v. Watson*, 90 Kan. 686, 163 Pac. 637.

Massachusetts. *Neal v. Wilson*, 213 Mass. 336, 100 N. E. 544.

Missouri. *Bank v. Simmons*, — Mo. —, 204 S. W. 837.

North Carolina. *Bank v. Moore*, 138 N. Car. 529, 51 S. E. 79; *International Harvester Co. v. Parham*, 172 N. Car. 389, 90 S. E. 503.

Ohio. *Cummings v. Kent*, 44 O. S. 92, 4 N. E. 710.

Washington. *Post v. Tamm*, 91 Wash. 504, 158 Pac. 91.

West Virginia. *Long v. Potts*, 70 W. Va. 719, 75 S. E. 62.

to do so.² Extrinsic evidence is not admissible to show a prior agreement to the effect that a blank endorsement should not be operative.³

§ 2178. Extrinsic evidence to annex condition precedent. If the party against whom relief is sought on a written contract concedes that the contract was placed in the possession of the adversary party, but claims that it was taken with the understanding that it was not to go into effect until some other or further event should happen, and that such event has not happened, he is not seeking to vary or contradict the contract, but to show that no contract between the parties ever came into effect. Evidence of conditions precedent to the taking effect of a written contract is therefore admissible.⁴ This is merely the rule that an instrument may be delivered to the adversary party to take effect on the happening of a future event, restated in terms of the parol-evidence

² *Stevens v. Inch*, 98 Kan. 306, 158 Pac. 43.

³ *Schine v. Johnson*, 92 Conn. 590, 103 Atl. 974.

⁴ *England*. *Pym v. Campbell*, 6 El. & Bl. 370; *Wallis v. Littell*, 11 C. B. N. S. 369.

United States. *Ware v. Allen*, 128 U. S. 590, 32 L. ed. 563; *Burke v. Dulaney*, 153 U. S. 228, 38 L. ed. 698; *Tug River, etc., Co. v. Brigel*, 86 Fed. 818, 30 C. C. A. 415; *Beach v. Nevins*, 162 Fed. 129, 89 C. C. A. 129, 18 L. R. A. (N.S.) 288; *Storey v. Storey*, 214 Fed. 973.

Arkansas. *American Sales Book Co. v. Whitaker*, 100 Ark. 360, 37 L. R. A. (N.S.) 91, 140 S. W. 132; *Deming Investment Co. v. Echols*, 122 Ark. 611, 183 S. W. 165; *Inman v. Quirey*, 128 Ark. 605, 194 S. W. 858.

Colorado. *Bourke v. Van Keuren*, 20 Colo. 95, 36 Pac. 882; *Hurlburt v. Dusenbery*, 26 Colo. 240, 57 Pac. 860; *Divine v. George*, — Colo. —, 166 Pac. 242.

Connecticut. *McFarland v. Sikes*, 54 Conn. 250, 1 Am. St. Rep. 111, 7 Atl. 408.

Illinois. *Price v. Hudson*, 125 Ill. 284, 17 N. E. 817.

Iowa. *Reichart v. Wilhelm*, 83 Ia. 510, 50 N. W. 19; *McCormick Harvesting Machine Co. v. Morlan*, 121 Ia. 451, 96 N. W. 976; *Garner v. Kratzer*, 173 Ia. 292, 155 N. W. 296; *Carney v. Miller*, — Ia. —, 174 N. W. 643.

Kansas. *Goutermont v. Bland*, 99 Kan. 431, 162 Pac. 270.

Maine. *Rivard v. Continental Casualty Co.*, 116 Me. 46, 100 Atl. 101.

Maryland. *Beall v. Poole*, 27 Md. 645; *Colonial Park Estates v. Massart*, 112 Md. 648, 77 Atl. 275.

Massachusetts. *Wilson v. Powers*, 131 Mass. 539; *Adams v. Morgan*, 150 Mass. 143, 22 N. E. 708.

Michigan. *Fulton v. Priddy*, 123 Mich. 298, 81 Am. St. Rep. 201, 82 N. W. 65; *Central Sav. Bank v. O'Connor*, 132 Mich. 578, 102 Am. St. Rep. 433, 94 N. W. 11.

Minnesota. *Westman v. Krumweide*, 30 Minn. 313, 15 N. W. 255; *Bowser v. Fountain*, 128 Minn. 198, L. R. A. 1916B, 1036, 150 N. W. 795.

New York. *Benton v. Martin*, 52 N. Y. 570; *Reynolds v. Robinson*, 110 N. Y. 654, 18 N. E. 127; *Harnickell v.*

rule.² Extrinsic evidence may be used to show that a note in the custody of the payee was to take effect only on the happening of some event which never has happened, as between the parties and as against all but bona fide holders.³ Extrinsic evidence is admissible to show that a promissory note,⁴ or a mortgage,⁵ should not take effect until the loan for which such instrument was given was made. A contract to the effect that a note shall not

Ins. Co., 111 N. Y. 390, 2 L. R. A. 150, 18 N. E. 632; *Smith v. Dotterweich*, 200 N. Y. 299, 33 L. R. A. (N.S.) 892, 93 N. E. 985; *Grannis v. Stevens*, 216 N. Y. 583, 111 N. E. 263 [rehearing denied, *Grannis v. Stevens*, 217 N. Y. 664, 112 N. E. 1060].

Oklahoma. *Rutherford v. Holbert*, 42 Okla. 735, L. R. A. 1915B, 221, 142 Pac. 1099; *Williamson v. Scully*, 52 Okla. 531, 152 Pac. 839; *Waggoner Bank & Trust Co. v. Doak*, — Okla. —, 172 Pac. 61; *J. M. Hoard, Jr., Co. v. Grand Rapids Showcase Co.*, — Okla. —, 173 Pac. 844.

Pennsylvania. *Gunzburger v. Rosenthal*, 226 Pa. St. 300, 26 L. R. A. (N.S.) 840, 75 Atl. 418.

Rhode Island. *Sweet v. Stevens*, 7 R. I. 375.

Tennessee. *Bissenger v. Guiteman*, 53 Tenn. (6 Heisk.) 277.

Utah. *Martineau v. Hanson*, 47 Utah 549, 155 Pac. 432.

Vermont. *Gilman v. Williams*, 74 Vt. 327, 52 Atl. 428.

Virginia. *Catt v. Olivier*, 98 Va. 580, 36 S. W. 980.

Washington. *Reiner v. Crawford*, 23 Wash. 669, 83 Am. St. Rep. 848, 63 Pac. 516.

Wisconsin. *Nutting v. Ins. Co.*, 98 Wis. 26, 73 N. W. 432; *Curry v. Colburn*, 99 Wis. 319, 67 Am. St. Rep. 860, 74 N. W. 778; *Golden v. Meier*, 129 Wis. 14, 116 Am. St. Rep. 935, 107 N. W. 27; *Harder v. Reinhardt*, 162 Wis. 558, 156 N. W. 959. "The making and delivering of a writing, no matter how complete a contract according to its terms, is not a binding contract if delivered upon a condition precedent

to its becoming obligatory. In such case it does not become operative as a contract until the performance on happening of the condition precedent." *Cleveland Refining Co. v. Dunning*, 115 Mich. 238, 239, 73 N. W. 239 [citing, *Ware v. Allen*, 128 U. S. 590, 32 L. ed. 563; *Phelps v. Abbott*, 114 Mich. 88].

A written contract for the sale of patented articles may be shown by oral evidence to be subject to the assent of the original licensor. *Carney v. Miller*, — Ia. —, 174 N. W. 643.

² See § 1205.

³ *Connecticut.* *McFarland v. Sikes*, 54 Conn. 250, 1 Am. St. Rep. 111, 7 Atl. 408.

Iowa. *McKnight v. Parsons*, 136 Ia. 390, 113 N. W. 858 [sub nomine, *McKnight v. Parsons*, 22 L. R. A. (N.S.) 718]; *Wauke Savings Bank v. Jones*, 179 Ia. 261, 159 N. W. 691.

Michigan. *Central Sav. Bank v. O'Connor*, 132 Mich. 578, 102 Am. St. Rep. 433, 94 N. W. 11.

Minnesota. *American Multigraph Sales Co. v. Grant*, 135 Minn. 208, 160 N. W. 676.

North Carolina. *Farrington v. McNeill*, 174 N. Car. 420, 93 S. E. 957.

Utah. *Martineau v. Hanson*, 47 Utah 549, 155 Pac. 432; *Smith v. Brown*, 50 Utah 27, 165 Pac. 468.

Virginia. *Catt v. Olivier*, 98 Va. 580, 36 S. E. 980.

Vermont. *Gilman v. Williams*, 74 Vt. 327, 52 Atl. 428.

⁴ *Smith v. Dotterweich*, 200 N. Y. 299, 33 L. R. A. (N.S.) 892, 93 N. E. 985.

⁵ *Deming Investment Co. v. Echols*, 122 Ark. 611, 183 S. W. 165.

take effect until the happening of a certain event and that it shall not be negotiated until such event happens, may be shown as against one who is not a bona fide holder.⁶ Evidence is admissible to show that a note was to take effect only if the horse for whose price it was given should be warranted,⁷ or if the stock in a corporation for which such note was given should be delivered in a specified time,⁸ or that a note which is given for certain stock is not to take effect unless such corporation establishes a store,⁹ or if the policy of insurance for which it was given should prove satisfactory to the maker of the note;¹⁰ that the note was to take effect only if negotiated at a specified place;¹¹ that it was to take effect only if the maker did not demand by a certain day that it should be redelivered;¹² that it was to take effect only if the land for which it was given was recovered;¹³ that it was not to take effect unless the maker should collect an amount which the payee had previously advanced;¹⁴ that a written guaranty was conditioned upon the purchase of a certain amount of leather by the party whose credit was guaranteed;¹⁵ that an insurance policy was not to take effect until the insured had canceled another policy on the same property in a different company;¹⁶ that a written order of goods is to take effect only upon the happening of certain future events,¹⁷ as that a contract which is entered into through an agent is to take effect only upon approval by the principal;¹⁸ that a written order for goods was to take effect only if the vendee succeeded in canceling a written order

⁶ *McKnight v. Parsons*, 136 Ia. 390, 113 N. W. 858 [sub nomine, *McKnight v. Parsons*, 22 L. R. A. (N.S.) 718].

⁷ *Trumbull v. O'Hara*, 71 Conn. 172, 41 Atl. 546.

⁸ *Beach v. Nevins*, 162 Fed. 129, 89 C. C. A. 129, 18 L. R. A. (N.S.) 288.

⁹ *Divine v. George*. — Colo. —, 166 Pac. 242.

¹⁰ *Parker v. Bond*, 121 Ala. 529, 25 So. 898.

See also, *Mehlin v. Life Association*, 2 Ind. Terr. 396, 51 S. W. 1063.

¹¹ *United States National Bank v. Ewing*, 131 N. Y. 506, 27 Am. St. Rep. 615, 30 N. E. 501.

¹² *McFarland v. Sikes*, 54 Conn. 250, 1 Am. St. Rep. 111, 7 Atl. 408. And

see to the same effect, in a written contract of subscription for stock, *Ada Dairy Association v. Meara*, 123 Mich. 470, 82 N. W. 258.

¹³ *Farrington v. McNeill*, 174 N. Car. 420, 93 S. E. 957.

¹⁴ *Harder v. Reinhardt*, 162 Wis. 558, 156 N. W. 959.

¹⁵ *Lennox v. Murphy*, 171 Mass. 370, 50 N. E. 644.

¹⁶ *Moore v. Insurance Association*, 107 Ga. 199, 33 S. E. 65.

¹⁷ *Bowser v. Fountain*, 128 Minn. 198, L. R. A. 1916B, 1036, 150 N. W. 795.

¹⁸ *Gunzburger v. Rosenthal*, 228 Pa. St. 300, 26 L. R. A. (N.S.) 840, 75 Atl. 418.

previously given to another person;¹⁹ that a lease of a mining claim was to take effect only if the lessees should be able to obtain a certain amount of money from a third person;²⁰ that a contract to sell mining stock was to take effect only on condition that the vendor's agent in another town had not already sold the same stock;²¹ that a note should take effect only if the transaction as part of which it was given was approved by the attorney of the maker;²² that a written contract of sale should take effect only if the purchase were approved by the engineer of the vendee;²³ that the contract should not take effect until the purchaser had had an opportunity to inspect the goods and to approve them;²⁴ that a note is not to take effect until the maker has an opportunity to examine the property purchased and accepts such property,²⁵ or that an insurance policy, temporarily placed in the possession of the insured, but afterwards withdrawn by the agent, is not to take effect unless approved by the insurance company,²⁶ or that such instrument was not delivered as a completed contract.²⁷ Extrinsic evidence is admissible to show that sureties who sign a bond and leave it in the custody of the obligee do not intend to be bound unless their principal signs such bond.²⁸ Evidence is admissible to show that a contract to pay a commission for a first mortgage loan was not to take effect unless a second mortgage loan was also obtained.²⁹ Evidence is admissible to show that one signed as surety with the understanding that he was to be liable only if others signed with him.³⁰ Extrinsic evidence is admissible to show as between the original parties that the payee

¹⁹ *Cleveland Refining Co. v. Dunning*, 115 Mich. 238, 73 N. W. 239.

²⁰ *Hurlburt v. Dusenbery*, 26 Colo. 240, 57 Pac. 860.

²¹ *Reiner v. Crawford*, 23 Wash. 669, 83 Am. St. Rep. 848, 63 Pac. 516.

²² *Ware v. Allen*, 128 U. S. 590, 32 L. ed. 563.

²³ *Pym v. Campbell*, 6 El. & B. 370.

²⁴ *American Sales Book Co. v. Whitaker*, 100 Ark. 360, 37 L. R. A. (N.S.) 91, 140 S. W. 132.

²⁵ *Burke v. Dulaney*, 153 U. S. 228, 38 L. ed. 698.

²⁶ *Nutting v. Ins. Co.*, 98 Wis. 26, 73 N. W. 432.

²⁷ *Rivard v. Continental Casualty Co.*, 116 Me. 46, 100 Atl. 101.

²⁸ *School District v. Lapping*, 100 Minn. 139, 12 L. R. A. (N.S.) 1105, 110 N. W. 849.

²⁹ *Bowes v. Christian*, 222 Mass. 359, 110 N. E. 1034.

³⁰ *United States. Dair v. United States*, 83 U. S. (16 Wall.) 1, 21 L. ed. 491.

Alabama. Guild v. Thomas, 54 Ala. 414, 25 Am. Rep. 703.

Kentucky. Hudspeth's Administrator v. Tyler, 108 Ky. 520, 56 S. W. 973.

Maine. Readfield v. Shaver, 50 Me. 36, 79 Am. Dec. 592.

knew that the surety signed with the understanding that he should not be bound unless a chattel mortgage was given by the principal debtor to secure the obligation.³¹ Even an instrument under seal,³² such as a release,³³ may be shown in some jurisdictions to have been placed in the custody of the obligee upon condition that it should not take effect unless some specified event should happen. Extrinsic evidence is admissible to show that a sealed release was given upon condition that it should take effect only if the maker of such release was forced into bankruptcy.³⁴ Evidence is admissible to show that a written subscription for stock in a corporation was not to go into effect until a certain number of persons had signed.³⁵ If the payee does not know that the surety does not intend to be bound unless others sign the contract, the surety can not avoid liability to the payee even if the principal debtor delivered the instrument to the payee in violation of his agreement with his surety. This principle applies equally to negotiable notes³⁶ and to non-negotiable bonds.³⁷ This is not because of the parol-evidence rule, however, but because such facts do not constitute a defense. This principle has been carried so far that a written instrument, purporting to be a contract of sale, deposited

Michigan. *Hall v. Parker*, 37 Mich. 590, 26 Am. Rep. 540; *Hessell v. Johnson*, 63 Mich. 623, 6 Am. St. Rep. 334, 30 N. W. 209.

Minnesota. *School District v. Lap- ping*, 100 Minn. 139, 12 L. R. A. (N.S.) 1105, 110 N. W. 849; *American Multi-graph Sales Co. v. Grant*, 135 Minn. 208, 160 N. W. 676.

Nebraska. *Cutler v. Roberts*, 7 Neb. 4, 29 Am. Rep. 371.

³¹ *Goutermont v. Bland*, 99 Kan. 431, 162 Pac. 270.

³² *Stiebel v. Grosberg*, 202 N. Y. 266, 36 L. R. A. (N.S.) 1147, 95 N. E. 692.

³³ *Stiebel v. Grosberg*, 202 N. Y. 266, 36 L. R. A. (N.S.) 1147, 95 N. E. 692.

³⁴ *Stiebel v. Grosberg*, 202 N. Y. 266, 36 L. R. A. (N.S.) 1147, 95 N. E. 692.

³⁵ *Gilman v. Gross*, 97 Wis. 224, 72 N. W. 885.

³⁶ **Georgia.** *Clark v. Bryce*, 64 Ga. 486.

Indiana. *Whitcomb v. Miller*, 90 Ind. 384.

Iowa. *Micklewait v. Noel*, 69 Ia. 344, 28 N. W. 630.

Kentucky. *Smith v. Moberly*, 49 Ky. (10 B. Mon.) 266, 52 Am. Dec. 543.

South Carolina. *Wylie v. Bank*, 63 S. Car. 406, 41 S. E. 504.

Tennessee. *Lookout Bank v. Aull*, 93 Tenn. 645, 42 Am. St. Rep. 934, 27 S. W. 1014.

Vermont. *Farmers', etc., Bank v. Humphrey*, 36 Vt. 554, 86 Am. Dec. 671.

³⁷ *Carroll County v. Ruggles*, 69 Ia. 269, 58 Am. Rep. 223, 28 N. W. 590.

"A surety on a bond can not defeat his liability thereon by showing that it was delivered in violation of agreements between himself and the principal or any other co-maker, unknown to the party for whose benefit it was given." *Richardson v. Bank*, 57 O. S. 299, 314, 48 N. E. 1100.

with a third person, has been explained orally as a mere memorandum of the terms on which the vendee could exercise an option to purchase.³⁸

Whether an express condition precedent in a contract precludes extrinsic evidence of another oral condition which is not inconsistent with the express provisions of the contract or not, is a question upon which there is some conflict of authority. It seems to be held generally that there is as much reason for admitting extrinsic evidence of an oral condition precedent to the taking effect of a contract which itself contains a different condition precedent as there is for admitting extrinsic evidence of an oral condition precedent to a contract which on its face purports to be absolute.³⁹ The fact that a contract of subscription is by its terms not to take effect unless a specified amount is subscribed, does not prevent extrinsic evidence of other consistent oral conditions precedent.⁴⁰ There is some authority for holding that an express condition precedent precludes extrinsic evidence of another oral condition precedent.⁴¹ If a contract for conducting an advertising campaign contains a provision that the conducting of a certain contest is a condition precedent to guaranty of increased sales, extrinsic evidence is inadmissible to show that such contest was a condition precedent to liability upon notes given under such contract.⁴² If a written contract of subscription contains a number of express conditions, extrinsic evidence is said to be inadmissible to show other oral conditions.⁴³ This, however, may be a case in which the contract itself was to take effect in any event and the oral condition affected performance and not liability. The principle that extrinsic evidence of an oral condition precedent is admissible to show that the contract never took effect, must not be extended to permit extrinsic evidence of conditions or covenants in cases in which it is shown that the contract has taken effect. Extrinsic evidence of this sort is a violation of the parol-

³⁸ *Adams v. Morgan*, 150 Mass. 143, 22 N. E. 708.

³⁹ *Rutherford v. Holbert*, 42 Okla. 735, L. R. A. 1915B, 221, 142 Pac. 1099; *Golden v. Meier*, 120 Wis. 14, 116 Am. St. Rep. 935, 107 N. W. 27.

⁴⁰ *Rutherford v. Holbert*, 42 Okla. 735, L. R. A. 1915B, 221, 142 Pac. 1099.

⁴¹ *Loveland v. Epstein Drug Co.*, 227 Mass. 311, 116 N. E. 570.

⁴² *Loveland v. Epstein Drug Co.*, 227 Mass. 311, 116 N. E. 570.

⁴³ *Guthrie & Western Ry. Co. v. Rhodes*, 19 Okla. 21, 21 L. R. A. (N.S.) 490, 91 Pac. 1119. (In this case, however, the conditions possibly affected the performance of the contract of subscription rather than its validity.)

evidence rule, since it does not affect the existence of the contract but seeks to add new terms to the contract under guise of showing conditions.⁴⁴

This general principle is sometimes stated in the form that extrinsic evidence of a condition is inadmissible unless the condition affects the consideration.⁴⁵ Evidence which tends to show a want of consideration,⁴⁶ or a total failure of consideration,⁴⁷ is admissible even if it takes the outward form of evidence to annex condition.⁴⁸

In some jurisdictions where the maker has voluntarily put the instrument into the possession of the adversary party he can not show that it was not to take effect until some other party had signed it, on the theory that an escrow can not be deposited with the adversary party.⁴⁹ Thus where a deed⁵⁰ or a mortgage⁵¹ has been voluntarily surrendered to the grantee or mortgagee, it can not be shown that it was to be inoperative until the happening of a specified event.

⁴⁴ *Abbott v. Kennedy*, — Ark. —, 201 S. W. 830; *Probasco v. Shaw*, 144 Ga. 416, 87 S. E. 466; *Grannis v. Stevens*, 216 N. Y. 583, 111 N. E. 263 [rehearing denied, *Grannis v. Stevens*, 217 N. Y. 664, 112 N. E. 1060]; *Colvin v. Goff*, 82 Or. 314, L. R. A. 1917C, 300, 161 Pac. 568.

"In the case at bar the appellee admitted that the contract took effect and was completed at the time of the delivery, and he undertook to show by parol testimony that it was to be paid only in the event the dividends earned from the stock were sufficient to pay the consideration. In *Gorrell v. Home Life Ins. Co.*, 63 Fed. 371, 377, 11 C. C. A. 240, 246, it is said:

"The proof proposed here was of an agreement inconsistent with the writing, which in itself is complete and unambiguous. The written promise to pay is absolute. By the proposed proof that promise would have been nullified, and the note converted into an agreement that the sum named should be paid out of accruing commissions, and not otherwise. The case is clearly distinguishable from *Burke v. Dulaney*, 153 U. S. 228, where evidence was ad-

mitted to show a parol agreement that a note should not become operative as a note until the maker could examine the property for which it was given. That attack was upon the delivery, and not, as in this case, upon the meaning of the terms of a note, of the delivery of which no question has been made either in the pleadings or proofs." *Abbott v. Kennedy*, — Ark. —, 201 S. W. 830. See §§ 2145, 2179 and 2196.

⁴⁵ *Colvin v. Goff*, 82 Or. 314, L. R. A. 1917C, 300, 161 Pac. 568.

⁴⁶ See § 2180.

⁴⁷ See § 2185.

⁴⁸ *Colvin v. Goff*, 82 Or. 314, L. R. A. 1917C, 300, 161 Pac. 568.

⁴⁹ *Findley v. Means*, 71 Ark. 289, 73 S. W. 101; *Clanin v. Machine Co.*, 118 Ind. 372, 3 L. R. A. 863, 21 N. E. 35. See § 1206.

⁵⁰ *Hubbard v. Greeley*, 84 Me. 340, 17 L. R. A. 511; *Wipfler v. Wipfler*, 153 Mich. 18, 16 L. R. A. (N.S.) 941, 116 N. W. 544; *Dorr v. Midelburg*, 65 W. Va. 778, 23 L. R. A. (N.S.) 987, 65 S. E. 97.

⁵¹ *Sargent v. Cooley*, 12 N. D. 1, 94 N. W. 576.

§ 2179. **Extrinsic evidence to annex condition subsequent.** If the party against whom relief is sought concedes that the contract has taken effect, but seeks to add a condition thereto by extrinsic evidence, he is seeking to add to a written contract by extrinsic evidence of the intention of the parties direct. If the contract is complete and is therefore one within the parol-evidence rule, such evidence is inadmissible.¹ The acceptor of a bill of exchange can not show that the acceptance was made upon an oral condition.² But if "executor" is added to the signature of the acceptor, an oral contract that he should be liable only out of the funds of the estate has been held enforceable.³ Extrinsic evidence is inadmissible to show that a note which is unconditional upon its face is subject to a condition subsequent,⁴ as that it is to be void if the machinery, in payment of which it is given, does not do a specified amount of work in a specified time,⁵ or that the note is not to be paid unless the animal for the purchase price of which it is given, conforms to a specified guaranty;⁶ that the note is given simply to show the amount of unsold goods in the possession

¹ **United States.** *Levy, etc., Co. v. Kauffman*, 114 Fed. 170, 52 C. C. A. 126.

Arizona. *Hurley v. Young Men's Christian Association*, 16 Ariz. 26, 52 L. R. A. (N.S.) 220, 140 Pac. 816.

Colorado. *Mackey v. Magnon*, 28 Colo. 100, 62 Pac. 945 [affirming, 54 Pac. 907].

Georgia. *Stapleton v. Munroe*, 111 Ga. 848, 36 S. E. 428; *Bass Dry Goods Co. v. Mfg. Co.*, 119 Ga. 124, 45 S. E. 980.

Kentucky. *Gathright v. Improvement Co. (Ky.)*, 56 S. W. 163.

Iowa. *McCormick Harvesting Machine Co. v. Markert*, 107 Ia. 340, 78 N. W. 33.

Mississippi. *Feld v. Stewart*, 78 Miss. 187, 28 So. 819.

Oregon. *Colvin v. Goff*, 82 Or. 314, L. R. A. 1917C, 300, 161 Pac. 568; *Learned v. Holbrook*, 87 Or. 576, 170 Pac. 530.

Rhode Island. *McGinn v. B. H. Gladding Dry Goods Co.*, 40 R. I. 348, 101 Atl. 129.

Virginia. *Triplett v. Woodward's Admr.*, 98 Va. 187, 35 S. E. 455.

Washington. *Post v. Tamm*, 91 Wash. 504, 158 Pac. 91.

West Virginia. *Rosin Coal Land Co. v. Martin*, 81 W. Va. 33, 94 S. E. 358.

Wisconsin. *Hyde v. Bank*, 115 Wis. 170, 91 N. W. 230.

² *Burns, etc., Co. v. Doyle*, 71 Conn. 742, 71 Am. St. Rep. 235, 43 Atl. 483.

³ *Schmittler v. Simon*, 114 N. Y. 176, 11 Am. St. Rep. 621, 21 N. E. 162.

⁴ *Aultman v. Hawk (Neb.)*, 95 N. W. 695; *Post v. Tamm*, 91 Wash. 504, 158 Pac. 91.

Such as a contract that it should be payable out of a certain fund. *Van Tassel v. McGrail*, 93 Wash. 380, 160 Pac. 1053.

For the opposite view in general, see *Gandy v. Weckerly*, 220 Pa. St. 285, 123 Am. St. Rep. 691, 69 Atl. 858.

⁵ *Lunsford v. Malsby*, 101 Ga. 39, 28 S. E. 496.

⁶ *Probasco v. Shaw*, 144 Ga. 416, 87 S. E. 466.

of the makers of the note belonging to the payee, and that the note was not to be paid unless the goods were sold;⁷ that a mortgage debt is not to be paid unless the payee discharges a mortgage indebtedness upon another piece of land,⁸ or that its payment is contingent on the existence of an endowment fund,⁹ or that the maker of a note is to have an option of surrendering the policy for which the note was given, taking out another policy at a lower rate, and having the note canceled,¹⁰ or that it is not to be paid if the maker of another note for which this is given should become bankrupt.¹¹ If a note has been delivered with intention that it shall take effect, extrinsic evidence is inadmissible to show that it was not to be paid unless a specified judgment was reversed.¹² A written subscription which purports to be conditioned on the subscription of a certain amount, can not be modified by oral evidence so as to show an agreement with reference to the size or use of the ground, the use of the property or the persons who would be entitled to make use of such building.¹³ A executed a note payable to B, a business college, and B executed a certificate that A had purchased a scholarship which in terms was assignable and would enter college at a specified date. It was held by a divided court that an oral contract that such note should not be paid if the maker did not attend and could not sell the scholarship could not be shown to defeat recovery upon such note.¹⁴ So a bond to secure an agent's performance of duty can not be shown to be upon oral condition that the obligee of the bond should give immediate notice to the surety of any default by the agent.¹⁵ So a written contract for the sale of hops can not be avoided by showing an oral agreement that there should be no sale if the market was not as represented by the vendor.¹⁶ So a written con-

⁷ *Western Mfg. Co. v. Rogers*, 54 Neb. 456, 74 N. W. 849. But while inadmissible as a defense, such a contract has been held available for a counter-claim, as a collateral contract. *Clement Bane & Co. v. Houck*, 113 Ia. 504, 85 N. W. 765.

⁸ *Rhodes v. Owens*, 101 Wash. 324, 172 Pac. 241.

⁹ *Trustees of Christian University v. Hoffman*, 95 Mo. App. 488, 69 S. W. 474.

¹⁰ *Middleton v. Griffith*, 57 N. J. L. 442, 51 Am. St. Rep. 617, 31 Atl. 405.

¹¹ *Central Savings Bank v. O'Connor*, 132 Mich. 578, 94 N. W. 11.

¹² *Colvin v. Goff*, 82 Or. 314, L. R. A. 1917C, 300, 161 Pac. 568.

¹³ *Hurley v. Young Men's Christian Association*, 16 Ariz. 26, 52 L. R. A. (N.S.) 221, 140 Pac. 816.

¹⁴ *Jamestown Business College Association v. Allen*, 172 N. Y. 291, 92 Am. St. Rep. 741, 64 N. E. 952.

¹⁵ *Mason, etc., Co. v. Gage*, 119 Mich. 361, 78 N. W. 130.

¹⁶ *Lilienthal v. Brewing Co.*, 154 Mass. 185, 26 Am. St. Rep. 234, 12 L. R. A. 821, 28 N. E. 151.

tract for the sale of the business, and the payment of a certain sum of money therefor, can not be avoided by showing an oral agreement that this money should be paid only if the business was successful.¹⁷ So a written contract of sale can not be avoided by showing a contemporaneous oral contract giving the vendee the option to cancel his order in certain contingencies.¹⁸ So a contract for procuring a right of way for a railroad can not be avoided by showing that the contract was to be defeasible if the railroad company did not bridge a certain river.¹⁹ A contract which is conditioned upon the construction of a certain building can not be modified by an oral condition to the effect that such building should not be built unless a street were vacated.²⁰ So a written contract guaranteeing capacity of a heater can not be shown by extrinsic evidence to be conditioned on the vendee's building a stone wall under the house where the heater was to be used.²¹ So a written contract of guaranty can not be shown to be defeasible if mortgage security for the debt were given.²² A contract which is absolute upon its face can not be shown by extrinsic evidence to be a guaranty.²³ If a grantee assumes a mortgage debt in the deed to him, he can not show that this was conditioned on the payment of a certain sum by the grantor to the grantee.²⁴ A lease which is unconditional upon its face can not be shown by extrinsic evidence to be subject to a condition subsequent,²⁵ such as a condition that the lessee would be permitted to transfer his liquor license to the premises which he had leased.²⁶ Since extrinsic evidence is admissible to show fraud or mistake,²⁷ extrinsic evidence is admissible to show the omission of an oral condition subsequent from a written instrument by reason of fraud or mistake.²⁸

¹⁷ *Van Arsdale v. Brown*, 18 Ohio C. C. 52, 9 Ohio C. D. 488.

¹⁸ *Houck v. Wright* (Miss.), 23 So. 422; *Hanrahan v. Association*, 66 N. J. L. 80, s. c., 67 N. J. L. 526, s. c., 68 N. J. L. 730, 48 Atl. 517.

¹⁹ *Stanton v. R. R.*, 59 Conn. 272, 21 Am. St. Rep. 110, 22 Atl. 300.

²⁰ *Learned v. Holbrook*, 87 Or. 576, 170 Pac. 530.

²¹ *Mouat v. Montague*, 122 Mich. 334, 81 N. W. 112.

²² *Faulkner v. Gilbert*, 61 Neb. 602, 85 N. W. 843 [rehearing refused, 62 Neb. 126].

²³ *Dodge v. Cutrer*, 101 Miss. 844, 58 So. 208.

²⁴ *Woodcock v. Bostic*, 128 N. Car. 243, 38 S. E. 881.

²⁵ *O'Malley v. Grady*, 222 Mass. 202, 109 N. E. 829; *McGinn v. B. H. Gladding Dry Goods Co.*, 40 R. I. 348, 101 Atl. 129; *Rosin Coal Land Co. v. Martin*, 81 W. Va. 33, 94 S. E. 358.

²⁶ *O'Malley v. Grady*, 222 Mass. 202, 109 N. E. 829.

²⁷ See § 2180.

²⁸ *Rosin Coal Land Co. v. Martin*, 81 W. Va. 33, 94 S. E. 358 (obiter).

On the other hand, an express condition subsequent can not be modified by parol evidence of prior or contemporaneous negotiations.²⁹ In all these cases the condition is nothing more than an oral term sought to be incorporated in a complete written contract, or invoked to contradict that part of the contract which has been reduced to writing. It is clearly unenforceable under the parol evidence rule.

§ 2180. Want of consideration, mistake and fraud. Even if the written instrument has been delivered, either party has the right to show any facts which prevent the writing from constituting a valid contract.¹ The fact that a written contract which is not under seal has been signed and delivered, is not of itself conclusive that such contract is valid and operative for all purposes. There are various types of mistake and fraud which render a written contract invalid in spite of the outward form of signing and delivery.² Other forms of misrepresentation and fraud, together with facts which amount to duress and undue influence,³ may render such contract voidable at law or subject to rescission in equity. Such defenses can not be interposed unless extrinsic evidence is admissible to establish the facts which amount to such defenses in spite of the fact that the contract is in writing.⁴ If extrinsic evidence could not be introduced, such defenses could not be interposed unless the party who was guilty of fraud, duress, and the like, had set forth such fraud, duress, and the like, upon the face of the contract itself.

§ 2181. Extrinsic evidence of mistake. Mistake as to an essential element of a contract such as to the existence of the party, the subject-matter or the consideration, or the identity of the subject-

²⁹ *Emerson-Brantingham Co. v. Lyons*, 102 Kan. 733, 172 Pac. 513.

¹ *Iowa*. *Jeez v. A. Y. McDonald Mfg. Co.*, 179 Ia. 193, 161 N. W. 62.

Montana. *Petit v. Sinclier*, 53 Mont. 317, 163 Pac. 467.

Nevada. *Dixon v. Miller*. — Nev. —, 184 Pac. 926.

New Mexico. *Pople v. Orekar*, 22 N. M. 307, 161 Pac. 1110.

North Carolina. *American Potato Co. v. Jenette Bros.*, 172 N. Car. 1, 89 S. E. 791.

Oklahoma. *McLean v. Southwestern Casualty Ins. Co.*, — Okla. —, 159 Pac. 660.

Want of consideration for a negotiable instrument may be shown as between the parties, under § 28 of the Negotiable Instruments Law. *Dixon v. Miller*, — Nev. —, 184 Pac. 926.

See also, *Nolan v. Guggerty*, — Ia. —, 174 N. W. 706.

² See §§ 224 et seq., 242 and 251 et seq.

³ See §§ 133 et seq., 150 et seq., 176 et seq., 477 et seq., and 503 et seq.

⁴ *Parham-Thomas-McSwain v. Atlantic Life Ins. Co.*, 104 S. Car. 223, 88 S. E. 470.

See also, *Nolan v. Guggerty*, — Ia. —, 174 N. W. 706.

matter or the identity of the parties where that is material, prevents a transaction from amounting to a contract.¹ The fact that the transaction which is entered into under a mistake of one of these types is reduced to writing, does not alter the fact that there is no genuine agreement back of the outward written form. Accordingly, extrinsic evidence is admissible to show that a written contract was entered into under a mistake of one of these types,² whether such mistake relates to the terms of the contract,³ or to the subject-matter.⁴ Extrinsic evidence is admissible to show a mistake as to the contents of a release,⁵ or an insurance policy.⁶ Extrinsic evidence is admissible to show that the vendor of realty made a mistake as to the area thereof,⁷ or that a contract for an improvement was entered into under a mistake which was due to the engineer of the adversary party.⁸ A written contract which is entered into by reason of fraud or mistake as to the identity of the adversary party, does not prevent the person who is subsequent to

¹ See §§ 251 et seq.

² *United States*. *El Dia Insurance Co. v. Sinclair*, 228 Fed. 833, 143 C. C. A. 231.

Alabama. *Manning v. Carter*, — Ala. —, 77 So. 744.

Georgia. *Greer v. Caldwell*, 14 Ga. 207.

Kentucky. *Blanchard v. Kenton*, 7 Ky. (4 Bibb.) 451; *Murphy v. Trigg*, 17 Ky. (1 T. B. Mon.) 72; *Lingley v. Sharp*, 23 Ky. (7 T. B. Mon.) 248.

Louisiana. *Ford v. Parsons*, 142 La. 1093, 78 So. 128.

Massachusetts. *Long v. Athol*, 196 Mass. 497, 17 L. R. A. (N.S.) 96, 82 N. E. 665.

Mississippi. *Butler v. State*, 81 Miss. 734, 33 So. 847.

New York. *Coles v. Bowne*, 10 Paige (N. Y.) 526; *Welles v. Yates*, 44 N. Y. 525; *Bryce v. Lorillard R. Ins. Co.*, 55 N. Y. 240, 14 Am. Rep. 249.

North Carolina. *American Potato Co. v. Jenette Bros. Co.*, 172 N. Car. 1, 89 S. E. 791.

South Carolina. *Etheredge v. Aetna Insurance Co.*, 102 S. Car. 313, 86 S. E. 687.

West Virginia. *Rosin Coal Land Co. v. Martin*, 81 W. Va. 33, 94 S. E. 358.

Washington. *Union Machinery & Supply Co. v. Darnell*, 89 Wash. 226, 154 Pac. 183.

Alabama. *Dwight Mfg. Co. v. Word*, — Ala. —, 75 So. 979.

Illinois. *Barrie v. Frost*, 105 Ill. App. 187.

Iowa. *Jeez v. A. Y. McDonald Mfg. Co.*, 179 Ia. 193, 161 N. W. 62.

Kentucky. *Atwater v. Cardwell* (Ky.), 54 S. W. 960.

North Carolina. *Gwaltney v. Assurance Society*, 132 N. Car. 925, 44 S. E. 659; *American Potato Co. v. Jenette Bros. Co.*, 172 N. Car. 1, 89 S. E. 791.

Wisconsin. *Lord v. Accident Association*, 89 Wis. 19, 46 Am. St. Rep. 815, 26 L. R. A. 741, 61 N. W. 293.

⁴ *Bedell v. Wilder*, 65 Vt. 406, 36 Am. St. Rep. 871, 26 Atl. 589.

⁵ *Dwight Mfg. Co. v. Word*, — Ala. —, 75 So. 979; *Jeez v. A. Y. McDonald Mfg. Co.*, 179 Ia. 193, 161 N. W. 62.

⁶ *Etheredge v. Aetna Insurance Co.*, 102 S. Car. 313, 86 S. E. 687.

⁷ *Manning v. Carter*, — Ala. —, 77 So. 744.

⁸ *Long v. Athol*, 196 Mass. 497, 17 L. R. A. (N.S.) 96, 82 N. E. 665.

such fraud or mistake from enforcing the real agreement between the parties.⁹ The parol evidence rule has, of course, no application to mistake in the expression where reformation is sought.¹⁰ If it did, reformation could never be had under any circumstances. The courts are careful, however, to limit reformation to cases of mistake, fraud, and the like, since if by reformation any oral term could be added to the written contract, the sole effect of the parol evidence rule would be to drive the parties to equity.¹¹

§ 2182. Extrinsic evidence of fraud. Certain types of fraud, such as fraud as to an essential element of the contract,¹ prevents the transaction from amounting to a contract in spite of its outward form. Other types of fraud, such as fraud as to a material matter which is not one of the essential elements of the contract,² do not prevent the transaction from amounting to a contract, but render it voidable at the option of the party who has been misled. If the contract is not under seal, extrinsic evidence is admissible to show facts which amount to fraud,³ whether such fraud relates to one of the essential elements of the contract and prevents the

⁹ *Rittenhouse-Winterson Auto Co. v. Kisner*, 129 Md. 102, 98 Atl. 361.

¹⁰ *Lawrence County Bank v. Arndt*, 69 Ark. 406, 65 S. W. 1052; *Southern, etc., Co. v. Ozment*, 132 N. Car. 839, 44 S. E. 681. See ch. LXX.

¹¹ *Krueger v. Nicola*, 205 Pa. St. 38, 54 Atl. 494.

¹ See § 224.

² See §§ 341 et seq.

³ *United States. El Dia Insurance Co. v. Sinclair*, 228 Fed. 833, 143 C. C. A. 231; *Burroughs Adding Machine Co. v. Scandinavian-American Bank*, 239 Fed. 179.

Alabama. *Commercial Finance Co. v. Cooper Bros.*, 196 Ala. 285, 71 So. 684.

Arkansas. *Barker v. Lack*, 120 Ark. 323, 179 S. W. 493.

California. *Amer v. Hightower*, 70 Cal. 440.

Georgia. *Barrie v. Miller*, 104 Ga. 312, 69 Am. St. Rep. 171, 30 S. E. 840; *McCrary v. Pritchard*, 119 Ga. 876, 47 S. E. 341.

Illinois. *Race v. Weston*, 86 Ill. 91.

Iowa. *Jeez v. A. Y. McDonald Mfg. Co.*, 179 Ia. 193, 161 N. W. 62; *Houge v. St. Paul Fire & Marine Ins. Co.*, 174 Ia. 607, 156 N. W. 862; *Upham v. Mickleson (Ia.)*, 157 N. W. 264; *Port Huron Machine Co. v. Davis (Ia.)*, 162 N. W. 228; *Franke v. Kelsheimer*, 180 Ia. 251, 163 N. W. 239.

Kansas. *Griesa v. Thomas*, 99 Kan. 335, 161 Pac. 670; *Outcault Advertising Co. v. Smalley*, 101 Kan. 645, 168 Pac. 677.

Louisiana. *Ford v. Parsons*, 142 La. 1093, 78 So. 128.

Massachusetts. *Reagan v. Union Mut. L. Ins. Co.*, 189 Mass. 555, 2 L. R. A. (N.S.) 821, 76 N. E. 217.

Michigan. *Lake Erie Land Co. v. Chilinski*, 197 Mich. 214, 163 N. W. 929.

Minnesota. *Vilett v. Moler*, 82 Minn. 12, 84 N. W. 452; *Edward Thompson Co. v. Schroeder*, 131 Minn. 125, 154 N. W. 792; *Kempf v. Ranger*, 132 Minn. 64, 155 N. W. 1059.

transaction from amounting to a contract,⁴ or whether the fraud relates to a material fact which is not one of the essential elements of the contract and thus renders the contract voidable at the election of the party who has been misled.⁵ Extrinsic evidence is admissible to show fraud by which the maker was induced to

Mississippi. *Howie v. Pratt*, 83 Miss. 15, 35 So. 216.

Montana. *Petit v. Sinclier*, 53 Mont. 317, 163 Pac. 467.

New Hampshire. *Hoitt v. Holcomb*, 23 N. H. 535; *Cass v. Brown*, 68 N. H. 85, 44 Atl. 86; *Anderson v. Scott*, 70 N. H. 350, 47 Atl. 607.

New Mexico. *Pople v. Orekar*, 22 N. M. 307, 161 Pac. 1110; *Berrendo Irrigated Farms Co. v. Jacobs*, 23 N. M. 290, 168 Pac. 483.

New York. *Mayer v. Dean*, 115 N. Y. 556, 5 L. R. A. 540, 22 N. E. 261.

North Carolina. *American Potato Co. v. Jenette Bros. Co.*, 172 N. Car. 1, 89 S. E. 791.

North Dakota. *Elliott Supply Co. v. Green*, 35 N. D. 641, 160 N. W. 1002.

Oklahoma. *McLean v. Southwestern Casualty Ins. Co.*, — Okla. —, 159 Pac. 660; *Nickle v. Reeder*, — Okla. —, 166 Pac. 895; *American Bankers' Insurance Co. v. Hopkins*, — Okla. —, 169 Pac. 489; *Hooker v. Wilson*, — Okla. —, 169 Pac. 1097.

Oregon. *Hetrick v. Gerlinger Motor Car Co.*, 84 Or. 133, 164 Pac. 379.

South Carolina. *Parham-Thomas-McSwain v. Atlantic Life Ins. Co.*, 104 S. Car. 223, 88 S. E. 470.

South Dakota. *Rosholt v. Woulph*, — S. D. —, 167 N. W. 158 (obiter, as no fraud was shown):

Tennessee. *Fine v. Stuart* (Tenn. Ch. App.), 48 S. W. 371.

Utah. *Swanson v. Sims*, — Utah —, 170 Pac. 774.

Washington. *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613; *Union Machinery & Supply Co. v. Darnell*, 80 Wash. 226, 154 Pac. 183; *Ennis v. New*

World Life Insurance Co., 97 Wash. 122, 165 Pac. 1091.

West Virginia. *Rosin Coal Land Co. v. Martin*, 81 W. Va. 33, 94 S. E. 358.

⁴ **Alabama.** *Commercial Finance Co. v. Cooper Bros.*, 196 Ala. 285, 71 So. 684; *Adams Hardware Co. v. Wimbish*, — Ala. —, 78 So. 902.

Arkansas. *Hampton v. Haneline*, 125 Ark. 441, 189 S. W. 40.

Georgia. *McBride v. Publishing Co.*, 102 Ga. 422, 30 S. E. 999; *Gore v. Malsby*, 110 Ga. 893, 36 S. E. 315.

Kansas. *Griesa v. Thomas*, 99 Kan. 335, 161 Pac. 670.

North Carolina. *Cutler v. Lumber Co.*, 128 N. Car. 477, 39 S. E. 30.

Oregon. *Interior Warehouse Co. v. Dunn*, 80 Or. 528, 157 Pac. 806.

Vermont. *Cameron v. Estabrooks*, 73 Vt. 73, 50 Atl. 638; *Drown v. Oderkirk*, 89 Vt. 484, 96 Atl. 11. Where the party signing a release was unable to understand its contents because of pain. *Girard v. Wheel Co.*, 123 Mo. 358, 45 Am. St. Rep. 556, 25 L. R. A. 514, 27 S. W. 648. As to the existence of the subject-matter. *J. G. Shaw Blank Book Co. v. Maybell*, 86 Minn. 241, 90 N. W. 392.

⁵ **United States.** *Burroughs Adding Machine Co. v. Scandinavian-American Bank*, 239 Fed. 179.

Alabama. *Manning v. Carter*, — Ala. —, 77 So. 744.

Arkansas. *Barker v. Lack*, 120 Ark. 323, 179 S. W. 403.

Georgia. *Barrie v. Miller*, 104 Ga. 312, 69 Am. St. Rep. 171, 30 S. E. 840.

Iowa. *Dowagiac Mfg. Co. v. Gibson*, 73 Ia. 525, 5 Am. St. Rep. 697, 35 N. W. 603; *Sisson v. Kaper*, 105 Ia. 599,

execute a negotiable instrument if such negotiable instrument is not in the hands of a bona fide holder.⁶ Extrinsic evidence is admissible to show that a written contract of sale was entered into in reliance upon fraudulent representations,⁷ such as fraudulent representations as to the quality of the goods.⁸ Extrinsic evidence is admissible to show that a written contract for the sale of land was induced by fraudulent representations.⁹ The fact that a contract of fire insurance was entered into by reason of the representation of the agent of the insurer as to the meaning of a clause in an insurance policy which amounted to fraud, may be shown by extrinsic evidence.¹⁰ If an agent has been guilty of fraud against his principal, the fact of the agency may be established by extrinsic evidence, although by the terms of the written contract he is apparently acting as the adversary party.¹¹ If an agent has made

75 N. W. 490; *King-Yessler Real Estate Co. v. Messer* (Ia.), 160 N. W. 298; *Port Huron Machine Co. v. Davis* (Ia.), 162 N. W. 228.

Kansas. *Griesa v. Thomas*, 99 Kan. 335, 161 Pac. 670; *Outcault Advertising Co. v. Smalley*, 101 Kan. 645, 168 Pac. 677.

Maine. *Marston v. Ins. Co.*, 89 Me. 266, 56 Am. St. Rep. 412, 36 Atl. 389.

Massachusetts. *Reagan v. Union Mutual Life Insurance Co.*, 189 Mass. 555, 2 L. R. A. (N.S.) 821, 76 N. E. 217.

Michigan. *Rambo v. Patterson*, 133 Mich. 655, 95 N. W. 722; *Lake Erie Land Co. v. Chilinski*, 197 Mich. 214, 163 N. W. 929.

Minnesota. *Nelson v. Berkner*, 139 Minn. 301, 166 N. W. 347.

Nebraska. *Bauer v. Taylor* (Neb.), 96 N. W. 268.

New York. *Mayer v. Dean*, 115 N. Y. 556, 5 L. R. A. 540, 22 N. E. 261.

North Carolina. *American Pure Food Co. v. Elliott*, 151 N. Car. 393, 31 L. R. A. (N.S.) 910, 66 S. E. 451.

North Dakota. *Elliott Supply Co. v. Green*, 35 N. D. 641, 160 N. W. 1002.

Oklahoma. *Nickle v. Reeder*, — Okla. —, 166 Pac. 895; *American Bankers' Insurance Co. v. Hopkins*, — Okla.

—, 169 Pac. 489; *Hooker v. Wilson*, — Okla. —, 169 Pac. 1097.

Pennsylvania. *Maute v. Gross*, 56 Pa. St. 250, 94 Am. Dec. 62.

Washington. *American Savings Bank & Trust Co. v. Bremerton Gas Co.*, 99 Wash. 18, 168 Pac. 775.

Wisconsin. *Bank v. Kurth*, 167 Wis. 43, 166 N. W. 658.

Contracts within the Statute of Frauds: sale of realty. *Gustafson v. Rustemeyer*, 70 Conn. 125, 66 Am. St. Rep. 92, 39 L. R. A. 644, 30 Atl. 104.

⁶ *Rosholt v. Woulph*, — S. D. —, 167 N. W. 158 (obiter, as no fraud was shown to exist).

⁷ *Upham v. Mickleson* (Ia.), 157 N. W. 264; *Bank v. Kurth*, 167 Wis. 43, 166 N. W. 658.

⁸ *American Pure Food Co. v. Elliott*, 151 N. Car. 393, 31 L. R. A. (N.S.) 910, 66 S. E. 451.

⁹ *Manning v. Carter*, — Ala. —, 77 So. 744.

¹⁰ *Houge v. St. Paul Fire & Marine Ins. Co.*, 174 Ia. 607, 156 N. W. 862.

¹¹ *Lavalleur v. Hahn*, 152 Ia. 649, 39 L. R. A. (N.S.) 24, 132 N. W. 877; *King-Yessler Real Estate Co. v. Messer* (Ia.), 160 N. W. 298; *American Savings Bank & Trust Co. v. Bremerton Gas Co.*, 99 Wash. 18, 168 Pac. 775.

a secret profit in the purchase of property for his principal, the fact of his agency may be established by extrinsic evidence, although by the terms of the contract between the principal and the agent, the agent is treated as vendor of the realty which he is in fact to buy for his principal.¹² The fact that a written contract provides that all the terms of such contract are contained in such writing does not prevent the introduction of extrinsic evidence for the purpose of showing fraud.¹³ Extrinsic evidence to contradict the contractual provisions of a contract is admissible only where there is an issue as to fraud, mistake, and the like, as to such contents.¹⁴ If the fraud which is alleged is fraud as to a material matter which is not one of the essential elements of the contract, extrinsic evidence is not admissible to contradict the contractual provisions of the contract.¹⁵ If the issue is as to fraud, in the terms of the contract itself, extrinsic evidence is admissible to show that a provision in a contract was inserted or omitted by fraud.¹⁶ In an action at law, however, such evidence can not be introduced for the purpose of reforming the contract and enforcing it if it is reformed.¹⁷

If a contract is entered into with the intention of performing it, breach of contract is not of itself fraud,¹⁸ and hence no relief on the ground of fraud can be given against one who breaks an oral term of a contract which, except as to such term, has been put in the form of a complete written contract.¹⁹ Thus under a written contract to carry mails according to a certain schedule, an oral promise to procure a change in such schedule can not be treated as fraud.²⁰ If the breach of such oral covenant could be treated as fraud, nothing would be left of the parol evidence rule.

¹² *Lavalleur v. Hahn*, 152 Ia. 649, 39 L. R. A. (N.S.) 24, 132 N. W. 877.

¹³ *Reagan v. Union Mutual Life Insurance Co.*, 189 Mass. 555, 2 L. R. A. (N.S.) 821, 76 N. E. 217; *Edward Thompson Co. v. Schroeder*, 131 Minn. 125, 154 N. W. 792; *Berrendo Irrigated Farms Co. v. Jacobs*, 23 N. M. 290, 168 Pac. 483; *Elliott Supply Co. v. Green*, 35 N. D. 641, 160 N. W. 1002.

¹⁴ *Hutchison v. Westbrook*, 191 Mich. 484, 158 N. W. 135.

¹⁵ *Hutchison v. Westbrook*, 191 Mich. 484, 158 N. W. 135.

¹⁶ *Adams Hardware Co. v. Wimbish*,

— Ala. —, 78 So. 902; *Hampton v. Haneline*, 125 Ark. 441, 189 S. W. 40; *Greisa v. Thomas*, 99 Kan. 335, 161 Pac. 670; *Drown v. Oderkirk*, 89 Vt. 484, 96 Atl. 11.

¹⁷ *Maxson v. Ashland Iron Works*, 85 Or. 345, 166 Pac. 37, 167 Pac. 271. See §§ 2137 et seq.

¹⁸ See § 295.

¹⁹ *Knowlton v. Keenan*, 146 Mass. 86, 4 Am. St. Rep. 282, 15 N. E. 127; *Holland City State Bank v. Meeuwsen*, 192 Mich. 326, 158 N. W. 1032.

²⁰ *Knowlton v. Keenan*, 146 Mass. 86, 4 Am. St. Rep. 282, 15 N. E. 127.

In Pennsylvania, breach of an oral contract,²¹ such as a contract by which the payee of a note agrees to pay a certain obligation to the maker before the maker is to be required to pay the note,²² is regarded as fraud which enables the maker to set up such oral contract as a defense. In Pennsylvania, however, the parol evidence rule has a different meaning from that which it has in most jurisdictions.²³ If a contract provides that a negotiable instrument shall not take effect until the happening of a certain event, and that it shall not be negotiated until such event takes place, breach of the agreement not to negotiate has been said to be fraud.²⁴ Cases of this sort, however, can be explained better on the theory that such extrinsic evidence annexes a condition precedent,²⁵ and that such condition can be shown as against all but bona fide holders.

The making of a contract without the intention of keeping it amounts to fraud,²⁶ and extrinsic evidence of such a promise is admissible upon the issue of fraud, although it tends to contradict the terms of the written instrument.²⁷

§ 2183. Illegality. Illegal contracts are unenforceable, not because of any desire on the part of the courts to aid either party thereto, but because public interests require that they be not enforced. If the parties thereto could make them enforceable by the simple device of putting them in writing, using such words as would conceal the illegality of the objects intended by them to be accomplished, or omitting all reference to such illegality, the rules on the subject of illegality would be of but little use. Accordingly, evidence that tends to show that the written contract is illegal,¹

²¹ *Gandy v. Weckerly*, 220 Pa. St. 285, 18 L. R. A. (N.S.) 434, 69 Atl. 858.

²² *Gandy v. Weckerly*, 220 Pa. St. 285, 18 L. R. A. (N.S.) 434, 69 Atl. 858.

²³ See § 2165.

²⁴ *McKnight v. Parsons*, 136 Ia. 390, 113 N. W. 858 [sub nomine, *McKnight v. Parsons*, 22 L. R. A. (N.S.) 718].

²⁵ See § 2178.

²⁶ See § 298.

²⁷ *Nelson v. Berkner*, 139 Minn. 301, 166 N. W. 347.

¹ *United States v. McMullen v. Hoffman*, 174 U. S. 639, 43 L. ed. 1117 [af-

firming, 83 Fed. 372, 45 L. R. A. 410, 28 C. C. A. 178, which reversed 75 Fed. 547]; *In re Canfield*, 190 Fed. 266.

Alabama. *People's Bank & Trust Co. v. Floyd*, — Ala. —, 75 So. 940.

Connecticut. *Smith v. David B. Crockett Co.*, 85 Conn. 282 39 L. R. A. (N.S.) 1148, 82 Atl. 569.

Georgia. *Exchange National Bank v. Henderson*, 139 Ga. 260, 51 L. R. A. (N. S.) 549, 77 S. E. 36.

Iowa. *Peed v. McKee*, 42 Ia. 689, 20 Am. Rep. 631; *France v. Munro*, 138 Ia. 1, 19 L. R. A. (N.S.) 391, 116 N. W. 577.

as to show that the contract is tainted with usury,² or is given to compound a felony;³ or that the contract is entered into for the purpose of entrapping persons into committing crimes and for securing compensation for the detection of them in such crime;⁴ or that the real purpose of the contract is to provide for bribing the agents of a third person;⁵ or that the real consideration of a promissory note is the political influence of the payee;⁶ or that a contract is entered into to secure personal influence for the purpose of obtaining a franchise;⁷ or that a lease is entered into for the purpose of carrying on an illegal business,⁸ such as prostitution;⁹

Kansas. *Friend v. Miller*, 52 Kan. 139, 39 Am. St. Rep. 340, 34 Pac. 397.

Kentucky. *Wilhite v. Roberts*, 34 Ky. (4 Dana) 172.

Maine. *Gould v. Leavitt*, 92 Me. 416, 43 Atl. 17.

Massachusetts. *Sherman v. Wilder*, 106 Mass. 537.

Michigan. *Detroit Salt Co. v. Salt Co.*, 134 Mich. 103, 96 N. W. 1.

Mississippi. *Yazoo & M. V. R. Co. v. Searles*, 85 Miss. 520, 68 L. R. A. 715, 37 So. 939; *Mitchell v. Campbell*, 111 Miss. 806, 72 So. 231; *Lavecchia v. Tillman*, 115 Miss. 288, 76 So. 266.

Pennsylvania. *Kuhn v. Buhl*, 251 Pa. St. 348, 96 Atl. 977.

Rhode Island. *Martin v. Clarke*, 8 R. I. 389, 5 Am. Rep. 586.

Washington. *Ennis v. New World Life Insurance Co.*, 97 Wash. 122, 165 Pac. 1091.

Wisconsin. *Manufacturers' & M. Inspection Bureau v. Everwear Hosiery Co.*, 152 Wis. 73, 42 L. R. A. (N.S.) 847, 138 N. W. 624.

Contra, *Hoefeld v. Ozello*, — Ill. —, 125 N. E. 5.

See also as contra, *Hunter v. Byron*, 92 Wash. 469, 159 Pac. 703, where, however, the real purpose of the evidence was to show that the contract was never intended to take effect as between the parties, but that it was intended to deceive third persons.

² **United States.** *Ringer v. Virgin Timber Co.*, 213 Fed. 1001; *Chase & Baker Co. v. National Trust & Credit Co.*, 215 Fed. 633.

Alabama. *Smith v. Yancey*, — Ala. —, 73 So. 477.

Arkansas. *Roe v. Kiser*, 62 Ark. 92, 54 Am. St. Rep. 288, 34 S. W. 534.

Georgia. *Dwelle v. Blackwood*, 106 Ga. 486, 32 S. E. 593.

Iowa. *France v. Munro*, 138 Ia. 1, 19 L. R. A. (N.S.) 391, 115 N. W. 577.

Nebraska. *Koehler v. Dodge*, 31 Neb. 328, 28 Am. St. Rep. 518, 47 N. W. 913.

Texas. *Cotton States Building Co. v. Rawlins* (Tex. Civ. App.), 62 S. W. 805.

³ *People's Bank & Trust Co. v. Floyd*, — Ala. —, 75 So. 940; *Friend v. Miller*, 52 Kan. 139, 39 Am. St. Rep. 340, 34 Pac. 397.

Contra, as to a lease for the illegal sale of intoxicating liquor. *Hoefeld v. Ozello*, — Ill. —, 125 N. E. 5.

See also, as contra, *C. H. Little Co. v. Cadwell Transit Co.*, 197 Mich. 481, 163 N. W. 952.

⁴ *Manufacturers' & M. Inspection Bureau v. Everwear Hosiery Co.*, 152 Wis. 73, 42 L. R. A. (N.S.) 847, 138 N. W. 624.

⁵ *Smith v. David B. Crockett Co.*, 85 Conn. 282, 39 L. R. A. (N.S.) 1148, 82 Atl. 569.

⁶ *Exchange National Bank v. Henderson*, 139 Ga. 260, 51 L. R. A. (N.S.) 549, 77 S. E. 36.

⁷ *Obenchain v. Ransome-Crummey Co.*, 69 Or. 547, 138 Pac. 1078, 139 Pac. 920.

⁸ *Lavecchia v. Tillman*, 115 Miss. 288, 76 So. 266.

⁹ *Mitchell v. Campbell*, 111 Miss. 806, 72 So. 231.

or that a lease,¹⁰ or that a contract is intended to create a monopoly,¹¹ or is in violation of the anti-trust statutes;¹² that a contract to lease a railroad is illegal;¹³ or that a chattel mortgage¹⁴ is given to defraud creditors, does not violate the parol evidence rule and is admissible. A contract of stock subscription which is in writing may be shown by extrinsic evidence to be illegal.¹⁵

However, it has been held that it can not be shown that a note given by a husband to his wife for her release of dower was a part of an oral contract for a collusive divorce.¹⁶

§ 2184. Non-compliance with Statute of Frauds. If the contract is one which falls within the terms of the Statute of Frauds, a memorandum in writing is necessary if the contract is one which falls within the fourth section of the original statute,¹ and a memorandum in writing is one of the methods of satisfying the seventeenth section of the original statute.² To conform to the requirements of the statute, the memorandum must be complete and must set forth all the terms actually agreed upon between the parties.³ If the parties have entered into an oral contract which falls within the Statute of Frauds; if a written memorandum of such terms has been signed as required by statute; if such memorandum purports on its face to be a memorandum of a complete contract; but if such memorandum has omitted one or more of the terms upon which the parties had agreed in fact, we have a question of a conflict between the parol evidence rule and the Statute of Frauds. If the Statute of Frauds did not apply, the parol evidence rule would prevent the use of extrinsic evidence to show that such written contract was in fact incomplete.⁴ If it were not for the parol evidence rule,

¹⁰ *Sprague v. Rooney*, 104 Mo. 349, 16 S. W. 505 [overruling *Sprague v. Rooney*, 82 Mo. 493, 52 Am. Rep. 383].

¹¹ *Harding v. Glucose Co.*, 182 Ill. 551, 74 Am. St. Rep. 189, 55 N. E. 577.

¹² *Detroit Salt Co. v. Salt Co.*, 134 Mich. 103, 96 N. W. 1; *Yazoo & M. V. R. Co. v. Searles*, 85 Miss. 520, 68 L. R. A. 715, 37 So. 939.

¹³ *Clemons Electrical Mfg. Co. v. Walton*, 173 Mass. 286, 52 N. E. 132, 53 N. E. 820.

¹⁴ *Hangen v. Hachemeister*, 114 N. Y. 566, 11 Am. St. Rep. 691, 5 L. R. A. 137, 21 N. E. 1046.

¹⁵ *Ennis v. New World Life Insurance Co.*, 97 Wash. 122, 165 Pac. 1091.

¹⁶ *Irvin v. Irvin*, 169 Pa. St. 529, 29 L. R. A. 292.

¹ For the original fourth section, see § 1211.

For the nature of the memorandum, see §§ 1316 et seq.

For the effect of failure to comply with the statute, see §§ 1396 et seq.

² See §§ 1353 et seq.

³ See §§ 1333 et seq.

⁴ See § 2153.

there would be no difficulty in using oral evidence to show that such written memorandum was not what it purported to be and that it did not in fact comply with the Statute of Frauds. The solution which has actually been adopted by the courts is one which gives priority to the statute. In such a case oral evidence is admitted to show that the memorandum is in fact incomplete, that other terms have been agreed upon than those which are set forth in the memorandum; and it may thus be shown that such memorandum does not in fact satisfy the requirements of the Statute of Frauds.⁵ If one or more oral terms of such contract are thus established the contract is one which is proved in part by writing and in part by oral evidence, and the Statute of Frauds accordingly renders such contract unenforceable.⁶ If a written offer has been accepted with oral modifications, and the offeror has assented to such oral modification, the original written offer never took effect as a contract, and the right of either party to show the terms of the oral contract for the purpose of showing that the written offer never took effect, is even clearer.⁷ A written offer which by its terms imports payment of the entire consideration upon performance by the adversary party, may be shown by oral evidence to have been accepted on condition that payment should be made in installments, and it may be shown that such modification was acquiesced in by the offeror.⁸

If the parties have not in fact agreed upon the compensation to be paid, the contract is not incomplete, since a reasonable compensation will be implied;⁹ and, accordingly, the fact that the memorandum does not set forth the amount of compensation, does not render it insufficient,¹⁰ since a memorandum which sets forth all the terms of the contract is sufficient if the contract itself is sufficiently definite.¹¹ If, however, the parties have actually agreed upon a definite price, but have omitted to set forth such price in the written memorandum, oral evidence is admissible to show that

⁵ *Acebal v. Levy*, 10 Bing. 376; *Fisher v. Andrews*, 94 Md. 46, 50 Atl. 407; *Boardman v. Spooner*, 95 Mass. (13 All.) 353, 90 Am. Dec. 196; *Kahlotus Grain & Supply Co. v. Blair*, 101 Wash. 645, 172 Pac. 818.

⁶ *Beyerstedt v. Mill Co.*, 49 Minn. 1, 51 N. W. 619.

That an incomplete memorandum can not be supplemented by oral evi-

dence showing the remaining terms of the contract, see §§ 1335 et seq.

⁷ *Bruce v. Pearsall*, 59 N. J. L. 62, 34 Atl. 982.

⁸ *Bruce v. Pearsall*, 59 N. J. L. 62, 34 Atl. 982.

⁹ See §§ 92 et seq.

¹⁰ See § 1334.

¹¹ See § 1352.

a definite price was in fact agreed upon and that the written memorandum is accordingly incomplete.¹² If a broker has made an oral contract of sale which is subject to the approval by the purchaser of the quality of the goods which are sold, and the written memorandum does not show that such sale is subject to the approval of the purchaser, oral evidence is admissible to show such additional term, and to show that the contract is accordingly incomplete.¹³

§ 2185. Breach and performance. Performance and breach of a contract are questions which necessarily arise after the contract has been entered into. Accordingly, the parol evidence rule does not prevent a party to a contract from showing such breach as amounts to a discharge,¹ as of a promissory note not in the hands of a bona fide holder.² Under a written contract by which A agrees to convey a certain right or interest to B, extrinsic evidence of the fact that A does not possess such interest is admissible, since such evidence does not contradict the contract itself, but affects the performance thereof.³ Extrinsic evidence to the effect that property which was sold did not conform to the terms of the contract,⁴ or that one of the parties to the contract had so acted as to repudiate it,⁵ is not rendered inadmissible by the parol evidence rule. So the parol evidence rule has no application to evidence tending to show payment.⁶ Extrinsic evidence to the effect that the payee of a note agreed to foreclose a mortgage which was given to secure it and to apply the proceeds of such mortgage upon

¹² *Acebal v. Levy*, 10 Bing. 376; *Hoadley v. McLaine*, 10 Bing. 482.

See also, *Elmore v. Kingscote*, 5 Barn. & C. 583.

¹³ *Boardman v. Spooner*, 95 Mass. (13 All.) 353, 90 Am. Dec. 196. (The court said, however, that if the purchasers themselves had signed such a written memorandum they could not show that they had a right to reject the goods if they did not believe them to be of good quality.)

¹ *Florida*. *Braxton v. Liddon*, 49 Fla. 280, 38 So. 717.

Iowa. *Lektric Sales Co. v. Hammer*, 182 Ia. 1228, 166 N. W. 593.

Montana. *Petit v. Sinclier*, 53 Mont. 317, 163 Pac. 467.

North Dakota. *Sargent v. Cooley*, 12 N. D. 1, 94 N. W. 576.

Wyoming. *J. W. Denio Milling Co. v. Malin*, 25 Wyom. 143, 165 Pac. 1113

See, as to oral statement of ability to perform. *Clapp v. American Express Co.*, — Mass. —, 125 N. E. 162.

² *Kelley v. Guy*, 116 Mich. 43, 74 N. W. 291; *Warner v. Shulz*, 74 Minn. 252, 77 N. W. 25.

³ *Petit v. Sinclier*, 53 Mont. 317, 163 Pac. 467.

⁴ *Lektric Sales Co. v. Hammer*, 182 Ia. 1228, 166 N. W. 593.

⁵ *J. W. Denio Milling Co. v. Malin*, 25 Wyom. 143, 165 Pac. 1113.

⁶ *Continental Gin Co. v. Stocker*, 235 Fed. 1005.

Payment of promissory note. *G. Ober & Sons Co. v. Drane*, 106 Ga. 406, 32 S. E. 371.

such note and that such foreclosure has been had, is in legal effect evidence of payment and is not rendered inadmissible by the parol evidence rule.⁷ If A has signed B's name to a check without B's authority, extrinsic evidence to the effect that A actually received the money upon such check is admissible.⁸

§ 2186. Estoppel as evasion of parol evidence rule. An attempt is frequently made to avoid the application of the parol evidence rule by invoking the doctrine of estoppel, and to claim that the party who has made the oral promises upon which the adversary party has relied is estopped from denying the legal force and effect of such oral promises, even though the transaction has subsequently been reduced to the form of a written contract which appears upon its face to be complete and free from ambiguity and although the oral terms which it is sought to enforce were omitted from this written contract. It is evident that if this condition is well founded, the parol evidence rule has no standing in law. If this theory is correct the parties to a contract are estopped from setting up the parol evidence rule in the only case in which the parol evidence rule will have any legal effect. The answer to this contention is to be found in the nature of estoppel itself. Estoppel is based on representations of facts and not upon promises.¹ Accordingly, where this view prevails, it is held that the doctrine of estoppel does not apply and that the parol evidence rule prevents the introduction of evidence of oral agreements prior to the written contract or contemporaneous therewith, which are merged in the written contract by the operation of the rules already laid

⁷ *Continental Gin Co. v. Stocker*, 235 Fed. 1005.

⁸ *Hill v. First National Bank*, 129 Ark. 265, 195 S. W. 678.

¹ "By the express condition of the policy, the liability of the company was released upon the failure of the insured to pay the premium when it matured; and the plaintiff could not recover, unless the force of this condition could in some way be overcome. He sought to overcome it by showing that the agent, who induced him to apply for the policy, represented to him, in answer to suggestions that he might not be informed when to pay

the premiums, that the company would notify him in season to pay them, and that he need not give himself any uneasiness on that subject; that no such notification was given to him before the maturity of the second premium, and for that reason he did not pay it at the time required. This representation before the policy was issued, it was contended in the court below, and in this court, constituted an estoppel upon the company against insisting upon the forfeiture of the policy. But to this position there is an obvious and complete answer. All previous verbal arrangements were merged in

down.² If A and B enter into an oral contract, and in reducing such contract to writing, the writing does not express the true terms of the oral contract, relief is to be granted upon the theory of reformation, and not upon the theory of estoppel.³

Estoppel is nevertheless regarded, in some jurisdictions, as rendering admissible extrinsic evidence of the true understanding of the parties, in violation of the true meaning of the parol evidence rule.⁴

the written agreement. The understanding of the parties as to the amount of the insurance, the conditions upon which it should be payable, and the premium to be paid, was there expressed, for the very purpose of avoiding any controversy or question respecting them. The entire engagement of the parties, with all the conditions upon which its fulfillment could be claimed, must be conclusively presumed to be there stated. If, by inadvertence or mistake, provisions were omitted, the parties could have had recourse for a correction of the agreement to a court of equity, which is competent to give all needful relief in such cases. But, until thus corrected, the policy must be taken as expressing the final understanding of the assured and of the insurance company. * * * The doctrine of estoppel is applied with respect to representations of a party, to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect if a party who, by his statements as to matters of fact, or as to his intended abandonment of existing rights, had designedly induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statements, or enforce his rights against his declared intention of abandonment. But the doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a

subsequent change of intention and conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions, parties must provide by stipulations in their agreement when reduced to writing. The doctrine carried to the extent for which the assured contends in this case would subvert the salutary rule, that the written contract must prevail over previous verbal arrangements, and open the door to all the evils which that rule was intended to prevent." *Union Mutual Life Ins. Co. v. Moury*, 96 U. S. 544 (546, 548), 24 L. ed. 674.

See to the same effect, *Connecticut Fire Ins. Co. v. Buchanan*, 141 Fed. 877, 73 C. C. A. 111, 4 L. R. A. (N.S.) 758.

² *United States. Union Mutual Life Ins. Co. v. Moury*, 96 U. S. 544, 24 L. ed. 674; *Northern Assurance Co. v. Grand View Building Association*, 183 U. S. 308, 46 L. ed. 213; *Connecticut Fire Ins. Co. v. Buchanan*, 141 Fed. 877, 73 C. C. A. 111, 4 L. R. A. (N.S.) 758.

Illinois. White v. Walker, 31 Ill. 422.

Michigan. Faxton v. Faxton, 28 Mich. 159.

New Jersey. Dewees v. Manhattan Ins. Co., 35 N. J. L. 366; *Franklin Fire Ins. Co. v. Martin*, 40 N. J. L. 568, 29 Am. Rep. 271.

³ *Aetna Ins. Co. v. Brannon*, 99 Tex. 391, 2 L. R. A. (N.S.) 548, 89 S. W. 1057.

⁴ *People's F. Ins. Association v. Goyne*, 79 Ark. 315, 16 L. R. A. (N.S.) 1180, 96 S. W. 365; *Andersonian Investment Co. v. Wade*, — Wash. —, 184 Pac. 327.

§ 2187. Secondary evidence. While the contents of a written instrument should be proved by the introduction of the instrument itself in evidence, if the party against whom such evidence is offered insists upon such evidence, this is not due to the so-called parol evidence rule, but to the best evidence rule. If extrinsic evidence of the contents of a written instrument can be offered without violating the parol evidence rule, as where it is shown the written instrument is lost, such evidence is admissible as far as the parol evidence rule is concerned.¹ Oral evidence of the contents of a lost notice may be given.² In an action against a telegraph company for refusal to transmit a telegram, oral evidence of the contents of such telegram may be offered.³ The loss of one of two receipts in duplicate does not affect the legal operation of such receipt, and extrinsic evidence of the loss and contents of such receipt is not a violation of the parol evidence rule.⁴ Oral evidence is admissible to contradict such secondary evidence as to the contents of the lost written instrument.⁵

However, such evidence must always be limited to the contents of the written instrument. Other extrinsic evidence is governed by the rules that would be applicable if the written instrument were in evidence. If the written instrument supposed to be lost is found during trial, further evidence of its contents is inadmissible, even if some evidence has already been introduced.⁶

III

USE OF EXTRINSIC EVIDENCE IN CASES WITHIN THE RULE

§ 2188. Identification of parties. If the written contract shows that some particular parties were intended, but does not show with sufficient accuracy who such parties are, extrinsic evidence is

¹ *Western Union Telegraph Co. v. Lillard*, 86 Ark. 208, 17 L. R. A. (N.S.) 836, 110 S. W. 1035; *National Bank v. Duff*, 77 Kan. 248, 16 L. R. A. (N.S.) 1047, 94 Pac. 260; *Western Union Telegraph Co. v. Collins*, 45 Kan. 88, 10 L. R. A. 515, 25 Pac. 187; *Magie v. Herman*, 50 Minn. 424, 36 Am. St. Rep. 660, 52 N. W. 909; *In re Bugbee's Will*, — Vt. —, 102 Atl. 484.

² *National Bank v. Duff*, 77 Kan. 248, 16 L. R. A. (N.S.) 1047, 94 Pac. 260.

³ *Western Union Telegraph Co. v. Lillard*, 86 Ark. 208, 17 L. R. A. (N.S.) 836, 110 S. W. 1035.

⁴ *In re Bugbee's Will*, — Vt. —, 102 Atl. 484.

⁵ *Strain v. Fitzgerald*, 130 N. Car. 600, 41 S. E. 872.

⁶ *Grand Isle v. Kinney*, 70 Vt. 381, 41 Atl. 130.

admissible to identify such parties,¹ and as will be seen from the cases given, evidence of the intention direct may be resorted to. Extrinsic evidence is admissible to identify the office of a public officer so as to explain an ambiguity in his bond.² A contract which is entered into in the name of a company may be explained by extrinsic evidence to identify the members of the company and to show upon whom it was intended to impose the obligation.³ Under a written contract to pay money to a "railroad," extrinsic evidence can be used to show what railroad corporation was intended.⁴ So where a written contract purporting on its face to be made between A and B, is signed by A, C, D and B in the order given, it may be shown that C and D sign as sureties for B.⁵ Where a note is signed by A at the right, and by B at the left of the instrument, opposite A's signature, B may show that he signed as witness.⁶ So under an instrument "I. O. U. the sum of one hundred and sixty dollars, which I shall pay on demand to you," the real party intended by "you" may be shown.⁷ So where a note omits payee's name but recites "value received of him," the payee may be shown.⁸ So under a note "we promise to pay to the order of myself," signed by two persons, the real maker and payee may be shown.⁹ If the name set forth in the contract is shown not to be the name of the person therein described, extrinsic evidence may be admitted to show who such person is. Thus A took out a policy payable to "Mrs. Kate Hogan, his wife." Evidence was admitted to show that he had a wife, Ellen B. Hogan, and a married sister, Kate Wallace, formerly Kate Hogan; that the insured could not write and asked a physician to make out the application, and that

¹ **Alabama.** *Townley v. Corona Coal & Iron Co.*, — Ala. —, 77 So. 1.

Iowa. *Kuhl v. Chamberlain*, 140 Ia. 546, 21 L. R. A. (N.S.) 766, 118 N. W. 776.

Kentucky. *Geary v. Taylor*, 166 Ky. 501, 179 S. W. 426.

Maryland. *Morrison v. Baechtold*, 93 Md. 319, 48 Atl. 926.

North Carolina. *Walker v. Miller*, 139 N. Car. 448, 1 L. R. A. (N.S.) 157, 52 S. E. 125; *Troy & North Carolina Gold Mining Co. v. Snow Lumber Co.*, 170 N. Car. 273, 87 S. E. 40.

² *Kuhl v. Chamberlain*, 140 Ia. 546, 21 L. R. A. (N.S.) 766, 118 N. W. 776.

³ *Geary v. Taylor*, 166 Ky. 501, 179 S. W. 426.

⁴ *Mansfield, etc., R. R. v. Brown*, 28 O. S. 223.

⁵ *Thompson v. Coffman*, 15 Or. 631, 16 Pac. 713.

⁶ *Aultman, etc., Co. v. Gunderson*, 6 S. D. 226, 55 Am. St. Rep. 837, 60 N. W. 859.

⁷ *Kinney v. Flynn*, 2 R. I. 319.

⁸ *Barkley v. Tarrant*, 20 S. Car. 574, 47 Am. Rep. 853 (even where the note was under seal).

⁹ *Jenkins v. Bass*, 88 Ky. 397, 21 Am. St. Rep. 344, 11 S. W. 293.

the latter thought that the insured's wife was named Kate.¹⁰ Parties may be identified by extrinsic evidence even if the contract is one required to be proved in writing, or is required to be in writing. Thus extrinsic evidence is admissible to show that in a promise to pay A's debt to "your concern," addressed to "Friend Geo.," the latter was the agent of A's creditor, the "concern."¹¹ Mistake in the name of a grantee may be explained by extrinsic evidence.¹² Thus extrinsic evidence is admissible to show to whom a mortgage was to be paid.¹³ So where a deed was made to "John Elliott and Amanda Elliott, his wife," evidence is admissible to show that Amanda Elliott, the grantee, was a woman with whom John Elliott was living in unlawful relations, though he had a lawful wife living, named Amanda.¹⁴ Where a deed was made to a woman after her marriage, and her maiden name was inserted as that of grantee, extrinsic evidence was admissible to show that she was intended as the grantee, and that the grantor did not know of her marriage.¹⁵ Where the Christian name of a grantee is omitted from a deed, extrinsic evidence is admissible to show who the grantee is.¹⁶ If a conveyance is made to a partnership in its firm name, the grantees may be identified by extrinsic evidence.¹⁷ Under a deed to "Jarrett, Moon & Co.," extrinsic evidence was admissible to show whether Jarrett was one grantee and Moon another, or whether Jarrett Moon was the name of the sole grantee.¹⁸ Under a grant to A, "as trustee," extrinsic evidence is admissible to show for whom he was acting as trustee.¹⁹ Extrinsic evidence is admissible to show that the persons who executed a deed were all of the children of the grantor.²⁰

¹⁰ *Hogan v. Wallace*, 166 Ill. 328, 46 N. E. 1136. (From these facts the supreme court found that the wife was the beneficiary intended. They rejected, not as inadmissible, but as improbable, further evidence of the physician that the insured named the beneficiary "Kate Hogan," that the physician asked if that was the insured's wife, that insured remained silent, and that the physician added "his wife.")

¹¹ *Haskell v. Tukesbury*, 92 Me. 551, 60 Am. St. Rep. 529, 43 Atl. 500.

¹² *Troy & North Carolina Gold Mining Co. v. Snow Lumber Co.*, 170 N. Car. 273, 87 S. E. 40.

¹³ *Morgan v. Lake View Co.*, 97 Wis. 275, 72 N. W. 872.

¹⁴ *Wolff v. Elliott*, 68 Ark. 326, 57 S. W. 1111.

¹⁵ *Scanlan v. Wright*, 30 Mass. (13 Pick.) 523, 25 Am. Dec. 344.

¹⁶ *Leach v. Dodson*, 64 Tex. 185.

¹⁷ *Walker v. Miller*, 139 N. Car. 448, 1 L. R. A. (N.S.) 157, 52 S. E. 125.

¹⁸ *Holmes v. Jarrett*, 54 Tenn. (7 Heisk.) 506. (In either case, the grantee would take in trust for the partnership.)

¹⁹ *Union Pacific R. R. v. Durant*, 95 U. S. 576, 24 L. ed. 391.

²⁰ *Townley v. Corona Coal & Iron Co.*, — Ala. —, 77 So. 1.

§ 2189. Identification of subject-matter. If the written contract is ambiguous in indicating the subject-matter of the contract, extrinsic evidence is admissible to identify it.¹ Extrinsic evidence is admissible to show what is included by the words "entire

¹ **England.** Cowen v. Truefitt [1898], 2 Ch. 551 [affirmed (1899), 2 Ch. 309].

United States. Bradley v. Packet Co., 38 U. S. (13 Pet.) 89, 10 L. ed. 72; Reed v. Ins. Co., 95 U. S. 23, 24 L. ed. 348; Buckbee v. Hohenadel, 224 Fed. 14, 139 C. C. A. 478, L. R. A. 1916C, 1001.

Alabama. Moore v. Paving Co., 118 Ala. 563, 23 So. 798; Edwards v. Bender, 121 Ala. 77, 25 So. 1010; Reynolds v. Trawick, 197 Ala. 165, 72 So. 378.

Arkansas. Blackburn v. Thompson, 127 Ark. 438, 193 S. W. 74.

California. Osborn v. Hoyt, — Cal. —, 184 Pac. 854.

Georgia. Follendore v. Follendore, 110 Ga. 359, 35 S. E. 676; King v. Brice, 145 Ga. 65, 88 S. E. 960; Morris v. Beckum, 145 Ga. 562, 89 S. E. 704; Swint v. Swint, 147 Ga. 467, 94 S. E. 571.

Idaho. Allen v. Kitchen, 16 Ida. 133, L. R. A. 1917A, 563, 100 Pac. 1052.

Illinois. Barrett v. Stow, 15 Ill. 423.

Indiana. Baldwin v. Boyce, 152 Ind. 46, 51 N. E. 334.

Kentucky. Dotson v. Fletcher, 171 Ky. 589, 188 S. W. 642.

Maine. American Mercantile Exchange v. Blunt, 102 Me. 128, 120 Am. St. Rep. 463, 10 L. R. A. (N.S.) 414, 66 Atl. 212; Ross v. Maine Cent. R. Co., 114 Me. 287, 96 Atl. 223.

Massachusetts. Stoops v. Smith, 106 Mass. 63, 1 Am. Rep. 85, 97 Am. Dec. 76; Swett v. Shumway, 102 Mass. 365, 3 Am. Rep. 471; Harris v. North American Insurance Co., 190 Mass. 361, 4 L. R. A. (N.S.) 1137, 77 N. E. 493; Carpenter v. Sugden, 231 Mass. 1, 119 N. E. 959.

Michigan. Stoddard Mfg. Co. v. Miller, 107 Mich. 51, 64 N. W. 948.

Minnesota. Reeves v. Cress, 80 Minn. 466, 83 N. W. 443; J. G. Shaw, etc., Co. v. Maybell, 86 Minn. 241, 90 N. W. 392.

Mississippi. Albritton v. Fairley, 116 Miss. 705, 77 So. 651; Pearce v. Tharpe, 118 Miss. 107, 79 So. 69.

Nebraska. Drexel v. Murphy, 59 Neb. 210, 80 N. W. 813; Harlan County v. Whitney, 65 Neb. 105, 90 N. W. 993.

Nevada. De Remer v. Anderson, 41 Nev. 287, 169 Pac. 737.

New York. Field v. Munson, 47 N. Y. 221.

Ohio. Hurd v. Robinson, 11 O. S. 232.

Pennsylvania. Title Guaranty & Surety Co. v. Lippincott, 252 Pa. St. 112, 97 Atl. 201; Howard v. Innes, 253 Pa. St. 593, 98 Atl. 761.

South Carolina. State Agricultural & Mechanical Soc. v. Taylor, 104 S. Car. 167, 88 S. E. 372.

South Dakota. Elliott Supply Co. v. Ross, — S. D. —, 168 N. W. 58.

Tennessee. Dougherty v. Chestnutt, 86 Tenn. 1, 5 S. W. 444.

Utah. Brown v. Markland, 16 Utah 360, 67 Am. St. Rep. 629, 52 Pac. 597; Fayter v. North, 30 Utah 156, 6 L. R. A. (N.S.) 410, 83 Pac. 742; Wade v. Dorius, — Utah —, 173 Pac. 564.

Vermont. Hart v. Hammett, 18 Vt. 127; Noyes v. Canfield, 27 Vt. 79.

Virginia. Riner v. Lester, 121 Va. 563, 93 S. E. 594; Asberry v. Mitchell, 121 Va. 276, 93 S. E. 638.

Wisconsin. Lynch v. Henry, 75 Wis. 631, 44 N. W. 837; Pritchard v. Lewis, 125 Wis. 604, 1 L. R. A. (N.S.) 565, 104 N. W. 989.

See also, § 2033 as to evidence of intention of parties concerning the meaning of the terms used.

estate."² It may be shown what "et cetera" includes.³ Extrinsic evidence is admissible to identify a debt,⁴ or a note,⁵ or a check.⁶ So in a contract to return a "due-bill," if the company did not issue a policy applied for, evidence is admissible to show that the "due-bill" was a note given for the premium of such policy.⁷ So in a contract to assume and pay the "debts" of a firm, it is permitted to show what are the debts of the firm,⁸ and to show that a debt appearing on the books of the firm is in fact the individual debt of one of the partners.⁹ So in a contract to assume and pay "claims of all persons who have performed labor upon, or furnished materials for us, in or on said property," evidence is admissible to show what claims are included.¹⁰ Even in a contract required to be proved by writing, oral evidence can be used to identify "the bills" guaranteed,¹¹ or an "account" guaranteed.¹² If a mortgage is given as security for a specified sum "more or less" for goods sold and money lent as evidenced by a running account, extrinsic evidence is admissible to identify the items which are secured by such mortgage.¹³ So where a deed is given as security for "money owing," extrinsic evidence is admissible to show what money was owing when the deed was delivered, and that this debt was intended even if incurred after the date of the deed.¹⁴ So where two writs of replevin issued for the same property and two replevin bonds are given, evidence is admissible to

² *Miles v. Miles*, 78 Miss. 904, 30 So. 2.

³ *Bagley v. Sugar Co.*, 111 La. 249, 35 So. 539; *Payson v. Lamson*, 134 Mass. 593, 45 Am. Rep. 348; *Manchester v. Bradner*, 107 N. Y. 346, 1 Am. St. Rep. 829, 14 N. E. 405; *Fosha v. O'Donnell*, 120 Wis. 336, 97 N. W. 924.

⁴ *Fitzpatrick v. Commissioners*, 26 Tenn. (7 Humph.) 224, 46 Am. Dec. 76.

⁵ *McConaughy v. Wilsey*, 115 Ia. 589, 88 N. W. 1101; *Robbins v. Klein*, 60 O. S. 199, 54 N. E. 94; *Hancock v. Melloy*, 189 Pa. St. 569, 42 Atl. 292.

⁶ *State Agricultural & Mechanical Soc. v. Taylor*, 104 S. Car. 167, 88 S. E. 372.

⁷ *Andrews v. Robertson*, 111 Wis. 334, 87 Am. St. Rep. 870, 54 L. R. A. 673, 87 N. W. 190.

⁸ *Cannon v. Moody*, 78 Minn. 68, 90 N. W. 842.

⁹ *Hanks v. Flynn*, 108 Ia. 165, 78 N. W. 839. (Even under a contract to assume debts of the firm "as shown by the books and invoices of the firm this day.")

¹⁰ *Brown v. Markland*, 16 Utah 360, 67 Am. St. Rep. 629, 52 Pac. 597.

¹¹ *Haskell v. Tukesbury*, 92 Me. 551, 69 Am. St. Rep. 529, 43 Atl. 500.

¹² *Waldheim v. Miller*, 97 Wis. 300, 72 N. W. 869. (As to show that it was for future advances.)

¹³ *Blackburn v. Thompson*, 127 Ark. 438, 193 S. W. 74.

¹⁴ *Swedish-American National Bank v. Bank*, 76 Minn. 409, 79 N. W. 399. (But evidence to show that the deed was intended to secure advances made after its delivery is inadmissible.)

show which bond was given for which writ.¹⁵ Under a contract to deliver at a certain dock which was described by its popular name, extrinsic evidence is admissible to show what dock was thus designated.¹⁶ If an order is given for silverware, some of which is described as "Rogers Bros., 1847," and the rest of which is described "E. S. Co., 1935," extrinsic evidence is admissible to show that all of such silverware was intended to be "Rogers Bros., 1847," and that the expression "E. S. Co.," was intended to provide that the silverware thus described should be marked with the seller's initials, since it was made expressly for the seller.¹⁷ In a sale of peaches to be grown in "sundry orchards," in two counties named,¹⁸ or a contract to sell all the timber on "their lands,"¹⁹ evidence is admissible to show what land the parties intended. So in a sale of a certain lot of logs, evidence is admissible to show what logs were intended, and hence that the amount of lumber was overestimated.²⁰ So evidence is admissible to identify "nine walnut trees."²¹ So extrinsic evidence is admissible to identify the property referred to in an insurance policy, as to show what was meant by "shed and additions attached,"²² or in a policy insuring a "cold storage warehouse," to show that a shed was part of the warehouse.²³ A policy which provides that it shall become void if the premises becomes vacant, may be explained by evidence tending to show that when such policy was issued the building was unfinished.²⁴ Extrinsic evidence is not admissible to show that the property insured was a different piece of property from that described in the policy, if the action is brought on the policy.²⁵ In a convey-

¹⁵ *McManus v. Donohoe*, 175 Mass. 308, 56 N. E. 291.

¹⁶ *Ross v. Maine Cent. R. Co.*, 114 Me. 287, 96 Atl. 223.

¹⁷ *Elliott Supply Co. v. Ross*, — S. D. —, 168 N. W. 58.

¹⁸ *Ontario, etc., Association v. Fruit Packing Co.*, 134 Cal. 21, 86 Am. St. Rep. 231, 53 L. R. A. 681, 66 Pac. 28.

And see *Reinstein v. Roberts*, 34 Or. 87, 75 Am. St. Rep. 564, 55 Pac. 90.

¹⁹ *Dorris v. King* (Tenn. Ch. App.), 54 S. W. 683.

²⁰ *Rib River Lumber Co. v. Ogilvie*, 113 Wis. 482, 89 N. W. 483.

²¹ *Carpenter v. Medford*, 99 N. Car. 495, 6 Am. St. Rep. 535, 6 S. E. 785.

²² *Cummins v. Ins. Co.*, 197 Pa. St. 61, 46 Atl. 902.

²³ *Boak Fish Co. v. Assurance Co.*, 84 Minn. 419, 87 N. W. 932.

²⁴ *Harris v. North American Insurance Co.*, 190 Mass. 361, 4 L. R. A. (N. S.) 1137, 77 N. E. 493.

²⁵ *Sanders v. Cooper*, 115 N. Y. 279, 12 Am. St. Rep. 801, 5 L. R. A. 633 [sub nomine, *Landers v. Cooper*, 22 N. E. 212].

Contra, where the agent wrote the application, describing other property than that insured. *Alabama, etc., Ins. Co. v. Minchener*, 133 Ala. 632, 32 So. 225.

ance of realty or in a contract for the sale of realty, extrinsic evidence is admissible to show what realty conforms to the description in the written contract, and thus to show what realty the parties intended to convey or to contract for.²⁶ Extrinsic evidence is admissible to show the actual boundaries of the tract in question,²⁷ as to show what is meant by the "point" of a cliff, and "thence with the cliff."²⁸ So in a contract to sell "coal in the northern hill as far as the center," extrinsic evidence is admissible to show the hill on grantor's land intended by this contract.²⁹ So if land is described by its ownership, and approximate, though not exact location,³⁰ as where in a contract of sale the name of the owner is given and it is said to front on Waters Road,³¹ or by its popular name,³² extrinsic evidence is admissible to show what land was intended. Thus under a contract for the sale of a half interest in "Linn Grove Mills and the land thereunto belonging," extrinsic evidence is admissible to identify the land.³³ Under a mortgage of "the quartz mill and lode, formerly owned by" a specified person, extrinsic evidence is admissible to show what property answering to such description was owned by such person.³⁴ So in a contract to lease a house described by its ownership, and the street on which

²⁶ **Alabama.** *Reynolds v. Trawick*, 197 Ala. 165, 72 So. 378.

Georgia. *Ainslie v. Eason*, 107 Ga. 747, 33 S. E. 711; *Tumlin v. Perry*, 108 Ga. 520, 34 S. E. 171; *King v. Brice*, 145 Ga. 65, 88 S. E. 960; *Morris v. Beckum*, 145 Ga. 562, 89 S. E. 704; *Swint v. Swint*, 147 Ga. 467, 94 S. E. 571.

Kansas. *Powers v. Scharling*, 64 Kan. 339, 67 Pac. 920.

Kentucky. *Dotson v. Fletcher*, 171 Ky. 589, 188 S. W. 642.

Louisiana. *Murphy v. Robinson*, 50 La. Ann. 213, 23 So. 323.

Massachusetts. *Hurley v. Brown*, 98 Mass. 545, 96 Am. Dec. 671.

Mississippi. *Albritton v. Fairley*, 116 Miss. 705, 77 So. 651; *Pearce v. Tharpe*, 118 Miss. 107, 79 So. 69.

New York. *Waring v. Ayres*, 40 N. Y. 357.

Pennsylvania. *Howard v. Innes*, 253 Pa. St. 593, 98 Atl. 761.

Rhode Island. *Lee v. Stone*, 21 R. I. 123, 42 Atl. 717.

Virginia. *Riner v. Lester*, 121 Va. 563, 93 S. E. 594; *Asherry v. Mitchell*, 121 Va. 276, 93 S. E. 638.

²⁷ *Stamphill v. Bullen*, 121 Ala. 250, 25 So. 928; *Hereford v. Hereford*, 131 Ala. 573, 32 So. 620, 651; *McMaster v. Morse*, 18 Utah 21, 55 Pac. 70.

²⁸ *Hall v. Conlee* (Ky.), 62 S. W. 899.

²⁹ *Lulay v. Barnes*, 172 Pa. St. 331, 34 Atl. 52.

³⁰ *Cottingham v. Hill*, 119 Ala. 353, 72 Am. St. Rep. 923, 24 So. 552; *Edwards v. Deans*, 125 N. Car. 59, 34 S. E. 165.

³¹ *Mohr v. Dillon*, 80 Ga. 572, 5 S. E. 770. (Decided under the Georgia statute.)

³² *Garvey v. Parkhurst*, 127 Mich. 368, 86 N. W. 802.

³³ *Brown v. Ward*, 110 Ia. 123, 81 N. W. 247.

³⁴ *Hancock v. Watson*, 18 Cal. 137.

it is located, extrinsic evidence is admissible to supply the house number.³⁵ So in a contract whereby A authorized B to sell certain lots, agreeing that when B had sold enough lots to realize five thousand, five hundred dollars, A would convey to B the remainder of the lots, B could introduce parol evidence to show what lots he had sold, in order to show what the remaining lots were.³⁶ So under a contract to divert the waters of a given brook, it may be shown that both branches thereof were intended, neither having a name.³⁷

Extrinsic evidence may be introduced to rebut the prima facie inferences as to the meaning of the parties which may be drawn from the rest of the instrument.³⁸ While it may be inferred that realty is situated in the town or city at which the contract for the sale thereof is dated, extrinsic evidence is admissible to show that the street upon which the contract recites that the realty is situated does not exist in such town or city.³⁹ Extrinsic evidence as to the appurtenances which the parties intend to pass with realty is admissible if the conveyance is silent as to the appurtenances which are to pass,⁴⁰ or if it describes them only as "privileges and appurtenances,"⁴¹ or if the description thereof in the deed is ambiguous.⁴²

If the description in the contract or conveyance is not sufficient when considered in connection with evidence of the ownership and location of the land to identify it, extrinsic evidence is not admissible to show what land the parties intended to contract for.⁴³ If a conveyance or mortgage applies equally to any one of a number of different tracts, extrinsic evidence is inadmissible to show which tract was intended by the parties.⁴⁴ A provision for the sale of

³⁵ *Bulkley v. Devine*, 127 Ill. 406, 3 L. R. A. 330, 20 N. E. 16.

³⁶ *Stamets v. Deniston*, 193 Pa. St. 548, 44 Atl. 575.

³⁷ *Petrie v. Hamilton College*, 158 N. Y. 458, 53 N. E. 216.

³⁸ *Kilday v. Schancupp*, 91 Conn. 29, L. R. A. 1917A, 151, 98 Atl. 335.

³⁹ *Kilday v. Schancupp*, 91 Conn. 29, L. R. A. 1917A, 151, 98 Atl. 335.

⁴⁰ *Wade v. Dorius*, — Utah —, 173 Pac. 564.

⁴¹ *Fayter v. North*, 30 Utah 156, 6 L. R. A. (N.S.) 410, 83 Pac. 742.

⁴² *Pritchard v. Lewis*, 125 Wis. 604, 1 L. R. A. (N.S.) 565, 104 N. W. 989.

⁴³ *Georgia. Gatins v. Angier*, 104 Ga. 386, 30 S. E. 876.

Idaho. Allen v. Kitchen, 16 Ida. 133, L. R. A. 1917A, 563, 100 Pac. 1052.

Nevada. De Remer v. Anderson, 41 Nev. 287, 169 Pac. 737.

Oklahoma. Ferguson v. Blackwell, 8 Okla. 489, 58 Pac. 647.

Tennessee. Denison-Gholson Dry Goods Co. v. Hill, 135 Tenn. 60, 185 S. W. 723.

⁴⁴ *Denison-Gholson Dry Goods Co. v. Hill*, 135 Tenn. 60, 185 S. W. 723.

"any part" of certain premises has been held to be so indefinite that extrinsic evidence is inadmissible to identify the subject-matter.⁴⁵ A contract to convey realty which identifies it by the lot number and addition, but which does not identify it by the state, county or political district, or by the town or city in which it is located, is so indefinite that extrinsic evidence is inadmissible to supply the omission.⁴⁶ Such a contract is incomplete on its face, and the identification of the subject-matter does not therefore violate the parol evidence rule. The contract, however, is one controlled by the Statute of Frauds, which forbids such use of oral evidence. Still less can it be shown that a different tract was intended.⁴⁷ Identification can not be made the means of contradiction.⁴⁸

§ 2190. Identification can not be made means of contradiction.

Under a claim of identifying subject-matter, the parties to a contract can not show by extrinsic evidence that they intended to contract for other and different property from that described in their contract, for this would be a contradiction of the written contract.¹ If the description of realty in a contract or conveyance is unambiguous, and if it can be applied to an existing subject-matter by evidence which is admissible for identification, extrinsic evidence is inadmissible to show that the parties had agreed upon a different subject-matter from that which is set forth in such contract or

⁴⁵ *De Remer v. Anderson*, 41 Nev. 287, 169 Pac. 737.

⁴⁶ *Allen v. Kitchen*, 16 Ida. 133, L. R. A. 1917A, 563, 100 Pac. 1052.

⁴⁷ *Griffin v. Hall*, 115 Ala. 482, 22 So. 162.

⁴⁸ See § 2190.

¹ *Georgia*. *O'Neal v. Ward*, 148 Ga. 62, 95 S. E. 709.

Illinois. *Kane v. Farrelly*, 192 Ill. 521, 61 N. E. 648.

Minnesota. *Kramer v. Gardner*, 104 Minn. 370, 22 L. R. A. (N.S.) 492, 116 N. W. 925.

North Carolina. *Taylor v. Meadows*, 175 N. Car. 373, 95 S. E. 662.

Rhode Island. *Stanley v. Firemen's Insurance Co.*, 34 R. I. 491, 42 L. R. A. (N.S.) 79, 84 Atl. 601.

South Carolina. *Marchant v. Felder*, 107 S. Car. 516, 93 S. E. 179; *Taylor v. Meadows*, 175 N. Car. 373, 95 S. E. 662.

West Virginia. *Light v. Grant*, 73 W. Va. 56, 51 L. R. A. (N.S.) 792, 79 S. E. 1011.

Chattel mortgage. *Johnson v. Whitfield*, 124 Ala. 508, 82 Am. St. Rep. 196, 27 So. 406.

Insurance policy. *Sanders v. Cooper*, 115 N. Y. 279, 12 Am. St. Rep. 801, 5 L. R. A. 638 [sub nomine, *Landers v. Cooper*, 22 N. E. 212]. (Ox described as "one red-spotted ox"; as against levy, held inadmissible to show that a black ox was intended.)

Contract for sale of realty. *Duggan v. Uppendahl*, 197 Ill. 179, 64 N. E. 289

conveyance.² A contract or conveyance which describes certain realty can not be contradicted that the parties had agreed upon a smaller tract than that which is thus described.³ A contract by which one party agrees to pay an "outstanding and open account," can not be modified by extrinsic evidence in order to show that the parties had intended to provide for the payment of certain promissory notes as well.⁴ Extrinsic evidence is inadmissible to show that an insurance policy which is taken by an administrator upon property of the decedent, which is in his possession, is intended to cover the interest of the beneficiaries.⁵ Nor can the parties show that in addition to the property described in the contract, the other and different property was also contracted for. If the contract concerns personalty, the parol evidence rule forbids such addition, whether or not the local Statute of Frauds or the Sale of Goods Act includes personalty. Hence, if a bill of sale is complete on its face, the parties can not show that by oral contemporaneous agreement other property was included.⁶ If the contract concerns realty, such addition would violate not only the parol evidence rule but also the Statute of Frauds.⁷ Hence, under a lease, it can not be shown that premises omitted from the description were included by the prior agreement of the parties.⁸ Furthermore, the legal effect of the contract can not be contradicted,⁹ under guise of identifying the subject-matter. If A conveys to B all the coal under a certain tract of land, B can not introduce parol evidence to show that a certain vein of coal was in fact contracted for.¹⁰ If a contract by its terms and legal effect provides for a general subject-matter, extrinsic evidence is inadmissible to show that the parties were really contracting for a specific subject-matter.¹¹ In a contract for

² O'Neal v. Ward, 148 Ga. 62, 95 S. E. 709; Taylor v. Meadows, 175 N. Car. 373, 95 S. E. 662; Harman v. Dry Fork Colliery Co., 80 W. Va. 780, 94 S. E. 355.

³ Marchant v. Felder, 107 S. Car. 516, 93 S. E. 179.

⁴ Kramer v. Gardner, 104 Minn. 370, 22 L. R. A. (N.S.) 492, 116 N. W. 925.

⁵ Stanley v. Firemen's Insurance Co., 34 R. I. 491, 42 L. R. A. (N.S.) 79, 84 Atl. 601.

⁶ McEnery v. McEnery, 110 Ia. 718, 80 N. W. 1071; Becker v. Dalby (Ia.), 86 N. W. 314; Drexel v. Murphy, 59 Neb. 210, 80 N. W. 813.

⁷ See § 1411.

⁸ Haycock v. Johnston, 81 Minn. 49, 83 N. W. 494.

⁹ See §§ 1195 and 2148.

¹⁰ Light v. Grant, 73 W. Va. 56, 51 L. R. A. (N.S.) 792, 79 S. E. 1011.

¹¹ Georgia. Forsythe Mfg. Co. v. Castlen, 112 Ga. 109, 81 Am. St. Rep. 28, 37 S. E. 485.

Illinois. Mead v. Peabody, 183 Ill. 126, 55 N. E. 719.

Massachusetts. Violette v. Rice, 173 Mass. 82, 53 N. E. 144 [citing, Grimston v. Cuninghame (1894), 1 Q. B. 125; Drummond v. Atty. Gen., 2 H. L.

"one hundred bales of lint cotton," it is not permitted to show that cotton raised by the seller was intended.¹² So under a contract for the sale of "one hundred head of good, fat, merchantable hogs,"¹³ or "eight thousand bushels of ear-corn,"¹⁴ extrinsic evidence is inadmissible to show that specific property was contracted for. So in a contract to pay "any and all of the grantor's notes," extrinsic evidence is inadmissible to show that only certain specific notes were intended.¹⁵ So if land is conveyed to a railroad "for all legitimate railroad purposes," extrinsic evidence is inadmissible to show that certain specific purposes were agreed upon.¹⁶ So a written contract whereby an actress agrees to "render services at any theaters" for a specified time, can not be modified by showing an oral agreement that the services were to be in one specified part only.¹⁷

There is some apparent lack of harmony in judicial decisions on this question. Thus A agreed to deliver a certain amount of hay to the United States at a certain point. The contract was for hay generally, but both parties knew that the only way that A could obtain hay to furnish at that price was by cutting it in the Yellowstone Valley. The United States had all the hay in that valley cut by others. It was held that A was discharged.¹⁸ The admission of these facts was placed on the theory of the admissibility of surrounding circumstances, and not on identification of subject-matter.

Contradiction is not permitted under guise of identification of parties.¹⁹ A guaranty which is addressed to "Crane Brothers Company," a partnership, can not be shown to be intended for a corporation of a similar name.²⁰ If a note which is payable to a

Cas. 837; *Nichol v. Godts*, 10 Exch. 191].

Ohio. *Johnson v. Pierce*, 16 O. S. 472; *Ormsbee v. Machir*, 20 O. S. 295.

Oregon. *Abraham v. Oregon & California R. R. Co.*, 37 Or. 495, 82 Am. St. Rep. 779, 60 Pac. 899.

West Virginia. *Light v. Grant*, 73 W. Va. 56, 51 L. R. A. (N.S.) 792, 79 S. E. 1011.

¹² *Forsythe Mfg. Co. v. Castlen*, 112 Ga. 199, 81 Am. St. Rep. 28, 37 S. E. 485.

¹³ *Johnson v. Pierce*, 16 O. S. 472.

¹⁴ *Ormsbee v. Machir*, 20 O. S. 295.

¹⁵ *Mead v. Peabody*, 183 Ill. 126, 55 N. E. 719 [affirming, 83 Ill. App. 297].

¹⁶ *Abraham v. R. R.*, 37 Or. 495, 82 Am. St. Rep. 779, 60 Pac. 899.

¹⁷ *Violette v. Rice*, 173 Mass. 82, 53 N. E. 144 [citing, *Grimston v. Cuningham* (1894), 1 Q. B. 125; *Drummond v. Atty. Gen.*, 2 H. L. Cas. 837; *Nichol v. Godts*, 10 Exch. 191].

¹⁸ *United States v. Peck*, 102 U. S. 64, 26 L. ed. 46.

¹⁹ *Roberts v. Morgan*, 56 Okla. 513, 156 Pac. 319.

²⁰ *Crane Co. v. Specht*, 39 Neb. 123, 42 Am. St. Rep. 562, 57 N. W. 1015.

trustee names the beneficiary under such trust, extrinsic evidence is inadmissible to show that a different beneficiary was intended.²¹

§ 2191. Collateral consistent contracts. The rule that a written contract merges all prior and contemporaneous oral negotiations, applies only to such oral negotiations as concern the subject-matter embraced in the written contract.¹ Accordingly, a contract collateral to a written complete contract may be shown by extrinsic evidence if not contradictory.² A party is not prevented from recovering for hauling lumber in reliance upon a subsequent oral

²¹ *Roberts v. Morgan*, 56 Okla. 513, 156 Pac. 319.

¹ *California*. *Blahnik v. Small Farms Imp. Co.*, — Cal. —, 184 Pac. 661.

Iowa. *Witthauer v. Wheeler* (Ia.), 154 N. W. 423 [modifying opinion on rehearing, *Witthauer v. Wheeler*, 172 Ia. 225, 150 N. W. 46]; *Armstrong v. Cavanagh*, 183 Ia. 140, 166 N. W. 673.

Massachusetts. *Searle v. Roman Catholic Bishop*, 203 Mass. 493, 25 L. R. A. (N.S.) 992, 89 N. E. 809.

Minnesota. *Virginia & Rainy Lake Co. v. Helmer*, 140 Minn. 135, 167 N. W. 355.

New Mexico. *Locke v. Murdoch*, 20 N. M. 522, L. R. A. 1917B, 267, 151 Pac. 298.

North Carolina. *Anderson v. American Suburban Corporation*, 155 N. Car. 131, 36 L. R. A. (N.S.) 896, 71 S. E. 221; *Sumner v. Graham County Lumber Co.*, 175 N. Car. 654, 96 S. E. 97.

North Dakota. *Grand Forks, etc., Co. v. Tourtelot*, 7 N. D. 587, 75 N. W. 901.

Oklahoma. *Mackin v. Darrow Music Co.*, — Okla. —, 169 Pac. 497.

Vermont. *Goodwin v. Barre Savings Bank & Trust Co.*, 91 Vt. 228, 100 Atl. 34.

² *United States*. *Lucas v. Bradley*, 246 Fed. 693.

Arkansas. *Lasker-Morris Bank & Trust Co. v. Jones*, 131 Ark. 576, 199 S. W. 900.

California. *Savings Bank v. Asbury*, 117 Cal. 96, 48 Pac. 1081; *Blahnik v.*

Small Farms Imp. Co., — Cal. —, 184 Pac. 661.

Kentucky. *Short's Administratrix v. Reserve Loan Life Ins. Co.*, 175 Ky. 554, 194 S. W. 773.

Maryland. *Hieatzman v. Braecklein*, 131 Md. 482, 102 Atl. 917.

Massachusetts. *Glackin v. Bennett*, 226 Mass. 316, 115 N. E. 490.

Michigan. *Cutler v. Spens*, 191 Mich. 603, 158 N. W. 224; *Seaman v. Rindge*, 195 Mich. 417, 161 N. W. 919.

Minnesota. *Germania Bank v. Osborne*, 81 Minn. 272, 83 N. W. 1084; *King v. Dahl*, 82 Minn. 240, 84 N. W. 737; *Virginia & Rainy Lake Co. v. Helmer*, 140 Minn. 135, 167 N. W. 355.

Missouri. *Brown v. Bowen*, 90 Mo. 184, 2 S. W. 398.

Nebraska. *Huffman v. Ellis*, 64 Neb. 623, 90 N. W. 552.

New Hampshire. *Webber v. Loran-ger*, — N. H. —, 103 Atl. 1050.

New Mexico. *Locke v. Murdoch*, 20 N. M. 522, L. R. A. 1917B, 267, 151 Pac. 298.

North Carolina. *Sumner v. Graham County Lumber Co.*, 175 N. Car. 654, 96 S. E. 97.

Oklahoma. *Mackin v. Darrow Music Co.*, — Okla. —, 169 Pac. 497.

Pennsylvania. *Gandy v. Weckerly*, 220 Pa. St. 285, 18 L. R. A. (N.S.) 434, 69 Atl. 858; *Noel v. Kessler*, 252 Pa. St. 244, 97 Atl. 446.

South Carolina. *Glenn v. Rudd*, 68 S. Car. 102, 102 Am. St. Rep. 659, 46 S. E. 555.

contract, by the fact that he had entered into a prior written contract with reference to such lumber, if at the time of such written contract it was agreed orally that he should not be obliged to do such hauling.³ An oral contract by an actress for the fall and winter may be enforced, though she had made a contemporaneous written contract for the summer.⁴ So an oral contract to pay commissions on a sale of realty in addition to the price fixed in the written contract;⁵ an oral contract not to sell other lots at less than a given price;⁶ an oral contract by the vendors of realty to lay pavement, to construct water mains, and to secure the extension of a street car line;⁷ an oral contract that the vendor shall keep the realty contracted for insured for the benefit of the vendee;⁸ an oral contract that if the mortgagee took out a policy on the property he should protect the interest of the mortgagor in addition to a written provision to the effect that if the mortgagor did not keep the property insured the mortgagee could insure his interest therein, and recover the premiums thus paid from the mortgagor;⁹ an oral contract made when a note is given to a bank to allow a deposit in the bank to be credited thereon;¹⁰ and an oral contract that the vendee of stone should have a derrick ready to receive the stone and should settle any controversy over the amount of stone furnished, as shown by the tickets given by vendor before using the stone,¹¹ are all of them so far collateral to the written contract as to be enforceable. A written lease does not exclude evidence of oral agreements collateral thereto, which do not change any of the rights or duties created by such lease.¹² So

South Dakota. Emerson-Brantingham Implement Co. v. Edgar, 39 S. D. 139, 163 N. W. 575.

Tennessee. Quigley v. Shedd, 104 Tenn. 560, 58 S. W. 266.

Vermont. Goodwin v. Barre Savings Bank & Trust Co., 91 Vt. 228, 100 Atl. 34.

³Noel v. Kessler, 252 Pa. St. 244, 97 Atl. 446.

⁴Drake v. Allen, 179 Mass. 197, 60 N. E. 477.

⁵Lasker-Morris Bank & Trust Co. v. Jones, 131 Ark. 576, 199 S. W. 900; Hall v. McNally, 23 Utah 606, 65 Pac. 724.

⁶Rackemann v. Improvement Co.,

167 Mass. 1, 57 Am. St. Rep. 427, 44 N. E. 990.

⁷Anderson v. American Suburban Corporation, 155 N. Car. 131, 36 L. R. A. (N.S.) 896, 71 S. E. 221.

⁸Keefer v. Ins. Co., 29 Ont. 394; Parcell v. Grosser, 109 Pa. St. 617, 1 Atl. 909.

⁹Seaman v. Rindge, 195 Mich. 417, 161 N. W. 919.

¹⁰Roe v. Bank, 167 Mo. 406, 67 S. W. 303.

¹¹Mt. Vernon Stone Co. v. Sheely, 114 Ia. 313, 86 N. W. 301.

¹²Witthauer v. Wheeler (Ia.), 154 N. W. 423 [modifying opinion on rehearing, Witthauer v. Wheeler, 172 Ia. 225, 150 N. W. 46].

an oral contract to extend a lease under certain contingencies has been held so far collateral to the lease as to be enforceable.¹³ A written lease of an apartment does not preclude a right of action upon an oral lease of a garage in connection therewith.¹⁴ So in an action on a note the whole transaction under which the note was given may be shown, and a counterclaim may be based on an oral contract collateral to the note, as on an oral contract to repurchase the stock for which the note was given,¹⁵ or to redeem in gold the bank-notes for which the note was given,¹⁶ or to place certain claims in the hands of the maker of the note to collect on commission.¹⁷ Where a note was deposited with A as collateral under a written contract, an oral agreement that A should not collect it could not be enforced; but an agreement that the payee should collect it as agent for A, was held to be a collateral consistent contract, and enforceable.¹⁸ Where A had given B a promissory note, an oral contract whereby B was to collect certain rent for A, and credit upon A's debt, is enforceable.¹⁹ Where a note is given,²⁰ or a bill of exchange drawn,²¹ an oral contract that a set-off existing in favor of the maker or bearer was not waived, may be enforced. The maker of a note which is given for the balance of a debt may show that the payee was indebted to him in an unliquidated amount and that it was agreed orally that such amount when liquidated should be applied upon the note.²² An oral agreement with reference to a loan is enforceable, although it is collateral to a written policy of insurance.²³ An oral contract by which the seller of certain property agreed that upon the opening of a specified event he would repurchase it within a certain length of time, is enforceable as collateral to a written contract for the sale of such property.²⁴ A written assignment of a patent right does not prevent extrinsic

¹³ *Armington v. Stelle*, 27 Mont. 13, 94 Am. St. Rep. 811, 69 Pac. 115 (under § 2186 of the statutes of Montana).

¹⁴ *Armstrong v. Cavanagh*, 183 Ia. 140, 166 N. W. 673.

¹⁵ *Germania Bank v. Osborne*, 81 Minn. 272, 83 N. W. 1084.

¹⁶ *Racine County Bank v. Keep*, 13 Wis. 209.

¹⁷ *Singer Mfg. Co. v. Potts*, 59 Minn. 240, 61 N. W. 23.

¹⁸ *Jenkins v. Shinn*, 55 Ark. 347, 18 S. W. 240.

¹⁹ *Stebbins v. Lardner*, 2 S. D. 127,

48 N. W. 847; *Jones v. Keyes*, 16 Wis. 562.

²⁰ *Bennett v. Tillmon*, 18 Mont. 28, 44 Pac. 80.

See also, *Strassheim v. McGuire*, 37 N. D. 289, 164 N. W. 26.

²¹ *Bohn Mfg. Co. v. Harrison*, 13 Mont. 293, 34 Pac. 313.

²² *Lucas v. Bradley*, 246 Fed. 693.

²³ *Short's Administratrix v. Reserve Loan Life Ins. Co.*, 175 Ky. 554, 194 S. W. 773.

²⁴ *Corey v. Woodin*, 195 Mass. 464, 81 N. E. 260.

evidence of a contract to assign such interest to a corporation upon its formation in consideration of a certain portion of the stock of such corporation.²⁵ A written conveyance by the mortgagor to the mortgagee does not preclude evidence of an extrinsic agreement that such conveyance shall not operate as satisfaction of the mortgage debt.²⁶ The recital of the consideration for a conveyance as a specified mortgage and certain equities of redemption, together with an agreement on the part of the grantees to remove a specified building, does not prevent evidence of a subsequent agreement by which the grantees were to receive a certain amount for removing such building.²⁷

§ 2192. What contracts are collateral. To enforce the oral contract, even if not inconsistent, it must be collateral to the written contract and not merely a term thereof. The difficulty lies in the application of this rule. Under cover of enforcing collateral consistent contracts the attempt is often made to add oral terms to a complete written contract. Courts which recognize the parol evidence rule and the rule as to the collateral consistent contract in language which in the abstract would indicate that they were in perfect harmony, will show remarkable differences of opinion in deciding whether the term in question is a collateral contract or a mere term of the written contract. The true test of a collateral contract seems to be that it must be so far unconnected with the written contract that the court must be able to hold that the parties could have concluded their negotiations as embodied in the written contract without reference to or consideration of the terms of the oral contract.¹ "Oral testimony will not be admitted of prior or contemporaneous promises on a subject which is so closely connected with the principal transaction with respect to which the

²⁵ *Hieatzman v. Braecklein*, 131 Md. 482, 102 Atl. 917.

²⁶ *Glenn v. Rudd*, 68 S. Car. 102, 102 Am. St. Rep. 650, 46 S. E. 555.

²⁷ *Cutler v. Spens*, 191 Mich. 603, 158 N. W. 224.

¹ *United States. Seitz v. Brewers' Refrigerating Co.*, 141 U. S. 510, 35 L. ed. 837.

Arkansas. *Harris v. Trueblood*, 124 Ark. 308 [sub nomine, *Sternberg v. Trueblood*, 186 S. W. 836]; *Ashley, D. & N. Ry. Co. v. Cunningham*, 120 Ark.

346, 196 S. W. 798; *Garner v. Murphy*, 131 Ark. 594, 199 S. W. 902.

California. *Ayers v. Southern Pac. R. Co.*, 173 Cal. 74, 159 Pac. 144.

Iowa. *Empire Cream Separator Co. v. Bair*, 180 Ia. 375, 159 N. W. 976.

Indiana. *Welz v. Rhodius*, 87 Ind. 1, 44 Am. Rep. 747.

Kentucky. *Louisville Trust Co. v. Bayer Steam Soot Blower Co.*, 166 Ky. 744, 179 S. W. 1034.

Maine. *Arthur E. Guth Piano Co. v. Adams*, 114 Me. 390, 96 Atl. 722.

parties are contracting, as to be part and parcel of the transaction itself, without an adjustment of which the parties can not be considered as having finished their negotiations and finally concluded

Massachusetts. *Mills v. Swanton*, 222 Mass. 557, 111 N. E. 384

Michigan. *Appleby v. Sperling*, 194 Mich. 681, 161 N. W. 873.

Oklahoma. *Reed v. Moore*, 54 Okla. 354, 154 Pac. 348.

Oregon. *Sund v. Flagg & Standifer Co.*, 86 Or. 289, 168 Pac. 300.

Virginia. *Slaughter v. Smither*, 97 Va. 202, 33 S. E. 544.

"Undoubtedly the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction as to form part and parcel of it. And when the writing itself upon its face is couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing." *Seitz v. Brewers' Refrigerating Co.*, 141 U. S. 510, 517, 35 L. ed. 837.

"The so-called agreement that sales of liquor should never take place in Moron was essentially a warranty regarding the permanent advantages of the property sold. Such a warranty, if made, would be a part of the contract of sale and not collateral thereto.

To justify the admission of parol evidence of a contract between parties who have made an agreement in writing, on the ground that it is collateral, it must be upon a subject distinct from that to which the writing relates. *Germain Fruit Co. v. Armsby Co.*, 153 Cal. 594, 96 Pac. 319. Here the written agreement itself speaks on the subject of the sale of intoxicating liquors, and provides that none shall ever be sold on the premises described. To add to this provision the further stipulation that none should ever be sold in the entire town of Moron and that the railroad company should see that none was ever sold there, would be to add by parol to a written agreement which on its face purports to be complete upon that subject, and which, under section 1856, is presumed to embrace all the terms agreed on. Such evidence is inadmissible. *Harrison v. McCormick*, 89 Cal. 330, 26 Pac. 830, 23 Am. St. Rep. 469; *Germain F. Co. v. Armsby Co.*, supra; *Gardiner v. McDonogh*, 147 Cal. 319, 81 Pac. 964; *Empire I. Co. v. Mort*, 169 Cal. 739, 147 Pac. 960; *Johnson v. Bibb L. Co.*, 140 Cal. 99, 93 Pac. 730." *Ayers v. Southern Pac. R. Co.*, 173 Cal. 74, 159 Pac. 144.

"The admitted evidence tends to prove that at the time of the making of the final agreement of sale a further agreement was made that the car would be just as good as new, all the worn places thoroughly overhauled and that the plaintiff would guarantee it for a year. The writing signed by the parties appears on its face to be a complete contract, embracing all the particulars necessary to make a perfect agreement and designed to express the whole arrangement between the parties. The evidence therefore should

a contract."² Thus in an action on a note and mortgage, extrinsic evidence was inadmissible to show a contract whereby the mortgagee was to receive board from the mortgagor for life, and at his death the note and mortgage were to be canceled though such contract might be available as a counterclaim,³ and in deciding the case the court pointed out a test for determining whether the contract was collateral or not. "A very satisfactory test of the question under consideration will be to suppose this action to have been by defendant against plaintiff for his board as a right independent of the note, and that Kracke had pleaded as a defense the obligation of Homeyer to board him because of the stipulation in the note. The effect would be to so change the note as to make it not only an obligation for the payment of the amount therein stipulated, but an obligation against Homeyer to board the payee of the note during his life or until the note was paid. The right to make such a change in a written contract by averments sustained only by verbal proofs, is not open to reasonable discussion."⁴ One of the English cases that is often cited as a leading case, as recognizing the theory of collateral contracts, and as enforcing an oral contract to repair as collateral to a written lease, is in reality directly opposed to the latter rule.⁵ When this case first came before the

have been excluded unless the oral agreement relates to a subject independent of, distinct from and collateral to the sale of the motor car. *Dutton v. Gerrish*, 9 Cush. 89, 55 Am. Dec. 45; *Fitz v. Comey*, 118 Mass. 100; *Puffer Mfg. Co. v. Krum*, 210 Mass. 211, 213, 96 N. E. 139; *Glackin v. Bennett*, 226 Mass. 316, 115 N. E. 490.

"We are of opinion that the oral agreement directly touched and concerned the use and enjoyment of the thing sold, that it was not a mere inducement for entering into the sale, that it was a part of the bargain of sale, and was not independent of or collateral to that sale. The case at bar can not be distinguished in principle from *Brigham v. Rogers*, 17 Mass. 571, wherein it was held that, where an estate was demised by lease, no action lay on a parol promise made by the lessor at the time of executing the

lease, that the water on the premises demised would be good, and that there would be enough of it, and if not that he would make it so. This decision was approved in *Durkin v. Cobleigh* 156 Mass. 108, 30 N. E. 474, 17 L. R. A. 270, 32 Am. St. Rep. 436; *Spear v. Hardon*, 215 Mass. 89, 102 N. E. 126; *Naumberg v. Young*, 44 N. J. Law, 331, 344, 43 Am. Rep. 380; *Thompson Foundry & Machine Co. v. Glass*, 136 Ala. 648, 654, 33 South. 811." *MacAlman v. Gleason*, 228 Mass. 454, 117 N. E. 795.

² *Naumberg v. Young*, 44 N. J. L. 331, 342, 43 Am. Rep. 380 [cited and followed in *McTague v. Finnegan*, 54 N. J. Eq. 454, 35 Atl. 542].

³ *Kracke v. Homeyer*, 91 Ia. 51, 58 N. W. 1056.

⁴ *Kracke v. Homeyer*, 91 Ia. 51, 53, 58 N. W. 1056.

⁵ *Angell v. Duke*, L. R. 10 Q. B. 174.

court, it did not appear whether a written lease had been given or not, and the only question decided was whether an oral contract to repair could be enforced or whether the Statute of Frauds made it unenforceable. The court very properly held that the Statute of Frauds did not affect the contract.⁶ When the case was finally heard on its merits, it appeared from the evidence that a written lease had been given. The oral contract to repair was held unenforceable under the parol evidence rule.⁷

The rule which allows collateral consistent contracts to be enforced is unfortunately confused frequently with the rule which allows the use of extrinsic evidence to show the terms of a contract, a part of which only has been reduced to writing by a memorandum which shows on its face that it is incomplete, and which allows extrinsic evidence of the remaining terms of such contract, as far as they are consistent with the written terms.⁸ Many cases in which extrinsic evidence is admitted properly on the theory that the written contract shows on its face that it is incomplete, are explained on the theory that the contracts are collateral and consistent. If the distinction between the two rules is noted, cases which apparently are in conflict may frequently be reconciled. If a contract for the sale of a business appears upon its face to be complete, extrinsic evidence is inadmissible by the weight of authority to show the existence of a prior or contemporaneous oral contract by which the seller of such business agreed not to engage in such business thereafter in competition with the purchaser thereof.⁹ The fact that the contract for the sale of the business is prepared in great detail and is apparently intended to cover all the terms of the transaction, makes the admission of extrinsic evidence especially improper.¹⁰ The fact that the contract refers to the good will of the business and contains no covenant to refrain from competition, is regarded in some cases as conclusive of the fact that the parties considered the question of such a covenant and intended not to insert it, and accordingly extrinsic evidence of such

⁶ Angell v. Duke, L. R. 10 Q. B. 174.

⁷ Angell v. Duke, 32 L. T. 320.

⁸ See §§ 2151 et seq.

⁹ Arkansas. Harris v. Trueblood, 124 Ark. 308 [sub nomine, Sternberg v. Trueblood, 186 S. W. 836].

Massachusetts. Wilson v. Sherburne, 60 Mass. (6 Cush.) 68.

Rhode Island. Zanturjian v. Boornazian, 25 R. I. 151, 55 Atl. 199.

Virginia. Slaughter v. Smither, 97 Va. 202, 33 S. E. 544.

Washington. Gordon v. Parke & Lacy Machinery Co., 10 Wash. 18, 38 Pac. 755.

¹⁰ Wessell v. Havens, 91 Neb. 426, Ann. Cas. 1913C, 1377, 136 N. W. 70.

a covenant is regarded as inconsistent with the contract.¹¹ In some jurisdictions, however, the contract to refrain from competition is regarded as collateral to the contract for the sale of the business, and extrinsic evidence of an oral contract not to compete has been admitted.¹² If a written lease or conveyance of property which is used in a certain business is executed and delivered, extrinsic evidence has been held admissible on the ground that such conveyance or lease does not purport upon its face to be a complete statement of the entire transaction.¹³ If a written contract of employment is incomplete upon its face, as where it purports to fix only the rate of compensation,¹⁴ a prior oral agreement to the effect that the employe would not compete with his employer after the termination of the employment may be shown.¹⁵ If the instrument which provides for a lease purports on its face to set forth the entire contract between the parties, extrinsic evidence of an oral agreement not to compete has been held to be inadmissible.¹⁶ The admission of evidence as to a collateral contract has also been justified on the theory that such collateral contract is an oral contract which is the consideration for the written contract or an inducement therefor.¹⁷

A deed has been held not to merge an oral agreement by the vendor to construct a street if the vendee bought the land conveyed by such deed.¹⁸ A written contract with an agent for the sale of realty upon a commission, which provides that the principal agrees

¹¹ *Wessel v. Havens*, 91 Neb. 426, Ann. Cas. 1913C, 1377, 136 N. W. 70; *Zanturjian v. Boornazian*, 25 R. I. 151, 55 Atl. 199.

¹² *Fusting v. Sullivan*, 41 Md. 162; *Locke v. Murdoch*, 20 N. M. 522, L. R. A. 1917B, 267, 151 Pac. 298.

"In the case at bar it will be seen that the contract of September 23, 1910, was in reference to the sale of appellant's practice and certain of his office furniture, and was entirely silent as to the subject-matter contained within the parol agreement, which was subsequently put in writing. We therefore are constrained to hold that the general rule contended for by appellant has no application to the facts of this case, and that the court did not err in admitting evidence of the parol

agreement made contemporaneous with the execution of the written contract, and not varying any of the terms thereof." *Locke v. Murdoch*, 20 N. M. 522, L. R. A. 1917B, 267, 151 Pac. 298.

¹³ *Welz v. Rhodius*, 87 Ind. 1, 44 Am. Rep. 747; *Leineau v. Smart*, 30 Tenn. (11 Humph.) 308.

¹⁴ *Turner v. Abbott*, 116 Tenn. 718, 6 L. R. A. (N.S.) 892, 94 S. W. 64.

¹⁵ *Turner v. Abbott*, 116 Tenn. 718, 6 L. R. A. (N.S.) 892, 94 S. W. 64.

¹⁶ *Doyle v. Dixon*, 94 Mass. (12 All.) 576.

¹⁷ *Locke v. Murdoch*, 20 N. M. 522, L. R. A. 1917B, 267, 151 Pac. 298.

See §§ 1204 and 2165.

¹⁸ *Drew v. Wiswall*, 183 Mass. 554, 67 N. E. 666.

to furnish an abstract which shows clear title to the realty, does not prevent the admission of evidence to the effect that the principal had notified the agent that such title was subject to a reservation of certain mineral rights.¹⁹ A contract of compromise of disputes arising out of a contract of sale is not rendered inadmissible because of a subsequent written contract between the parties whereby one undertakes to act as the agent of the other.²⁰

Accordingly, the better rule is that if the written contract is incomplete on its face, then by the operation of a different principle, any oral term consistent with the writing may be enforced, while if the contract is complete on its face, and the principle of the collateral consistent contract is invoked, only such contracts as are really collateral to the written contract can be enforced. So where A bought a draft from B, intending to use it in the purchase of cattle, an oral agreement that if A did not make such use of the draft he could return it to B, and receive credit therefor on his account with B, can be enforced.²¹ Where certain securities are deposited under a written contract and receipt, an oral contract under which other securities are deposited is enforceable.²² The cases in which the action was based on a note may, however, be explained on the theory that the note was not a complete contract.²³ Where a written bond has been given for the purchase of realty, an oral contract has been enforced, giving the vendee the right to rescind the contract and receive back his bond and mortgage given therefor.²⁴ An oral contract that a building erected by a lessee upon the leased premises, shall be the personal property of the lessee, is so far collateral to a written lease that it can be enforced.²⁵ Under a contract between two co-owners of realty, whereby one of them agreed to sell his interest in such realty to the other for a specified consideration, an oral agreement that outstanding partnership accounts between them should be settled, and the balance due from the vendor to the vendee should be applied upon the purchase price, has been held enforceable.²⁶

¹⁹ Appleby v. Sperling, 194 Mich. 681, 161 N. W. 873.

²⁰ Empire Cream Separator Co. v. Bair, 180 Ia. 375, 159 N. W. 976.

²¹ Collingwood v. Bank, 15 Neb. 118, 17 N. W. 359. (In this case, however, while such contract was enforceable, A had delayed the return of the draft an unreasonable time, and the drawee had become insolvent in the meantime. A was therefore not allowed to recover.)

²² Blackwood v. Brown, 34 Mich. 4.

²³ See § 2151.

²⁴ Cloud v. Markle, 186 Pa. St. 614, 40 Atl. 811.

²⁵ Ryder v. Faxon, 171 Mass. 206, 68 Am. St. Rep. 417, 50 N. E. 631; Searle v. Roman Catholic Bishop, 203 Mass. 493, 25 L. R. A. (N.S.) 992, 89 N. E. 809.

²⁶ Redfield v. Gleason, 61 Vt. 220, 15 Am. St. Rep. 889, 17 Atl. 1075.

§ 2193. Examples of contracts held not to be collateral. Illustrations of oral contracts offered in evidence as collateral to a written contract, but held unenforceable as being really terms of the written contract, are by no means uncommon. Thus an oral contract to repair a house leased by a written lease,¹ or to ditch the farm leased,² or to repair a levee,³ or not to build within a certain distance of a rented building.⁴ A written lease in a contract whereby the lessee agrees to purchase electricity from the lessor, renders inadmissible evidence of a contemporaneous oral agreement to the effect that the lessee should not operate an engine upon the leased realty,⁵ are so closely connected with a written lease that they can not be enforced. The courts are not harmonious on these questions however. Thus in some jurisdictions an oral contract whereby the lessor agrees to put the premises into safe condition or to make certain repairs,⁶ or to destroy rabbits which were overrunning the farm,⁷ or to erect a kitchen on the property leased,⁸ has in each case been held enforceable though a written lease was given. So a contract to have the front street graded and water mains put in, has been held so far collateral to a deed for the land as to be proved by parol.⁹ An oral contract that the grantor should not have a right of way over the land conveyed is so far collateral to a deed that it may be used to rebut an implied right of way from necessity.¹⁰ A conveyance of a right of way is held to render inadmissible extrinsic evidence of an oral agreement for the employment of the grantor as a part of the consideration of such convey-

¹ Connecticut. *Gulliver v. Fowler*, 64 Conn. 556, 30 Atl. 852.

Iowa. *Lerch v. Times Co.*, 91 Ia. 750, 60 N. W. 611.

Indiana. *Roehrs v. Timmons*, 28 Ind. App. 578, 63 N. E. 481.

Massachusetts. *Mills v. Swanton*, 222 Mass. 557, 111 N. E. 384.

Michigan. *Grashaw v. Wilson*, 123 Mich. 364, 82 N. W. 73.

Oklahoma. *Reed v. Moore*, 54 Okla. 354, 154 Pac. 348.

Ohio. *Howard v. Thomas*, 12 O. S. 201.

² *Diven v. Johnson*, 117 Ind. 512, 3 L. R. A. 308, 20 N. E. 428.

³ *Garner v. Murphy*, 131 Ark. 594, 199 S. W. 902.

⁴ *Haycock v. Johnston*, 81 Minn. 49, 83 N. W. 494, 1118.

⁵ *Phoenix Pad Mfg. Co. v. Roth*, 127 Md. 540, 96 Atl. 762.

⁶ *Hines v. Wilcox*, 96 Tenn. 148, 54 Am. St. Rep. 823, 34 L. R. A. 824, 33 S. W. 914; *Webber v. Loranger*, — N. H. —, 103 Atl. 1050.

⁷ *Erskine v. Adeane*, L. R. 8 Ch. App. 756; *Morgan v. Griffith*, L. R. 6 Ex. 70.

⁸ *Betts v. Demumbrane*, *Cooke* (Tenn.) 39.

⁹ *Durkin v. Cobleigh*, 156 Mass. 103, 32 Am. St. Rep. 436, 17 L. R. A. 270, 30 N. E. 474.

¹⁰ *Lebus v. Boston*, 107 Ky. 98, 47 L. R. A. 79, 51 S. W. 609, 52 S. W. 956.

ance.¹¹ Under a written contract for the sale of realty, extrinsic evidence is inadmissible to show an oral agreement that certain restrictions should be inserted in other conveyances of adjoining land.¹² The fact that such restrictions appear in the contract of sale with reference to the specific tract of realty which is sold,¹³ or the fact that the purchaser was shown a typewritten copy of such prospective restrictions and that the contract of agency provided for "restrictions as to offensive occupations,"¹⁴ does not authorize the admission of extrinsic evidence. Accordingly, no action against the grantor can be maintained because of his breach of his oral agreement to insert restrictions which prevent the sale of liquor upon the entire tract, a part of which is sold by such contract of sale.¹⁵ An oral contract to repair has been held enforceable though a written contract for the sale of the property had been entered into.¹⁶ Under an oral contract between A and a railroad corporation, whereby the railroad was to construct two convenient and necessary crossings over its tracks on A's land, an oral agreement between A and the railroad as to the kind of crossing to be constructed, was unenforceable.¹⁷ An oral contract was made for distributing the estate of one of the parties among the other parties, his children. Subsequently, two branches of this contract were put in writing, and the written contract appeared upon its face to be complete. The remaining oral terms were held to be unenforceable.¹⁸ A written contract was entered into to compromise a judgment for seventeen thousand dollars upon payment of five thousand dollars, the consideration for the reduction being expressed in the written contract to be one dollar, "and for the further consideration of the relation of myself and family to P. Rehill and Elizabeth Rehill, his wife," Rehill being the judgment debtor. A collateral oral contract that in consideration of such settlement the judgment creditor's wife, who had been brought up by the Rehills, should be their heir and devisee at their death, was unenforceable.¹⁹ A prior

¹¹ *Ashley, Drew & N. Ry. Co. v. Cunningham*, 129 Ark. 346, 196 S. W. 798.

¹² *Ayers v. Southern Pacific Railroad Co.*, 173 Cal. 74, L. R. A. 1917F, 949, 159 Pac. 144; *Roberts v. Lombard*, 78 Or. 100, 152 Pac. 499; *Caveny v. Curtis*, 257 Pa. St. 575, 101 Atl. 853.

¹³ *Roberts v. Lombard*, 78 Or. 100, 152 Pac. 499.

¹⁴ *Caveny v. Curtis*, 257 Pa. St. 575, 101 Atl. 853.

¹⁵ *Ayers v. Southern Pacific Railroad Co.*, 173 Cal. 74, L. R. A. 1917F, 949, 159 Pac. 144.

¹⁶ *Manning v. Jones, Busb. (N. Car.)* 368.

¹⁷ *Martin v. R. R.*, 48 W. Va. 542, 37 S. E. 563.

¹⁸ *McEnery v. McEnery*, 110 Ia. 718, 80 N. W. 1071.

¹⁹ *McTague v. Finnegan*, 54 N. J. Eq. 454, 35 Atl. 542.

oral agreement to the effect that payment of rent may be made by giving a bill payable in a certain specified time, can not be shown as a collateral consistent contract if subsequently a written lease was entered into which provided for payment at certain specified times and which contained no reference to payment by such bill.²⁰ Where A had made a contract with B to cut certain timber growing on B's land, and to haul it to a certain stream at a distance from B's land, A could not show an oral agreement whereby B was to furnish a right of way for a tramway from his land to the stream.²¹ Under a written contract for grading, which purports on its face to be complete and to provide for the payment of specified amounts for each different class of excavation, a prior oral agreement to the effect that the classification of the engineer of one of the parties as to such excavation should be final can not be shown.²² Thus where an inventor makes a written assignment of his patents to the government, in consideration of one dollar and other considerations, a collateral oral contract that the assignor shall be employed by the government as long as his invention is used, and that the government shall pay a reasonable compensation for the use of his patent, can not be enforced.²³ An oral warranty can not be shown as collateral to a written contract of sale which purports on its face to be complete, which does not contain an express covenant of warranty and from which an implied warranty can not be inferred because of the language of the parties or the circumstances of the case.²⁴ Under a written contract of sale, an oral agreement to keep the property sold in repair for a year, can not be shown on the theory that it is a collateral consistent contract.²⁵ Under a written contract by which a contractor who agrees to construct certain paving agrees to buy rock from the adversary party, an oral contract to the effect that such adversary party agrees to furnish all the rock which is necessary can not be shown.²⁶ Under a written contract of employment an oral contract by which such employe

²⁰ *Henderson v. Arthur* [1907], 1 K. B. 10.

See § 2196.

²¹ *Sutton v. Kentucky Lumber Co.* (Ky.), 44 S. W. 86.

²² *Sund v. Flagg & Standifer Co.*, 86 Or. 289, 168 Pac. 300.

²³ *McAleer v. United States*, 150 U. S. 424, 38 L. ed. 1130.

²⁴ *Hamilton Iron & Steel Co. v.*

Groveland Mining Co., 233 Fed. 388, 147 C. C. A. 324; *Electric Storage Battery Co. v. Waterloo C. F. & N. R. Co.*, 138 Ia. 369, 19 L. R. A. (N.S.) 1183, 116 N. W. 144.

See § 2197.

²⁵ *MacAlman v. Gleason*, 228 Mass. 454, 117 N. E. 795.

²⁶ *Elliott Contracting Co. v. Portland*, 88 Or. 150, 171 Pac. 760.

agreed to sell a specified amount of goods can not be shown.²⁷ Under a contract of insurance, an oral provision for arbitration can not be shown.²⁸ So under a written contract of adoption, complete on its face, an oral contract to devise or bequeath property to the child adopted can not be shown.²⁹ A promise that a corporation will maintain a surplus out of payments made to it in excess of the par value of its capital stock, is not collateral to a written contract of subscription which is a part of the same transaction, and oral evidence of such promise is therefore inadmissible.³⁰

§ 2194. Collateral inconsistent contracts. If the collateral contract is inconsistent with the written contract, it can not be enforced even if it is really collateral, and if it would have been enforceable had it been consistent with the written contract.¹ An oral contract which is collateral to a written contract and which attempts to change the time which is fixed by such written contract for performance, is unenforceable.² An oral contract, collateral to a written contract and changing the time fixed therein for performance, is unenforceable, as an oral contract to pay to the vendor of realty two hundred dollars on the execution of the written contract;³ an oral contract for the payment of commissions after the expiration of the time fixed by a written contract for

²⁷ *Standard Scale & Supply Co. v. Reiter*, 227 Fed. 414, 142 C. C. A. 110.

²⁸ *Rutter v. Ins. Co.*, 138 Ala. 202, 35 So. 33.

²⁹ *Brantingham v. Huff*, 174 N. Y. 53, 95 Am. St. Rep. 545, 66 N. E. 620.

³⁰ *Hicks v. Helm*, 126 Ark. 400, 190 S. W. 564.

¹ *United States. Keith v. Parker*, 115 Fed. 397.

Alabama. *Middleton v. Alabama Power Co.*, 196 Ala. 1, 71 So. 461.

Connecticut. *Adams v. Turner*, 73 Conn. 38, 46 Atl. 247.

Iowa. *Kracke v. Homeyer*, 91 Ia. 51, 58 N. W. 1056; *Younie v. Walrod*, 104 Ia. 475, 73 N. W. 1021.

Kansas. *Outcault Advertising Co. v. H. G. Waltner Mercantile Co.*, 96 Kan. 689, 153 Pac. 518.

Kentucky. *Louisville Trust Co. v. Bayer Steam Soot Blower Co.*, 166 Ky. 744, 179 S. W. 1034.

Maine. *Arthur E. Guth Piano Co. v. Adams*, 114 Me. 390, 96 Atl. 722.

Maryland. *Boswell v. Hostetter*, 129 Md. 53, 98 Atl. 222.

Massachusetts. *Tripp v. Smith*, 180 Mass. 122, 61 N. E. 804.

Michigan. *Phelps v. Abbott*, 114 Mich. 88, 72 N. W. 3.

Minnesota. *Rooney v. Koenig*, 80 Minn. 483, 83 N. W. 399.

Nebraska. *Benton v. Sikyta*, 84 Neb. 808, 24 L. R. A. (N.S.) 1057, 122 N. W. 61.

Vermont. *Daggett v. Johnson*, 49 Vt. 345.

Wisconsin. *Hunter v. Hathaway*, 108 Wis. 620, 84 N. W. 996.

² *Gunter v. Road Improvement District*, 125 Ark. 492, 189 S. W. 53; *Lewis v. Wilson*, 108 S. Car. 47, 93 S. E. 242. See § 2196.

³ *Walker v. Mack*, 129 Mich. 527, 89 N. W. 338.

performance;⁴ an oral contract changing the time for making repairs where the written contract provided for making repairs and delivering possession at a specified time;⁵ an oral contract that a note, on its face payable generally, should be paid out of certain specified funds,⁶ or to credit on a note given, a sum in the event of the breach of another contract;⁷ an oral contract to the effect that a negotiable instrument which was executed and delivered at the same time, should not be negotiated,⁸ or an oral contract to conform to usage as to payment under a written building contract, where, no time for payment being specified, the payment was in legal effect due only on completion of the building.⁹ One who signs a note as surety can not show an oral contract whereby the maker agreed to take a mortgage from the principal debtor as further security and to enforce such mortgage before proceeding against the surety.¹⁰ So an oral agreement that the vendor will procure and file for record a patent for certain land which he has contracted to sell by written contract, within sixty days from the date of such contract, can not be enforced where the contract merely requires the vendor to furnish a good abstract and a warranty deed.¹¹ An oral agreement which refers to fixtures can not be shown for the purpose of modifying a written lease which makes provision for fixtures.¹² A sole partnership of realty by mutual deeds of separate tracts, can not be modified by an oral agreement on the part of one grantee to assume an obligation which was a lien upon one of such tracts.¹³ A contract which is claimed to be collateral to a written contract can no more be enforced if it is inconsistent with the legal effect of the written provisions of such contract than if it is inconsistent with the express provisions thereof.¹⁴ An oral contract by which one party agreed to revise advertising matter furnished by the other, can not be shown under a written contract for the use of advertising articles which appears

⁴ *Boswell v. Hostetter*, 129 Md. 53, 98 Atl. 222.

⁵ *Tripp v. Smith*, 180 Mass. 122, 61 N. E. 804.

⁶ *Keith v. Parker*, 115 Fed. 397.
Contra, *Gandy v. Weckerly*, 220 Pa. St. 285, 123 Am. St. Rep. 691, 69 Atl. 858.

⁷ *Phelps v. Abbott*, 114 Mich. 88, 72 N. W. 3.

⁸ *Benton v. Sikyta*, 84 Neb. 808, 24 L. R. A. (N.S.) 1057, 122 N. W. 61.

⁹ *Riddell v. Ventilating Co.*, 27 Mont. 44, 69 Pac. 241.

¹⁰ *Anderson v. Matheny*, 17 S. D. 225, 95 N. W. 911.

¹¹ *Younie v. Walrod*, 104 Ia. 475, 73 N. W. 1021.

¹² *Middleton v. Alabama Power Co.*, 196 Ala. 1, 71 So. 461.

¹³ *Garner v. Garner*, 117 Miss. 694, 78 So. 623.

¹⁴ *Louisville & N. R. Co. v. Willbanks*, 133 Ga. 15, 24 L. R. A. (N.S.) 374, 65

upon its face to be complete.¹⁵ Under a written contract of sale, which purports to be complete, a collateral oral agreement to the effect that the seller warranted that he had paid the same price which he was to receive, can not be shown.¹⁶ Under a contract for the conveyance of realty, a collateral agreement for the reservation for a right of way can not be shown.¹⁷ Under a written contract of sale, the legal effect of which was to pass title upon delivery, a collateral oral contract that the vendee should test the property sold before accepting it, and before acquiring the title, was unenforceable.¹⁸ A prior agreement with reference to the term of a lease can not be shown if inconsistent with the term fixed by the lease itself.¹⁹ So under a written contract, the effect of which is to make a separate complete sale of each installment as delivered, an oral contract providing for redelivery in the event of failure to pay for subsequent installments can not be enforced.²⁰ Where A made a contract with B, whereby A was to make application for, and if possible obtain, letters patent for "certain new and useful improvements in hat pouncing, or finishing machines," in certain countries, in consideration of five thousand, five hundred dollars to be paid by B to A, B could not show an oral agreement that future improvements were included in addition to those already made by A, nor could he show that the money was to be paid by him only if the improvements made the machines able to pounce hats in the English method.²¹

IV

APPLICATION OF FOREGOING PRINCIPLES

§ 2195. Method of performance. It is sometimes said in very general language that extrinsic evidence is always admissible to show contemporaneous oral agreements as to the method of per-

S. E. 86; *Outcault Advertising Co. v. H. G. Waltner Mercantile Co.*, 96 Kan. 689, 153 Pac. 518; *Carpenter v. Sugden*, 231 Mass. 1, 119 N. E. 959; *Trout v. Norfolk & W. R. Co.*, 107 Va. 576, 17 L. R. A. (N.S.) 702, 59 S. E. 394.
¹⁵ *Outcault Advertising Co. v. H. G. Waltner Mercantile Co.*, 96 Kan. 689, 153 Pac. 518.

¹⁶ *Carpenter v. Sugden*, 231 Mass. 1, 119 N. E. 959.

¹⁷ *Louisville & N. R. Co. v. Willbanks*

133 Ga. 15, 24 L. R. A. (N.S.) 374, 65 S. E. 86; *Trout v. Norfolk & W. R. Co.*, 107 Va. 576, 17 L. R. A. (N.S.) 702, 59 S. E. 394.

¹⁸ *Van Winkle v. Crowell*, 146 U. S. 42, 36 L. ed. 880.

¹⁹ *Becker v. Baker*, 174 Ia. 97, 156 N. W. 317.

²⁰ *Hardwick v. McClurg*, 16 Colo. App. 354, 65 Pac. 405.

²¹ *Adams v. Turner*, 73 Conn. 38, 46 Atl. 247.

forming a written contract, as long as the evidence does not contradict the terms thereof. The application of this rule in its most general form would go a long way toward annulling the parol evidence rule. In certain cases its operation is clear. The case in which it undoubtedly applies is where the written contract is incomplete or ambiguous on its face. Thus if a contract is incomplete or ambiguous upon its face, extrinsic evidence is admissible to show the manner of payment,¹ or the character,² size,³ or quality,⁴ of material to be furnished, or to show how and by whom logs sold are to be measured,⁵ or where railroad ties are to be inspected,⁶ or to show where a furnace whose erection is contracted for is to be placed.⁷ So where a furnace is sold under a guaranty that it will save a certain per cent. of fuel, extrinsic evidence is admissible to show what kind of test is to be made.⁸ So if the written contract is incomplete, extrinsic evidence is admissible to show the time of performance,⁹ as the time of payment.¹⁰ If a contract with reference to a specified water course leaves it uncertain whether the tributaries of such stream were included or not, evidence of the prior agreement of the parties may be shown.¹¹ A contract for securing water by drilling a well, which does not specify the kind of water to be secured, may be explained by evidence of the prior negotiations of the parties so as to show that fresh water was intended.¹² If the contract shows that some credit is to be given, evidence is admissible to show for what length of time it was given,¹³ and in time of paying an agent commissions,¹⁴ or the length of time for which the contract is to run,¹⁵ as that it is a contract at

¹ Block Queensware Co. v. Metzger, 70 Ark. 232, 65 S. W. 920. Even if the contract is within the Statute of Frauds. See v. Butler, 167 Mass. 426, 57 Am. St. Rep. 466, 46 N. E. 52.

² Whatley v. Reese, 128 Ala. 500, 29 So. 606.

³ Meader v. Allen, 110 Ia. 588, 81 N. W. 799.

⁴ Aultman v. Clifford, 55 Minn. 159, 43 Am. St. Rep. 478, 56 N. W. 593.

⁵ Gould v. Excelsior Co., 91 Me. 214, 64 Am. St. Rep. 221, 39 Atl. 554.

⁶ Havana, etc., Ry. v. Walsh, 85 Ill. 58.

⁷ Kumberger v. Spring Co., 158 N. Y. 339, 53 N. E. 3.

⁸ Hawley, etc., Co. v. Hooper, 90 Md. 390, 45 Atl. 456.

⁹ Whatley v. Reese, 128 Ala. 500, 29 So. 606; Richter v. Stock Co., 129 Cal. 367, 62 Pac. 39.

¹⁰ Schaeppi v. Glade, 195 Ill. 62, 62 N. E. 874.

¹¹ Johnson v. Tackitt, 173 Ky. 406, 191 S. W. 117.

¹² Smith v. Vose & Sons Piano Company, 194 Mass. 193, 9 L. R. A. (N.S.) 966, 80 N. E. 527.

¹³ Crowley v. Langdon, 127 Mich. 51, 86 N. W. 391.

¹⁴ Walters v. King, 119 Cal. 172, 51 Pac. 35.

¹⁵ Bankers' Accident Ins. Co. v. Rogers, 73 Minn. 12, 75 N. W. 747.

will.¹⁶ So if no time is fixed in the contract for passing title, extrinsic evidence is admissible to show that title is to be retained until the property is paid for.¹⁷ If the contract is incomplete, evidence is admissible to show the place of payment.¹⁸ In some cases this principle has been applied to notes which did not provide for the place of payment, and extrinsic evidence has been admitted to show an oral agreement fixing the place of payment.¹⁹ In other cases it has been held that in the absence of a provision in the note fixing a place of payment, the law would draw inferences as to such place, which inferences could not be contradicted by extrinsic evidence.²⁰ If a contract for the transportation of goods implies the right of the owner to require delivery at an intermediate point, extrinsic evidence of such instructions on his part is admissible.²¹ Another class of cases which is discussed elsewhere,²² exists where the parties to a written contract enter into a collateral consistent contract by which they provide a means for the performance of the written contract.²³ While cases of this sort can be explained readily upon general principles, there is practically a sharp conflict of authority between the different cases as to the relation between the collateral contract and the written contract and as to their consistency or inconsistency.²⁴ Thus where A gave B his note, an oral agreement whereby B was to collect certain rents belonging to A and apply them on such note was enforceable.²⁵ A collateral contract by which a note is to be paid out of the proceeds of the sale of property,²⁶ or by which the payee is to accept the partnership interest of one of the makers of the note as payment of a portion thereof,²⁷ or by which property which is to be paid for in

¹⁶ Real Estate Title Co.'s Appeal, 125 Pa. St. 549, 11 Am. St. Rep. 920, 17 Atl. 450.

¹⁷ Myers v. Taylor, 107 Tenn. 364, 64 S. W. 719.

¹⁸ Ebert v. Arends, 190 Ill. 221, 60 N. E. 211.

¹⁹ Cox v. Bank, 100 U. S. 704, 25 L. ed. 739; Blackerly v. Ins. Co., 83 Ky. 574.

²⁰ Moore v. Davidson, 18 Ala. 209.

²¹ Virginia & Southwestern Railroad Co. v. Sutherland, 138 Tenn. 266, L. R. A. 1916B, 77, 197 S. W. 863.

²² See § 2191.

²³ Arkansas. Jones v. Little, 128 Ark. 640, 194 S. W. 229.

Iowa. Roberts v. Ozias, 179 Ia. 1141, 162 N. W. 584.

North Carolina. Vaughan-Robertson Drug Co. v. Grimes-Mills Drug Co., 173 N. Car. 502, 92 S. E. 376.

Oklahoma. Mackin v. Darrow Music Co., — Okla. —, 169 Pac. 497.

Pennsylvania. Gandy v. Weckerly, 220 Pa. St. 285, 18 L. R. A. (N.S.) 434, 69 Atl. 858.

²⁴ See §§ 2191 and 2196.

²⁵ Stebbins v. Lardner, 2 S. D. 127, 48 N. W. 847.

²⁶ Roberts v. Ozias, 179 Ia. 1141, 162 N. W. 584.

²⁷ Jones v. Little, 128 Ark. 640, 194 S. W. 229.

installments may be paid for by specified kinds of work and labor,²⁸ has been enforced. An oral contract by which a creditor of a corporation, who has given a note for a subscription to its stock, is not to be obliged to pay such note until the debt of the corporation to him is paid, has been enforced.²⁹ An oral contract by which a number of incorporators agree to sign a subscription contract for a specified amount of the stock and by which it was agreed that they should pay for only a portion of the amount thus indicated and the remaining portion was to be paid by the other parties who had agreed to subscribe and pay for such stock, was said to be "a convenient way of paying" the amount of the written subscription.³⁰ Where a note under seal was given, the maker was allowed to show that it was not to be paid until another note given therewith had been collected.³¹ Beyond these classes of cases the courts should not go. It must be admitted, however, that some authorities permit oral terms to be added to a complete written contract, and in some cases even allow the written terms to be contradicted under guise of showing the method of performance. Thus where A had given a note to B, it was held that A could show that A and B had sold to X land owned by A and B, that X had given therefor his note to A, and that the note in litigation, given by A to B and for one half the amount of X's note to A, was to be paid only out of X's note.³² This case, however, is, on this point, contrary to the weight of authority, as such evidence is generally held to contradict the written contract. Where A had bought land from B and had given his note therefor, it was held that A could show that the note was payable only after the land was surveyed and that a reduction in the price was to be made proportional to the deficiency in acreage below the estimated amount.³³ This case may be sustained on the theory that a partial failure of consideration was shown. So an oral contract for the payment of a note by sawing lumber has been enforced.³⁴ So a written contract to deliver a

²⁸ *Mackin v. Darrow Music Co.*, — Okla. —, 169 Pac. 497.

²⁹ *Gandy v. Weckerly*, 220 Pa. St. 285, 18 L. R. A. (N.S.) 434, 69 Atl. 858. (This decision is based upon the theory of fraud and is affected by the peculiar Pennsylvania view of the admissibility of extrinsic evidence.)

³⁰ *Vaughan-Robertson Drug Co. v.*

Grimes-Mills Drug Co., 173 N. Car. 502, 92 S. E. 376.

³¹ *Quin v. Sexton*, 125 N. Car. 447, 34 S. E. 542.

³² *Quin v. Sexton*, 125 N. Car. 447, 34 S. E. 542.

³³ *McGee v. Craven*, 106 N. Car. 351, 11 S. E. 375.

³⁴ *Ramsay v. Capshaw*, 71 Ark. 408, 75 S. W. 479.

quantity of peaches ranging from a maximum to a minimum quantity at vendor's option, to be grown in "sundry orchards" in a certain specified county, may be shown by oral evidence to be a contract for the product of certain specific orchards and to be conditioned on the fact of producing a crop on such orchards.³⁸

§ 2196. Agreement as to performance contradicting written contract. An oral contemporaneous contract which changes the time of performance from that fixed by a complete written contract, can not be enforced.¹ The fact that the written contract contains a promise "to pay," does not render it so uncertain or ambiguous that extrinsic evidence may be offered to show that such payment could be made by giving an obligation payable in the future.² An oral contract contemporaneous with the execution of a promissory note, providing for an extension thereof, is unenforceable.³ A prior oral agreement to renew an obligation if interest thereon were paid,⁴ or postponing the time of maturity to a date later than that fixed by the terms of the note,⁵ can not be shown to vary the time of payment. If a note by its terms matures at a certain time, extrinsic evidence of a contemporaneous contract to renew until

³⁸ Ontario, etc., Association v. Cutting, 134 Cal. 21, 86 Am. St. Rep. 231, 53 L. R. A. 681, 66 Pac. 28.

¹ England. Henderson v. Arthur [1907], 1 K. B. 10.

United States. Nalitsky v. Williams, 237 Fed. 802; Shoninger v. Dormer Bros. Co., 241 Fed. 662, 154 C. C. A. 420.

California. Harloe v. Lambie, 132 Cal 133, 64 Pac. 88.

Iowa. Steele v. Ingraham, 175 Ia. 653, 155 N. W. 294.

Kansas. Commercial National Bank v. Hutchinson Box Board & Paper Co., 98 Kan. 350, 158 Pac. 44.

Kentucky. Allen v. Thompson, 108 Ky. 476, 56 S. W. 823; Fechheimer v. Goldnamer, 169 Ky. 243, 183 S. W. 541.

North Carolina. Copeland v. Howard, 172 N. Car. 842, 90 S. E. 123; Cherokee County v. Meroney, 173 N. Car. 653, 92 S. E. 616; Acme Manufacturing Co.

v. McCormick, 175 N. Car. 277, 95 S. E. 555.

Oregon. Edgar v. Golden, 36 Or. 448, 60 Pac. 2, 48 Pac. 1118; Tallmadge v. Hooper, 37 Or. 503, 61 Pac. 349 [rehearing denied, 37 Or. 514, 61 Pac. 1127]; Colvin v. Goff, 82 Or. 314, L. R. A. 1917C, 300, 161 Pac. 568.

South Dakota. Black Hills Trust & Savings Bank v. Plunkett, — S. D. —, 166 N. W. 527.

² Henderson v. Arthur [1907], 1 K. B. 10.

³ Commercial National Bank v. Hutchinson Box Board & Paper Co., 98 Kan. 350, 158 Pac. 44; Thomas v. Plow Co., 56 Neb. 383, 76 N. W. 876; Acme Manufacturing Co. v. McCormick, 175 N. Car. 277, 95 S. E. 555; Homewood People's Bank v. Heckert, 207 Pa. St. 231, 56 Atl. 431.

⁴ Lewis v. Wilson, 108 S. Car. 47, 93 S. E. 242.

⁵ Cherokee County v. Meroney, 173 N. Car. 653, 92 S. E. 616.

the maker's business is in such condition that he does not need the payee's financial assistance, is inadmissible.⁶ A prior oral agreement to the effect that rent should be paid by a bill due in three months, can not be shown to contradict a written lease which provides for payment of rent at a specified time.⁷ An oral agreement to the effect that a note should not become due until the maker had sold a certain business, can not be shown to contradict the express provisions of such note as to its maturity.⁸ A prior oral agreement not to foreclose a chattel mortgage at maturity is unenforceable.⁹ So a contemporaneous oral contract to renew a bill of exchange can not be enforced.¹⁰ A prior oral agreement for payment in installments can not be shown to vary the express terms of a contract which provides for payment as an entirety.¹¹ Where a contract does not fix the time for payment, and accordingly payment is to be made when the contract is performed, an oral contract for payment in advance is unenforceable.¹² So where a certificate of deposit, payable in twelve months, was given, extrinsic evidence is inadmissible to show that the holder had agreed to present the certificate for payment at the end of six months.¹³ So a continuing guarantee "until further notice," can not be shown to be limited to a period of one year.¹⁴ A written contract of guaranty for consignments made to another during one year, can not be shown to be limited to the first shipment.¹⁵ Under a written contract to deliver certain quantities each month, oral evidence of an agreement to deliver certain quantities each week is inadmissible.¹⁶ So under a chattel mortgage an oral agreement that the mortgagor may retain possession of the property until a future time, is inadmissible where, by the terms of the mortgage, the mortgagee is entitled to the immediate possession.¹⁷ If a written contract for

⁶ *Hall v. Bank*, 173 Mass. 16, 73 Am. St. Rep. 255, 44 L. R. A. 310, 53 N. E. 154.

⁷ *Henderson v. Arthur* [1907], 1 K. B. 10.

⁸ *Fechheimer v. Goldnamer*, 169 Ky 243, 183 S. W. 541.

⁹ *Moore v. Howe*, 115 Ia. 62, 87 N. W. 750.

¹⁰ *New London Credit Syndicate v. Neale* [1898], 2 Q. B. 487.

¹¹ *Nalitzky v. Williams*, 237 Fed. 802.

¹² *Gunter v. Road Improvement District*, 125 Ark. 492, 189 S. W. 53; *Langley v. Rodriguez*, 122 Cal. 580, 68

Am. St. Rep. 70, 55 Pac. 406; *Kistler v. McBride* (N. J. Eq.), 48 Atl. 558.

¹³ *Citizens' Bank v. Jones*, 121 Cal. 30, 53 Pac. 354.

¹⁴ *Indiana Bicycle Co. v. Tuttle*, 74 Conn. 489, 51 Atl. 538.

¹⁵ *Braun v. Woollacott*, 129 Cal. 107, 61 Pac. 801.

¹⁶ *Shoninger v. Dormer Bros. Co.*, 241 Fed. 662, 154 C. C. A. 420.

¹⁷ *Robieson v. Royce*, 63 Kan. 886, 66 Pac. 646. (No opinion in official report.)

sawing logs shows the method of delivery agreed upon, a contemporaneous oral contract for another method of delivery can not be enforced.¹⁸

An absolute promise to pay at a certain time can not be modified by evidence of a contemporaneous oral contract to the effect that such payment should not be made until the happening of some other event,¹⁹ such as the sale of certain realty,²⁰ or the reversal of a certain judgment.²¹

If a note appears upon its face to be unconditional, extrinsic evidence is inadmissible to show that it should not be paid until certain collateral had been exhausted,²² or that it should be satisfied out of certain property which was subject to mortgage.²³ A written lease which fixes the term can not be varied by an inconsistent prior oral agreement fixing the term.²⁴ An oral agreement as to the amount to be paid can not be shown to contradict the express terms of a written contract.²⁵ A contract for the sale of realty for a lumber firm can not be modified by a prior oral agreement to deduct a certain amount for any deficiency below a certain area.²⁶ An oral agreement to the effect that a subscriber to stock should be discharged from liability without paying such subscription can not vary the terms of the written subscription.²⁷ An oral contract fixing the place of performance can not be shown to vary the terms of a written contract which fixes the place of performance.²⁸

If the place of performance of a contract is specified by the express terms of the contract, or is to be inferred by fair implication from the terms which are used, extrinsic evidence is inadmissible to contradict the contract and to show that the parties had in

¹⁸ Mead v. Dunlevie, 174 N. Y. 108, 66 N. E. 658.

¹⁹ Security National Bank v. Pulver, 131 Minn. 454, 155 N. W. 641; Cherokee County v. Meroney, 173 N. Car. 653, 92 S. E. 616.

²⁰ Cherokee County v. Meroney, 173 N. Car. 653, 92 S. E. 616.

²¹ Colvin v. Goff, 82 Or. 314, L. R. A. 1917C, 300, 161 Pac. 568.

²² Security National Bank v. Pulver, 131 Minn. 454, 155 N. W. 641.

²³ Smith v. McLaughlin, 120 Ark. 366, 179 S. W. 496.

²⁴ Becker v. Baker, 174 Ia. 97, 156 N. W. 317.

²⁵ Gill v. Ruggles, 104 S. Car. 461, 89 S. E. 503.

²⁶ Slump v. Blain, 177 Ia. 239, 158 N. W. 491.

²⁷ Huster v. Newkirk Creamery & Ice Co., 42 Okla. 440, L. R. A. 1915A, 390, 141 Pac. 790. (This was put in part upon the ground that such contract operated as a fraud upon the remaining subscribers.)

²⁸ Lawson v. Hobbs, 120 Va. 690, 91 S. E. 750.

²⁹ Tuttle v. Burgett, 53 O. S. 498, 53 Am. St. Rep. 649, 30 L. R. A. 214, 42 N. E. 427; Flinn v. Boso, 79 W. Va. 493, 92 S. E. 130.

fact entered into an oral agreement prior to or contemporaneous with the written contract by which they fixed a different place of performance from that which is specified in the written contract or fairly to be inferred therefrom.²⁹

A contract which shows on its face that the promisee is the sole beneficiary, can not be modified by showing that another person was, in fact, a beneficiary in part.³⁰

§ 2197. Warranties. A warranty is not a contract which is separate and distinct from a contract of sale, but on the contrary, it is one of the terms of the contract of sale.¹ Accordingly, a written contract of sale which purports upon its face to be complete, can not be added to by showing that the parties had entered into a prior or contemporaneous oral contract of warranty.² This is

³⁰ *New Orleans Northeastern Ry. Co. v. Lott*, 118 Miss. 57, 79 So. 1.

¹ *United States. Marmet Coal Co. v. People's Coal Co.*, 226 Fed. 646, 141 C. C. A. 402; *Hamilton Iron & Steel Co. v. Groveland Mining Co.*, 233 Fed. 388, 147 C. C. A. 324.

Arkansas. Western Cabinet & Fixture Mfg. Co. v. Davis, 121 Ark. 370, 181 S. W. 273.

Georgia. Bond v. Perrin, 145 Ga. 200, 88 S. E. 954.

Massachusetts. Glackin v. Bennett, 226 Mass. 316, 115 N. E. 490.

Minnesota. McNaughton v. Wahl, 99 Minn. 92, 116 Am. St. Rep. 389, 108 N. W. 467.

² *United States. Seitz v. Machine Co.*, 141 U. S. 510, 35 L. ed. 837; *Wilson v. Cattle Ranch Co.*, 73 Fed. 994, 20 C. C. A. 244; *Marmet Coal Co. v. People's Coal Co.*, 226 Fed. 646, 141 C. C. A. 402; *Hamilton Iron & Steel Co. v. Groveland Mining Co.*, 233 Fed. 388, 147 C. C. A. 324.

Arkansas. Western Cabinet & Fixture Mfg. Co. v. Davis, 121 Ark. 370, 181 S. W. 273.

Georgia. Bond v. Perrin, 145 Ga. 200, 88 S. E. 954.

Indiana. McCormick Harvesting Machine Co. v. Yoeman, 26 Ind. App. 415, 59 N. E. 1069.

Kansas. Diebold, etc., Lock Co. v. Huston, 55 Kan. 104, 28 L. R. A. 53, 39 Pac. 1035; *Ehrsam v. Brown*, 64 Kan. 466, 67 Pac. 867.

Massachusetts. Glackin v. Bennett, 226 Mass. 316, 115 N. E. 490.

Michigan. Hallwood Cash Register Co. v. Millard, 127 Mich. 316, 86 N. W. 833; *D. M. Osborne & Co. v. Wigent*, 127 Mich. 624, 86 N. W. 1022; *Bayer v. Winton Motor Co.*, 194 Mich. 222, 160 N. W. 642.

Minnesota. Thompson v. Libby, 34 Minn. 374, 26 N. W. 1; *McNaughton v. Wahl*, 99 Minn. 92, 116 Am. St. Rep. 389, 108 N. W. 467.

North Carolina. A. B. Farquhar Co. v. Hardy Hardware Co., 174 N. Car. 369, 93 S. E. 922.

Tennessee. Somerville v. Gullett Gin Co., 137 Tenn. 509, 194 S. W. 576.

Vermont. Hebard v. Cutler, 91 Vt. 218, 99 Atl. 879.

Washington. Grubb v. House, 93 Wash. 200, 160 Pac. 421; *Singmaster v. Hall*, 98 Wash. 134, 167 Pac. 136.

Wisconsin. Milwaukee Boiler Co. v. Duncan, 87 Wis. 120, 41 Am. St. Rep. 33, 58 N. W. 232.

Contra, Puget Sound, etc., Works v. Clemmons, 32 Wash. 36, 72 Pac. 465.

especially clear where the written contract of sale provides that the only warranties are those contained in the sale,³ or where the contract provides that no agent has power to modify the warranty, and the attempt is made to show an oral warranty entered into through an agent.⁴ Where there was an express warranty that an engine is made of good material, an oral warranty that it had power to run a certain separator could not be enforced.⁵ Under a written agreement to furnish certain electrical apparatus according to specifications of the latest type with first-class material and workmanship, an oral warranty that such apparatus will produce certain specified results can not be shown.⁶ A written guarantee as to certain specified matters still more clearly excludes evidence of an oral guaranty as to other matters.⁷ A provision that the vendor "guarantees above property only as to title," excludes an oral guarantee that the property is "in first-class condition and suitable for the purpose for which it was intended."⁸ Where there is an express written warranty against breakage, evidence of an oral warranty against defective working is inadmissible.⁹ So where a written order is given for a fireproof safe, evidence of a contemporaneous oral warranty is inadmissible, and the language of the order itself does not imply a warranty that the safe is fireproof.¹⁰ If a contract for the sale of an automobile is in writing and appears on its face to be complete, evidence of an oral warranty is inadmissible.¹¹ On the other hand, it has been said that a contract for the sale of trees may be explained by showing the original orders given therefor in order to show that the vendor warranted that such trees were healthy,¹² or that they were of a certain specified kind.¹³

³ *Singmaster v. Hall*, 98 Wash. 134, 167 Pac. 136.

⁴ *A. B. Farquhar Co. v. Hardy Hardware Co.*, 174 N. Car. 369, 93 S. E. 922.

⁵ *Nichols v. Crandall*, 77 Mich. 401, 6 L. R. A. 412, 43 N. W. 875.

⁶ *Electric Storage Battery Co. v. Waterloo, C., F. & N. R. Co.*, 138 Ia. 369, 19 L. R. A. (N.S.) 1183, 116 N. W. 144.

⁷ *Holt & Duggan Co. v. Clary*, 146 Ga. 46, 90 S. E. 381.

⁸ *Holt & Duggan Co. v. Clary*, 146 Ga. 46, 90 S. E. 381.

⁹ *Dowagiac Mfg. Co. v. Corbit*, 127 Mich. 473, 86 N. W. 954 [rehearing denied, 87 N. W. 886].

¹⁰ *Diebold Safe and Lock Co. v. Huston*, 55 Kan. 104, 28 L. R. A. 53, 39 Pac. 1035.

¹¹ *Glackin v. Bennett*, 226 Mass. 316, 115 N. E. 490; *Bayer v. Winton Motor Co.*, 194 Mich. 222, 160 N. W. 642.

¹² *Grisinger v. Hubbard*, 21 Ida. 469, Ann. Cas. 1913E, 87, 122 Pac. 853. (This may possibly be justified on the theory of an implied warranty.)

¹³ *Graham v. Brown Bros. Co.*, 30 Ida. 651, 168 Pac. 9.

The parties can not introduce evidence of facts from which a warranty could be implied where the contract is in writing. Thus they can not show that the sale was by sample,¹⁴ or that an apparatus was sold for a specific purpose.¹⁵ The rule forbidding the addition of oral warranties to complete written contracts, applies to other contracts besides those of sale. Thus in a contract for employing a life insurance agent, and paying him commissions on renewals, an oral guaranty as to the amount of renewals is unenforceable.¹⁶ So in an assignment of a mortgage, an oral guaranty that the mortgage was a valid lien on the property is unenforceable.¹⁷ So in a written contract for the sale of land, an oral warranty as to the location of an electric railway can not be enforced.¹⁸ Where a written lease has been given, evidence of an oral warranty as to the condition of the property leased can not be enforced.¹⁹ So an oral warranty that a boiler and engine situated on leased property is in good condition, is unenforceable where a written lease has been given.²⁰ The admission of evidence of an express oral warranty, which is the same as that which would be implied without such evidence, is not, however, prejudicial error.²¹

If the written contract shows upon its face that it is incomplete as to the warranty, extrinsic evidence is admissible as far as the parol evidence rule is concerned, to show the oral warranty upon which the parties had agreed.²² If a written contract for the installation of a heating system shows that the parties intended to guarantee some specified temperature but the space for the statement of the exact temperature is not filled in, extrinsic evidence is admissible to show the temperature upon which the parties had actually agreed.²³ The fact that a lien is reserved does not author-

¹⁴ *Wiener v. Whipple*, 53 Wis. 298, 40 Am. Rep. 775, 10 N. W. 433.

¹⁵ *McCray, etc., Co. v. Woods*, 99 Mich. 269, 41 Am. St. Rep. 599, 58 N. W. 320.

¹⁶ *Montgomery v. Ins. Co.*, 97 Fed. 913, 38 C. C. A. 553.

¹⁷ *Nally v. Long*, 71 Md. 585, 17 Am. St. Rep. 547, 18 Atl. 811.

¹⁸ *Baker v. Flick*, 200 Pa. St. 13, 49 Atl. 349.

¹⁹ *Stevens v. Pierce*, 151 Mass. 207, 23 N. E. 1006; *McLean v. Nicol*, 43 Minn. 169, 45 N. W. 15; *York v. Steward*, 21 Mont. 515, 43 L. R. A. 125, 55

Pac. 29; *Naumberg v. Young*, 44 N. J. L. 331, 43 Am. Rep. 380.

²⁰ *Naumberg v. Young*, 44 N. J. L. 331, 43 Am. Rep. 380 [citing, *Dutton v. Gerrish*, 63 Mass. (9 Cush.) 89].

²¹ *Tufts v. Verkuyl*, 124 Mich. 242, 82 N. W. 801.

²² *Schneider v. Fairmon*, 128 Ark. 425, 194 S. W. 251; *Sparks v. Lord*, 198 Mich. 415, 164 N. W. 490; *Standard Paint Co. v. Vietor*, 120 Va. 595, 91 S. E. 752.

²³ *Sparks v. Lord*, 198 Mich. 415, 164 N. W. 490.

ize the addition of an oral warranty to a written contract of sale.²⁴ The rule that a written contract can not be supplemented by an oral warranty applies only to cases in which the written contract is the repository of the intention of the parties. If it can be shown that the written contract is entered into by a mistake,²⁵ such as a mistake as to the identity of the parties,²⁶ extrinsic evidence of an oral warranty may be shown.

A written contract which is entered into under mistake as to an essential element does not merge a prior oral warranty.²⁷ If A buys an automobile from B, believing that B is the agent for the manufacturer, X, when in fact B is the owner thereof, a written contract by which it is agreed that the manufacturer would replace defective parts, may be modified by showing that B had warranted such automobile orally.²⁸

On the other hand, a warranty which is contained in a contract of sale, whether by express terms or by implication, can not be modified by prior oral agreement.²⁹

§ 2198. Surety. A surety who signs as a maker may show his relation to the instrument in an action thereon between himself and the payee,¹ whether he has signed such note in the usual place as

²⁴ *Hebard v. Cutler*, 91 Vt. 218, 99 Atl. 879.

²⁵ *Rittenhouse-Winterson Auto Co. v. Kissner*, 129 Md. 102, 98 Atl. 361.

²⁶ *Rittenhouse-Winterson Auto Co. v. Kissner*, 129 Md. 102, 98 Atl. 361.

²⁷ *Rittenhouse-Winterson Auto Co. v. Kissner*, 129 Md. 102, 98 Atl. 361.

²⁸ *Rittenhouse-Winterson Auto Co. v. Kissner*, 129 Md. 102, 98 Atl. 361.

²⁹ *Singmaster v. Robinson*, 181 Ia. 522, 164 N. W. 776; *Bond v. Perrin*, 145 Ga. 200, 88 S. E. 954.

¹ *Alabama*. *Compton v. Smith*, 120 Ala. 233, 25 So. 300.

Arkansas. *Thornton v. Bowie*, 123 Ark. 463, 185 S. W. 793; *Tancred v. First National Bank*, 124 Ark. 154, 187 S. W. 160.

California. *Daneri v. Gazzola*, 139 Cal. 416, 73 Pac. 179.

Georgia. *Buck v. Bank*, 104 Ga. 660, 30 S. E. 872.

Iowa. *First National Bank v. Dutcher*, 128 Ia. 413, 1 L. R. A. (N.S.) 142, 104 N. W. 497.

Kentucky. *Youtsey v. Kutz* (Ky.), 60 S. W. 857; *Craddock v. Lee* (Ky.), 61 S. W. 22; *Brady v. Equitable Trust Co.*, 178 Ky. 693, 199 S. W. 1082.

Massachusetts. *Weeks v. Parsons*, 176 Mass. 570, 58 N. E. 157.

Michigan. *Hitchcock v. Frackleton*, 116 Mich. 487, 74 N. W. 720.

Missouri. *Long v. Mason*, 273 Mo. 266, 200 S. W. 1062.

Montana. *Stanhope v. Shambow*, 54 Mont. 360, 170 Pac. 752.

North Carolina. *Foster v. Davis*, 175 N. Car. 541, 95 S. E. 917.

Oklahoma. *Stovall v. Adair*, 9 Okla. 620, 60 Pac. 282.

West Virginia. *Faulkner v. Thomas*, 48 W. Va. 148, 35 S. E. 915.

Wisconsin. *Breitengross v. Farr*, 100 Wis. 215, 75 N. W. 893.

maker,² or whether he has signed his name upon the back of such note before delivery.³ An accommodation party to an instrument may show that he signed in such capacity.⁴ Showing such relationship does not contradict the instrument on which action is brought. It merely shows the purpose for which it was given. However, as such relationship is usually important as between the surety and the payee when the surety has been released by the payee's giving an extension of time to the principal without the consent of the surety,⁵ or when the jurisdiction of the court is affected by the question of suretyship, the effect of such evidence is to change the legal rights of the parties, though not the legal effect of the contract. Thus where A, the real surety, signed as maker, B, the real borrower, appeared as payee, and B endorsed to C the real lender, these facts may be shown where by reason of citizenship in different states, the United States courts would not have jurisdiction otherwise.⁶ If A and B have signed a contract by which they agree to purchase certain property, A may show that B signed as surety in order to show that B is not a necessary party to a cross-petition to recover for breach of warranty which A has filed in an action against him upon the notes given for the purchase price.⁷ The makers of a note may show that they are all sureties for a principal who never signed at all, and thus show that they are discharged because the payee has released other security.⁸ A wife who gives a mortgage on her own realty to secure her husband's debt can show that she was surety for him.⁹ In an action between the sureties,¹⁰ as a suit for contribution,¹¹ even greater latitude in

² *Brady v. Equitable Trust Co.*, 178 Ky. 693, 199 S. W. 1082; *Foster v. Davis*, 175 N. Car. 541, 95 S. E. 917.

³ *Thornton v. Bowie*, 123 Ark. 463, 185 S. W. 793.

⁴ *Rice v. Rice*, 101 Kan. 20, 165 Pac. 799.

See also, *Lyon County State Bank v. Schaefer*, 102 Kan. 868, 171 Pac. 1159.

⁵ *Buck v. Bank*, 104 Ga. 660, 30 S. E. 872.

While such evidence is admissible as far as the parol evidence rule is concerned, it has become immaterial under the Negotiable Instruments Law in jurisdictions in which it is held that the extension of time does not release a surety who appears upon the face of the instrument to be a party primarily liable thereon. See ch. LXXXV.

⁶ *Goldsmith v. Holmes*, 36 Fed. 484, 13 Sawyer 526, 1 L. R. A. 816.

⁷ *First National Bank v. Dutcher*, 128 Ia. 413, 1 L. R. A. (N.S.) 142, 104 N. W. 497.

⁸ *Hoffman v. Habighorst*, 38 Or. 261, 53 L. R. A. 908, 63 Pac. 610.

⁹ *Price v. Cooper*, 123 Ala. 392, 26 So. 238. The Alabama code, § 2529, prohibiting a wife from becoming surety for her husband.

¹⁰ *Brown v. People's Bank*, 127 Ark. 486, 192 S. W. 900; *Frew v. Scoular*, 101 Neb. 131, L. R. A. 1917F, 1065, 162 N. W. 496; *Davis v. First National Bank*, 86 Or. 474, 161 Pac. 93, 168 Pac. 929.

¹¹ *Frew v. Scoular*, 101 Neb. 131, L. R. A. 1917F, 1065, 162 N. W. 496; *Davis v. First National Bank*, 86 Or. 474, 161 Pac. 93, 168 Pac. 929.

admitting extrinsic evidence to show the actual agreement between such sureties is permitted, since the contract between the sureties themselves is ordinarily not in writing, and accordingly the action is not an action between the parties to the written contract,¹² and furthermore, since the suit for contribution is not founded on contract. In an action between co-sureties for contribution, one of the sureties may show by extrinsic evidence that he signed as surety for the other surety and not for the principal debtor.¹³ Where a note was signed by A, B, C and D, and the word "surety" was added to D's signature, C may show that he, too, was a surety, and having paid the note, is entitled to contribution against D.¹⁴

As far as the contract between the creditor and the surety is concerned, the parol evidence rule applies as it does in any other contract.¹⁵ The surety can not introduce parol evidence to contradict the terms of his written contract.¹⁶ On the other hand, extrinsic evidence is not admissible to show that the parties intended to enter into a contract of guaranty by the use of language which does not import such intention.¹⁷

§ 2199. Drawer. The drawer of a bill of exchange is not protected by a contemporaneous oral agreement with the payee, exonerating him from liability if the drawee does not honor the draft.¹ But where the original draft was lost and the payee so delayed through his agent's negligence as to release the drawer, it was held that the drawer's giving a duplicate draft, to enable the payee to collect, if possible, from the drawee, did not revive his liability. Accordingly, an oral contract that the drawer should not be liable on such duplicate draft is enforceable.² If A has drawn a draft for B's accommodation, and B has deposited such draft for collection in bank X, and X has cashed B's checks in reliance upon such draft, extrinsic evidence is admissible in an action by X against A and B to show the relationship of the parties to the instrument.³

¹² *Brown v. People's Bank*, 127 Ark. 486, 192 S. W. 900.

See also, *Haupt v. Vint*, 68 W. Va. 657, 34 L. R. A. (N.S.) 518, 70 S. E. 702.

¹³ *Reed v. Rogers*, 134 Ark. 528, 204 S. W. 973; *Pope v. Hoefs*, 140 Minn. 443, 168 N. W. 584.

¹⁴ *Bulkeley v. House*, 62 Conn. 459, 21 L. R. A. 247, 26 Atl. 352.

¹⁵ *Mann v. Mann*, 119 Va. 630, 89 S. E. 897.

¹⁶ *Mann v. Mann*, 119 Va. 630, 89 S. E. 897.

¹⁷ *Title Guaranty & Surety Co. v. Lippincott*, 252 Pa. St. 112, 97 Atl. 201.

¹ *Leadbitter v. Farrow*, 5 Maule & S. 345; *Citizens' Bank v. Millett*, 103 Ky. 1, 82 Am. St. Rep. 546, 44 L. R. A. 664, 44 S. W. 366; *Pentz v. Stanton*, 10 Wend. (N. Y.) 270, 25 Am. Dec. 558, *Bryan v. Duff*, 12 Wash. 233, 50 Am. St. Rep. 889, 40 Pac. 936.

² *Bank v. Farnsworth*, 7 N. D. 6, 38 L. R. A. 843, 72 N. W. 901.

³ *Lyon County State Bank v. Schaefer*, 102 Kan. 868, 171 Pac. 1159.

§ 2200. Indorsement—Regular indorsement held to be complete contract. Whether a contract of indorsement can be varied by contemporaneous parol agreement depends on whether it is looked upon as a complete contract. A regular indorsement, that is, an indorsement by one in the chain of title, is held in many jurisdictions to be a complete contract, and hence within the parol evidence rule.¹ Where this view obtains a parol agreement that an indorsement was without recourse;² or an oral agreement that an

¹ **United States.** *United States Bank v. Dunn*, 31 U. S. (6 Pet.) 51, 8 L. ed. 316; *Martin v. Cole*, 104 U. S. 30, 26 L. ed. 647.

Alabama. *People's Bank v. Moore*, — Ala. —, 78 So. 789.

California. *Citizens' Bank v. Jones*, 121 Cal. 30, 53 Pac. 354.

Connecticut. *Schine v. Johnson*, 92 Conn. 500, 103 Atl. 974.

Illinois. *Skelton v. Dustin*, 92 Ill. 49; *Hately v. Pike*, 162 Ill. 241, 53 Am. St. Rep. 304, 44 N. E. 441.

Iowa. *Shaw v. Jacobs*, 89 Ia. 713, 719; 48 Am. St. Rep. 411, 21 L. R. A. 440, 55 N. W. 333, 56 N. W. 684.

Kansas. *Blair v. McQuary*, 100 Kan. 203, 162 Pac. 1173 [judgment modified on rehearing, *Blair v. McQuary*, 100 Kan. 203, 164 Pac. 262].

Minnesota. *Kern v. Von Phul*, 7 Minn. 426, 82 Am. Dec. 105; *Farwell v. Trust Co.*, 45 Minn. 405, 22 Am. St. Rep. 742, 48 N. W. 326; *Porter v. Grain Co.*, 78 Minn. 210, 80 N. W. 965; *Giltner v. Quirk*, 131 Minn. 472, 155 N. W. 760; *Lake Harriet State Bank v. Miller*, 138 Minn. 481, 164 N. W. 989.

Mississippi. *Hawkins v. Shields*, 100 Miss. 739, 4 A. L. R. 760, 57 So. 4.

New Jersey. *Chaddock v. Vanness*, 35 N. J. L. 517, 10 Am. Rep. 256.

New York. *Fassin v. Hubbard*, 53 N. Y. 465.

Oklahoma. *Clark v. Sallaska*, — Okla. —, 4 A. L. R. 746, 174 Pac. 505 (obiter, as evidence allowed under special circumstances).

Texas. *Cresap v. Manor*, 63 Tex. 485.

Virginia. *Citizens' National Bank v. Walton*, 96 Va. 435, 31 S. E. 890; *River-*

view Land Co. v. Dance, 98 Va. 239, 35 S. E. 720.

Washington. *Holt Mfg. Co. v. Brotherton*, 91 Wash. 354, 157 Pac. 849.

Wisconsin. *Union Bank v. Commercial Securities Co.*, 163 Wis. 470, 157 N. W. 510.

This result has been reached under the Negotiable Instruments Law. *Guaranty Investment Co. v. Gamble*, 102 Kan. 791, 171 Pac. 1152; *Meyers Co. v. Battle*, 170 N. Car. 168 [subnominee, *Myers Co. v. Battle*, 86 S. E. 1034].

"It is not competent to vary a written contract by parol evidence of what occurred between the parties prior to or contemporaneous with its making, and the law in that respect applies to the contract relations between the payee of a note and one who places his name thereon, in form, as an indorser, no fraud being practiced in securing the indorsement." *Union Bank v. Commercial Securities Co.*, 163 Wis. 470, 157 N. W. 510 [citing, *Charles v. Denis*, 42 Wis. 56; *Davy v. Kelley*, 66 Wis. 452, 29 N. W. 232; *Halbach v. Trester*, 102 Wis. 530, 78 N. W. 759, and *Hackley National Bank v. Barry*, 139 Wis. 96, 120 N. W. 275].

² **United States.** *United States Bank v. Dunn*, 31 U. S. (6 Pet.) 51, 8 L. ed. 316; *Martin v. Cole*, 104 U. S. 30, 26 L. ed. 647.

California. *Citizens' Bank v. Jones*, 121 Cal. 30, 53 Pac. 354.

District of Columbia. *Randle v. Coke Co.*, 15 D. C. App. 357.

Illinois. *Courtney v. Hogan*, 93 Ill. 101.

Minnesota. *Clarke v. Patrick*, 60 Minn. 269, 62 N. W. 284; *Lake Harriet*

endorser who sold an instrument for less than its face value should not be called upon to pay the same;³ or that a blank endorsement was to have no legal effect;⁴ or that indorsement was made only to pass title;⁵ or that the indorser was merely a guarantor,⁶ or a witness;⁷ or that he indorsed for identification only;⁸ or that he only guaranteed a deficiency after applying certain securities;⁹ or that he entered into an oral contract of guaranty;¹⁰ or that he was a maker,¹¹ is in each case unenforceable.

Even in jurisdictions which hold that a regular indorsement is a complete contract, there is a conflict as to whether a contemporaneous oral waiver of demand and notice is enforceable.¹² If waiver of demand and notice is stamped on the back of a note

State Bank v. Miller, 138 Minn. 481, 164 N. W. 989.

Missouri. Lewis v. Dunlap, 72 Mo. 174.

New York. Fassin v. Hubbard, 55 N. Y. 465.

Wisconsin. Charles v. Denis, 42 Wis. 56, 24 Am. Rep. 383.

³Decided under the Negotiable Instruments Law. Guaranty Investment Co. v. Gamble, 102 Kan. 791, 171 Pac. 1152.

⁴Schine v. Johnson, 92 Conn. 500, 103 Atl. 974.

⁵Iowa Valley State Bank v. Sigstad, 96 Ia. 491, 65 N. W. 407; Blair v. McQuary, 100 Kan. 203, 162 Pac. 1173 [judgment modified on rehearing, Blair v. McQuary, 100 Kan. 203, 164 Pac. 262].

⁶Hately v. Pike, 162 Ill. 241, 53 Am. St. Rep. 304, 44 N. E. 441; Howe v. Merrill, 59 Mass. (5 Cush.) 80; Youngberg v. Nelson, 51 Minn. 172, 38 Am. St. Rep. 497, 53 N. W. 629.

⁷Stack v. Beach, 74 Ind. 571, 39 Am. Rep. 113; Cochran v. Atchison, 27 Kan. 728; Prescott Bank v. Caverly, 73 Mass. (7 Gray) 217, 66 Am. Dec. 473; Bowler v. Braun, 63 Minn. 32, 56 Am. St. Rep. 449, 65 N. W. 124.

⁸Alabama National Bank v. Rivers, 116 Ala. 1, 67 Am. St. Rep. 95, 22 So. 580.

⁹Adams v. Wallace, 119 Cal. 67, 51 Pac. 14.

¹⁰Johnson v. Glover, 121 Ill. 283, 12 N. E. 257 [overruling, Worden v. Salter, 90 Ill. 160].

¹¹Finley v. Green, 85 Ill. 535; Vore v. Hurst, 13 Ind. 551, 74 Am. Dec. 268; Porter v. Grain Co., 78 Minn. 210, 80 N. W. 965; Harnett v. Holdrege, 73 Neb. 570, 119 Am. St. Rep. 905, 103 N. W. 277.

So under the Negotiable Instruments Law. Myers Co. v. Battle, 170 N. Car. 168, 86 S. E. 1034 [citing, Perry v. Taylor, 148 N. Car. 362, 62 S. E. 423, and Houser v. Faysoux, 168 N. Car. 1, 83 S. E. 692].

¹²That it is enforceable. Markland v. McDaniel, 51 Kan. 350, 20 L. R. A. 96, 32 Pac. 1114; Taunton Bank v. Richardson, 22 Mass. (5 Pick.) 436; Dye v. Scott, 35 O. S. 194, 35 Am. Rep. 604; In re Marquardt's Estate, 251 Pa. St. 73, 95 Atl. 917.

That it is not enforceable. Annville National Bank v. Kettering, 106 Pa. St. 531, 51 Am. Rep. 536; Goldman v. Davis, 23 Cal. 256; Farwell v. Trust Co., 45 Minn. 495, 22 Am. St. Rep. 742, 48 N. W. 326; Rodney v. Wilson, 67 Mo. 125, 29 Am. Rep. 499; Holt Mfg. Co. v. Brotherton, 91 Wash. 354, 157 Pac. 849.

above the signatures of the indorsers, evidence of an oral agreement that demand and notice should not be waived is unenforceable.¹³ If the words "without recourse" appear upon the back of the note under the signature of an endorser, extrinsic evidence is admissible to show that such provision was intended to apply to the contract of such endorser,¹⁴ especially under a statute which permits a qualified endorsement without adding the words "without recourse."¹⁵ Even in jurisdictions which hold that a blank indorsement is complete, a memorandum over the indorser's signature may show that some special contract was entered into and that this contract was not completely set forth. Thus a memorandum, "Sold one-half this note to A," above the signature of the alleged indorser, may show that the contract was not one of indorsement, but a mere memorandum of A's interest.¹⁶ The contract between the indorsers themselves is often regarded as subject to explanation by extrinsic evidence.¹⁷ It is said that while it is the general rule that a blank indorsement can not be modified by extrinsic evidence, an exception to such rule arises "when any fact or transaction raises an equity between endorser and endorsee, and shows it to be inequitable to enforce the written contract."¹⁸ An oral agreement by which the indorser agreed to collect the instrument and agreed to waive delay, was accordingly held to be admissible.¹⁹ As between the indorsers themselves, extrinsic evidence is admissible to show the order of their indorsement.²⁰ Accordingly, if A has drawn a bill of exchange payable to his own order, and has endorsed it, and B's signature appears upon the back of the instrument above A's endorsement, and if it is placed there before delivery, extrinsic evidence is admissible to show that he intended to become surety for the acceptor and to undertake a liability to the indorser.²¹ Extrinsic evidence is admissible to show that accommodation indorsers had entered into an agreement fixing the pro-

¹³ *Farmers' Exchange Bank v. Mining Co.*, 129 Cal. 263, 61 Pac. 1077.

¹⁴ *Leahmer v. McCollough*, 90 Kan. 451, 162 Pac. 297; *Goolrick v. Wallace*, 154 Ky. 596, 49 L. R. A. (N.S.) 789, 157 S. W. 920.

¹⁵ *Goolrick v. Wallace*, 154 Ky. 596, 49 L. R. A. (N.S.) 789, 157 S. W. 920.

¹⁶ *Hathaway v. Rogers*, 112 Ia. 638, 84 N. W. 674.

¹⁷ *Moll v. Roth Co.*, 77 Or. 593, 152 Pac. 235; *Plumley v. First National Bank*, 76 W. Va. 635, 87 S. E. 94.

¹⁸ Decided under Negotiable Instruments Law. *Moll v. Roth Co.*, 77 Or. 593, 152 Pac. 235.

¹⁹ Decided under Negotiable Instruments Law. *Moll v. Roth Co.*, 77 Or. 593, 152 Pac. 235.

²⁰ *Trego v. Cunningham*, 267 Ill. 367, 108 N. E. 350; *Schneider v. Mueller*, 82 N. J. L. 503, 81 Atl. 863; *Haddock v. Haddock*, 192 N. Y. 499, 19 L. R. A. (N.S.) 136, 85 N. E. 682.

²¹ *Haddock v. Haddock*, 192 N. Y. 499, 19 L. R. A. (N.S.) 136, 85 N. E. 682.

portions of their respective liabilities.²² An indorser may show that he was an accommodation indorser.²³ If the note is non-negotiable the oral agreement under which the promisee who signs as a first indorser would, had the note been negotiable, and another person who signs as a second indorser would, may be enforced.²⁴

Even when a contemporaneous oral contract can not modify a blank indorsement, a subsequent oral contract, made when the indorser transfers for the second time a note which he has indorsed before, and to which he has regained title, may modify the effect of the former blank indorsement and the second delivery.²⁵

§ 2201. Regular indorsement held to be incomplete. In other jurisdictions a regular indorsement is treated as an incomplete contract, or as some courts express it, only evidence that some contract has been entered into. Where such view obtains extrinsic evidence is admissible to show the terms of the contract.¹ Thus a parol contract that the indorsement was without recourse,² or that the indorser was a joint maker,³ or that the indorsee is to exhaust certain collateral before he looks to the indorser for payment,⁴ is enforceable where this rule obtains.

Even where a blank indorsement is held to be incomplete, a memorandum over the signature may show a complete written contract. Extrinsic evidence of the terms of the contract is then inadmissible.⁵

²² *Plumley v. First National Bank*, 76 W. Va. 635, 87 S. E. 94.

²³ *Meyers Co. v. Battle*, 170 N. Car. 168 [sub nomine, *Myers Co. v. Battle*, 86 S. E. 1034].

²⁴ *Young v. Sehon*, 53 W. Va. 127, 62 L. R. A. 499, 44 S. E. 136.

²⁵ *Clark v. Sallaska*, — Okla. —, 4 A. L. R. 746, 174 Pac. 505.

¹ *Georgia*. *Winnebago National Bank v. Woodliff*, 145 Ga. 239, 88 S. E. 973 (under § 5796, Code of 1910).

Iowa. *First National Bank v. Crabtree*, 86 Ia. 731, 62 N. W. 559.

Kansas. *Northrup National Bank v. Yates Center National Bank*, 98 Kan. 563, 159 Pac. 403.

Louisiana. *Ragsdale v. Ragsdale*, 105 La. 405, 29 So. 906.

Maine. *Roads v. Webb*, 91 Me. 406, 64 Am. St. Rep. 246, 40 Atl. 128.

Nebraska. *Holmes v. Bank*, 38 Neb. 326, 41 Am. St. Rep. 733, 56 N. W. 1011; *Corbett v. Fetzer*, 47 Neb. 269,

66 N. W. 417; *Jaster v. Currie*, 69 Neb. 4, 94 N. W. 995.

North Carolina. *Coffin v. Smith*, 128 N. Car. 252, 38 S. E. 864; *Sykes v. Everett*, 167 N. Car. 600, 4 A. L. R. 751, 83 S. E. 585.

Tennessee. *Taylor v. French*, 70 Tenn. (2 Lea) 257, 31 Am. Rep. 609.

² *Pritchett v. Hape* (Ky.), 51 S. W. 608; *Cake v. Bank*, 116 Pa. St. 264, 2 Am. St. Rep. 600, 9 Atl. 302.

By statute. *Dickinson v. Burke*, 8 N. D. 118, 77 N. W. 279.

³ *Barger v. Farnham*, 130 Mich. 487, 90 N. W. 281.

⁴ *Sykes v. Everett*, 167 N. Car. 600, 4 A. L. R. 751, 83 S. E. 585.

⁵ *Harrison v. McKim*, 18 Ia. 485; *Leary v. Blanchard*, 48 Me. 269; *United States National Bank v. Geer*, 55 Neb. 462, 70 Am. St. Rep. 390, 41 L. R. A. 444, 75 N. W. 1088 [reversing on rehearing, 53 Neb. 67, 41 L. R. A. 439, 73 N. W. 266].

§ 2202. Indorsement without recourse. An indorsement without recourse has been held not to be a complete contract.¹ Hence, an oral contract relieving the indorser for liability even for forgery is enforceable.² In other jurisdictions an indorsement "without recourse" constitutes a complete contract, and an oral guaranty can not be shown.³ Under either theory an oral agreement that an indorsement without recourse should have the legal effect of an unconditional indorsement contradicts the terms of the writing and is unenforceable.⁴

§ 2203. Irregular indorsers. An irregular indorsement, that is, an indorsement by one not in the chain of title, may be explained by parol in many jurisdictions.¹ Such indorser may be shown to be a joint maker,² or the real debtor,³ or it may be shown that a new note secured by mortgage was to have been given when the first note was half paid,⁴ or that successive blank indorsers were co-indorsers.⁵ In other jurisdictions the law regards the liability of an irregular indorser as so clear and certain that oral evidence of the real contract is inadmissible, though there is no harmony among the different jurisdictions as to what that liability is.⁶

¹ *Carroll v. Nodine*, 41 Or. 412, 93 Am. St. Rep. 743, 61 Pac. 51.

² *Carroll v. Nodine*, 41 Or. 412, 93 Am. St. Rep. 743, 69 Pac. 51.

³ *Youngberg v. Nelson*, 51 Minn. 172, 38 Am. St. Rep. 497, 53 N. W. 629.

⁴ *Cross v. Hollister*, 47 Kan. 652, 28 Pac. 693.

⁵ *Alabama*. *Carter v. Long*, 125 Ala. 280, 28 So. 74.

Illinois. *Kingsland v. Koeppel*, 137 Ill. 344, 13 L. R. A. 649, 28 N. E. 48; *Kistner v. Peters*, 223 Ill. 607, 114 Am. St. Rep. 362, 7 L. R. A. (N.S.) 400, 79 N. E. 311.

Kansas. *Fullerton v. Hill*, 48 Kan. 558, 18 L. R. A. 33, 29 Pac. 583.

Ohio. *Ewan v. Brooks-Waterfield Co.*, 55 O. S. 596, 60 Am. St. Rep. 719, 35 L. R. A. 786, 45 N. E. 1094.

Missouri. *Herndon v. Lewis*, 175 Mo. 116, 74 S. W. 976.

New Jersey. *Elliott v. Moreland*, 69 N. J. L. 216, 54 Atl. 224.

⁶ *Kistner v. Peters*, 223 Ill. 607, 114 Am. St. Rep. 362, 7 L. R. A. (N.S.) 400, 79 N. E. 311; *Commercial National*

Bank v. Atkinson, 62 Kan. 775, 64 Pac. 617; *Richardson v. Foster*, 73 Miss. 12, 55 Am. St. Rep. 481, 18 So. 573; *Young v. Sehon*, 53 W. Va. 127, 97 Am. St. Rep. 970, 44 S. E. 136.

³ *Witherow v. Slayback*, 158 N. Y. 649, 70 Am. St. Rep. 507, 53 N. E. 681. (So the directors of the indorsing corporation are liable by statute for not including such note in their report filed after the note was given, but before it fell due.)

⁴ *Fullerton v. Hill*, 48 Kan. 558, 18 L. R. A. 33, 29 Pac. 583.

⁵ *Sloan v. Gibbes*, 56 S. Car. 480, 76 Am. St. Rep. 559, 35 S. E. 408 [citing, *Phillips v. Preston*, 49 U. S. (5 How.) 278, 12 L. ed. 152; *Graves v. Johnson*, 48 Conn. 160, 40 Am. Rep. 162; *Holmes v. Bank*, 38 Neb. 326, 41 Am. St. Rep. 733, 56 N. W. 1011; *Taylor v. French*, 70 Tenn. (2 Lea) 257, 31 Am. Rep. 609]; *Brewer v. Woodward*, 54 Vt. 581, 41 Am. Rep. 857.

⁶ Indorser—by statute. *Spencer v. Allerton*, 60 Conn. 410, 13 L. R. A. 806, 22 Atl. 778 (can not be shown to be guarantor).

§ 2204. Purpose of indorsement. As in the case of other assignments of title, the purpose for which the indorsement is given may be shown, as long as the legal effect of the indorsement is not contradicted.¹ Thus an indorsement in blank may be shown to be for collection only,² or as collateral security.³ However, a blank indorsement to a bank, credit for the amount of the instrument being given to the indorser, can not be shown to be for collection only.⁴ If the indorsement shows upon its face the purpose of the indorsement, extrinsic evidence is not admissible to contradict the purpose which is therein expressed.⁵ An indorsement for collection can not be shown by parol to have been intended as an absolute indorsement.⁶ If an indorsement purports to be an indorsement for collection, extrinsic evidence is inadmissible to show that the indorsee is the actual owner of such instrument in whole or in part.⁷ If a note is indorsed to A, or order, and nothing

Second indorser. *Temple v. Baker*, 125 Pa. St. 634, 11 Am. St. Rep. 926, 3 L. R. A. 709, 17 Atl. 516. (Oral evidence inadmissible to show a guarantor and hence liable to payee.)

Co-maker, if indorsement before delivery. *Dennis v. Jackson*, 57 Minn. 286, 47 Am. St. Rep. 603, 59 N. W. 198. (Can not be shown to be indorser.)

¹ *Johnston v. Schnabaum*, 86 Ark. 82, 17 L. R. A. (N.S.) 838, 109 S. W. 1163; *Citizens' State Bank v. Tessman*, 121 Minn. 34, 45 L. R. A. (N.S.) 606, 140 N. W. 178; *Howell v. McCarty*, 77 W. Va. 695, 88 S. E. 181.

The last qualification, of course, applies in jurisdictions where an indorsement is held to be a complete contract, or else to indorsements in full which show the purpose for which they were given. *Lawrence v. Bank*, 6 Conn. 521; *Hazzard v. Duke*, 64 Ind. 220; *Barker v. Prentiss*, 6 Mass. 430.

² *Arkansas*. *Johnston v. Schnabaum*, 86 Ark. 82, 17 L. R. A. (N.S.) 838, 109 S. W. 1163.

California. *McPherson v. Weston*, 85 Cal. 90, 24 Pac. 733.

Illinois. *Scammon v. Adams*, 11 Ill. 575.

Kentucky. *Armstrong v. Bank*, 90 Ky. 431, 9 L. R. A. 553, 14 S. W. 411.

Minnesota. *Citizens' State Bank v. Tessman*, 121 Minn. 34, 45 L. R. A. (N.S.) 606, 140 N. W. 178.

West Virginia. *Howell v. McCarty*, 77 W. Va. 695, 88 S. E. 181.

³ *Hazzard v. Duke*, 64 Ind. 220.

⁴ *Shaw v. Jacobs*, 89 Ia. 713, 719; 18 Am. St. Rep. 411, 21 L. R. A. 440, 55 N. W. 333, 56 N. W. 684.

⁵ *Syracuse Third National Bank v. Clark*, 23 Minn. 263; *United States National Bank v. Geer*, 55 Neb. 462, 70 Am. St. Rep. 390, 41 L. R. A. 444, 75 N. W. 1088 [reversing on rehearing, 53 Neb. 67, 41 L. R. A. 439, 73 N. W. 266]; *Smith v. Bayer*, 46 Or. 143, 114 Am. St. Rep. 858, 79 Pac. 497; *First National Bank v. McCullough*, 50 Or. 508, 17 L. R. A. (N.S.) 1105, 93 Pac. 366.

⁶ *Syracuse Third National Bank v. Clark*, 23 Minn. 263; *United States National Bank v. Geer*, 55 Neb. 462, 70 Am. St. Rep. 390, 41 L. R. A. 444, 75 N. W. 1088 [reversing on rehearing, 53 Neb. 67, 41 L. R. A. 439, 73 N. W. 266].

⁷ *United States National Bank v. Geer*, 55 Neb. 462, 70 Am. St. Rep. 390, 41 L. R. A. 444, 75 N. W. 1088 [reversing on rehearing, 53 Neb. 67, 41 L. R. A. 439, 73 N. W. 266]; *Smith v. Bayer*, 46 Or. 143, 114 Am. St. Rep. 858, 79 Pac. 497.

appears on the indorsement to indicate that A was the cashier of a bank, extrinsic evidence is inadmissible to show that such indorsement was made to A for the purpose of passing title to the bank.⁸ If A has indorsed a negotiable instrument in blank to the X bank, extrinsic evidence is admissible to show that A took such instrument as the agent of the X bank and that he indorsed it as an accommodation endorser to vest title in the bank.⁹ "Pay to the order of R. C. O., cashier, for account," of a given bank, shows an indorsement for collection only. Extrinsic evidence is inadmissible to show that the indorsement was an absolute transfer.¹⁰

§ 2205. Contract signed by agent—Evidence to relieve agent from liability. If a written contract with B, executed by A on behalf of X, is signed by A in such form as to bind him personally, the question of the right of the parties to the contract to show that A was the agent of X and that such contract was intended to bind X, depends on the nature of the contract and the purpose for which A's agency is to be shown. If B sues on the contract and A seeks to show that he was agent and X was principal in order to avoid liability, such evidence is inadmissible.¹ If A signs his own name, without any addition thereto suggesting agency, the only effect of evidence showing A's agency and thereby relieving A from liability would be to contradict the terms of the contract. This rule applies to negotiable contracts such as notes² and drafts, so that the agency of an indorser who signs his individual name, can not be shown to relieve him,³ and the fact that a number of persons who indorsed a note which was signed by a church intended to indorse as committeemen of such church, and not in their personal capacity, can

⁸ Decided under Negotiable Instruments Law. *First National Bank v. McCullough*, 50 Or. 508, 17 L. R. A. (N. S.) 1105, 93 Pac. 366.

⁹ *First National Bank v. Reinman*, 93 Ark. 376, 28 L. R. A. (N.S.) 530, 125 S. W. 443.

¹⁰ *United States National Bank v. Geer*, 55 Neb. 462, 70 Am. St. Rep. 390, 41 L. R. A. 444, 75 N. W. 1088 [reversing on rehearing, 53 Neb. 67, 41 L. R. A. 439, 73 N. W. 266].

¹ *United States. American Alkali Co. v. Bean*, 125 Fed. 823.

Illinois. Vail v. Ins. Co., 192 Ill. 567, 61 N. E. 651.

Maine. Hancock v. Fairfield, 30 Me. 299.

Michigan. Cooper v. Sonk, 201 Mich. 655, 167 N. W. 842; *Vaughan-Robertson Drug Co. v. Grimes-Mills Drug Co.*, 173 N. Car. 502, 92 S. E. 376.

Utah. Roe v. Schweitzer, — Utah, —, 184 Pac. 938.

² *Lonnon v. Batchman*, 103 Kan. 266, 173 Pac. 415; *Sparks v. Despatch Co.*, 104 Mo. 531, 24 Am. St. Rep. 351, 12 L. R. A. 714, 15 S. W. 417; *Shuey v. Adair*, 18 Wash. 188, 63 Am. St. Rep. 879, 39 L. R. A. 473, 51 Pac. 388.

³ *Condon v. Pearce*, 43 Md. 83.

not be shown to relieve them.⁴ It also applies to non-negotiable contracts,⁵ such as a contract of sale,⁶ a contract of subscription to corporate stock,⁷ a contract of warranty,⁸ or a contract on behalf of corporation to be formed, signed so as to bind the promoters individually,⁹ or a contract on behalf of an existing corporation, signed individually by the directors so as to bind them personally.¹⁰

§ 2206. Addition of word "agent" held not to make contract ambiguous. If a contract is signed by A, with the addition to his signature of the word "agent" or some other word importing agency, but the language of the contract is such as to bind A personally, A is held personally liable in many jurisdictions, and the contract is not looked upon as ambiguous. Where this view prevails, A can not introduce extrinsic evidence that he was acting solely on behalf of his principal to relieve himself from liability.¹ This rule applies to negotiable contracts. Thus where a note was signed, "Mattress Co., John Knapp, Pt.," and begins, "We promise";² or where a note begins, "We promise," and is signed, "Canning Co., H. Wessel, Sec'y, Hartman, Pres.";³ or begins, "I promise," and is signed, "A, agent,"⁴ or "trustee";⁵ or begins, "We jointly and severally promise to pay to X in offi-

⁴ Cooper v. Sonk, 201 Mich. 655, 167 N. W. 842.

⁵ Chandler v. Coe, 54 N. H. 561; Meyer v. Redmond, 205 N. Y. 478, 41 L. R. A. (N.S.) 675, 98 N. E. 906; Vaughan-Robertson Drug Co. v. Grimes-Mills Drug Co., 173 N. Car. 502, 92 S. E. 376; Roe v. Schweitzer, — Utah, —, 184 Pac. 938.

⁶ Meyer v. Redmond, 205 N. Y. 478, 41 L. R. A. (N.S.) 675, 98 N. E. 906; Bulwinkle v. Cramer, 27 S. Car. 376, 13 Am. St. Rep. 645, 3 S. E. 776.

⁷ Vaughan-Robertson Drug Co. v. Grimes-Mills Drug Co., 173 N. Car. 502, 92 S. E. 376.

⁸ Cream City Glass Co. v. Friedlander, 84 Wis. 53, 36 Am. St. Rep. 895, 21 L. R. A. 135, 54 N. W. 28.

⁹ De Remer v. Brown, 165 N. Y. 410, 59 N. E. 129.

Contra, Lummus Cotton Gin Co. v. Cave, 109 S. Car. 213, 96 S. E. 94.

¹⁰ Lonnon v. Batchman, 103 Kan. 266, 173 Pac. 415.

¹ Moragne v. Machine Works, 124 Ala. 537, 27 So. 240; Lawrence County Bank v. Arndt, 69 Ark. 406, 65 S. W. 1052; Collins v. Buckeye Insurance Co., 17 O. S. 215, 93 Am. Dec. 612; Costello v. Bridges, 81 Wash. 192, L. R. A. 1915A, 853, 142 Pac. 687.

² Matthews v. Mattress Co., 87 Ia. 246, 19 L. R. A. 676, 54 N. W. 225.

³ McCandless v. Canning Co., 78 Ia. 161, 16 Am. St. Rep. 429, 4 L. R. A. 396, 42 N. W. 635 (or is signed by the name of the company, A, "Mgr.," B, "Pres."); Albany Furniture Co. v. Bank, 17 Ind. App. 531, 60 Am. St. Rep. 178, 47 N. E. 227.

⁴ Collins v. Ins. Co., 17 O. S. 215, 93 Am. Dec. 612.

⁵ Riordan v. Thornsby, 178 Ky. 321, 198 S. W. 920; Megowan v. Peterson, 173 N. Y. 1, 65 N. E. 738.

cial capacity," and is signed by the individual names of the makers, with the addition, "Whitfield Road Committee";⁶ or is signed, "O. O. Prescott, Pres.," of a given corporation;⁷ or is signed by several, who add, "Board of Business Managers,"⁸ or "as stockholders";⁹ or where a draft is drawn by "A, Treas.,"¹⁰ or by "A, agent for B";¹¹ or is indorsed, "A, agent";¹² or where a draft is accepted, "H. P. Eells, treasurer";¹³ or by "A, agent, K. & O. C. Co.,"¹⁴ extrinsic evidence is inadmissible to relieve the party so signing from personal liability. If a bond is signed by A, B and C, "board of commissioners" of a specified public corporation, extrinsic evidence is not admissible to show that they intended to bind themselves in their representative capacity and not personally.¹⁵

§ 2207. Addition of word "agent" held to make contract ambiguous. In other jurisdictions the addition of "agent" or some similar word to the signature is held to make it ambiguous, whether personal liability is intended or not, and to make extrinsic evidence of the intention of the parties admissible.¹ Thus the addition, "Sec'y Enid Town Co.,"² "pt.,"³ "pres.,"⁴ "agt.,"⁵ or "exr.,"⁶

⁶ *Savage v. Rix*, 9 N. H. 263.

⁷ *Prescott v. Hixon*, 22 Ind. App. 139, 72 Am. St. Rep. 291, 53 N. E. 391.

⁸ *Richmond, etc., Works v. Moragne*, 119 Ala. 80, 24 So. 834.

⁹ *Savings Bank v. Market Co.*, 122 Cal. 28, 54 Pac. 273.

¹⁰ *Bank v. Cook*, 38 O. S. 442.

¹¹ *Tannatt v. Bank*, 1 Colo. 278, 9 Am. Rep. 156; *Sturdivant v. Hull*, 59 Me. 172, 8 Am. Rep. 409.

¹² *Barnhisel v. Bank*, 14 Ohio C. C. 124.

Contra, *Babcock v. Beman*, 11 N. Y. 200.

¹³ *Eells v. Shea*, 20 Ohio C. C. 527, 11 Ohio C. D. 304.

¹⁴ *Robinson v. Bank*, 44 O. S. 441, 58 Am. Rep. 829, 8 N. E. 583.

¹⁵ *Costello v. Bridges*, 81 Wash. 192, L. R. A. 1915A, 853, 142 Pac. 687.

¹ *Alabama*. *Lutz v. Van Heynigen Brokerage Co.*, — Ala. —, 75 So. 284.

Georgia. *Raleigh & G. R. Co. v. Pullman Co.*, 122 Ga. 700, 50 S. E. 1008.

Iowa. *Farmers' National Bank v. Hatcher*, 176 Ia. 259, 157 N. W. 876.

Kentucky. *Riordan v. Thornsberry*, 178 Ky. 324, 198 S. W. 920.

Michigan. *Keidan v. Winegar*, 95 Mich. 430, 20 L. R. A. 705, 54 N. W. 901.

New Mexico. *Ellis v. Stone*, 21 N. M. 730, L. R. A. 1916F, 1223, 158 Pac. 480.

Tennessee. *Powell v. Construction Co.*, 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S. W. 691.

Texas. *Heffron v. Pollard*, 73 Tex. 96, 15 Am. St. Rep. 764, 11 S. W. 165.

Washington. *Richardson v. Hunter*, 88 Wash. 375, 153 Pac. 325.

² *Janes v. Bank*, 9 Okla. 546, 60 Pac. 290 [expressly overruling, *Keokuk, etc., Co. v. Mfg. Co.*, 5 Okla. 32, 47 Pac. 484].

³ *Small v. Elliott*, 12 S. D. 570, 76 Am. St. Rep. 630, 82 N. W. 92.

⁴ *Farmers' National Bank v. Hatcher*, 176 Ia. 259, 157 N. W. 876.

⁵ *Keidan v. Winegar*, 95 Mich. 430, 20 L. R. A. 705, 54 N. W. 901; *Clark v. Talbott*, 72 W. Va. 46, 44 L. R. A. (N.S.) 731, 77 S. E. 523.

⁶ *Schmittler v. Simon*, 114 N. Y. 176, 11 Am. St. Rep. 621, 21 N. E. 162.

have been held to make extrinsic evidence admissible. So where a note is signed, "U. M. Benham, President Odd Fellows' Hall Association; A. T. Lea, secretary," it is held proper to admit evidence to show that the note is the note of the association.⁷ So where a note given by a corporation was signed on the back by the individual names of the directors, with the addition, "Board of Directors," extrinsic evidence is admissible.⁸ A signature, "H. H. Gardner, cashier," has been held to import a personal liability, but open to so much doubt that extrinsic evidence was admissible.⁹

In some jurisdictions an instrument in which the official character of the promisor is set forth in the instrument, and individual signature is affixed, is so far ambiguous as to make extrinsic evidence admissible to relieve the party so signing from personal liability.¹⁰ Thus where the instrument began, "We, the president and directors" of a designated company, and was signed individually, extrinsic evidence was admitted to show that no personal liability was intended, but only the liability of the corporation of which such persons were officials.¹¹ The heading or contents of the instrument may help to make the question of personal liability ambiguous. Thus a note headed, "Midland Steel Co.," and signed, "R. J. Beatty, president," is so ambiguous that extrinsic evidence is admissible.¹² A written contract, at the top of which appears the words, "X, bank, A. Pres.," and which is signed, "A. Pres.," is so ambiguous that extrinsic evidence is admissible to show whether or not A was bound personally thereby.¹³ If a note begins, "We promise," and is signed, "X Company, by A. direct.," which is followed by the signatures of "B, direct.," and "C, direct.," each on a separate line below the signature of A, extrinsic evidence is admissible to show whether B and C intended a personal liability or not.¹⁴ A contract which is signed, "X Works,

⁷ Benham v. Smith, 53 Kan. 495, 36 Pac. 997.

⁸ Kline v. Bank, 50 Kan. 91, 34 Am. St. Rep. 107, 18 L. R. A. 533, 31 Pac. 688.

⁹ Gardner v. Cooper, 9 Kan. App. 587, 60 Pac. 540 [affirming on rehearing, 58 Pac. 230; citing, Benham v. Smith, 53 Kan. 495, 36 Pac. 997; Kline v. Bank, 50 Kan. 91, 18 L. R. A. 533, 31 Pac. 688; Bank v. Boardman, 46 Minn. 293, 48 N. W. 1116; Rowell v. Alsen, 32 Minn. 288, 20 N. W. 227].

¹⁰ Armstrong v. Andrews, 109 Mich. 537, 67 N. W. 567; W. C. Dean Jewelry Co. v. Storm, — Okla. —, 166 Pac. 1046.

¹¹ Haile v. Peirce, 32 Md. 327, 3 Am. Rep. 139.

¹² Second National Bank v. Steel Co., 155 Ind. 581, 52 L. R. A. 307, 58 N. E. 833.

¹³ Ellis v. Stoné, 21 N. M. 730, L. R. A. 1916F, 1228, 158 Pac. 480.

¹⁴ Denman v. Brenneman, 48 Okla. 506, L. R. A. 1915E, 1047, 149 Pac. 1105.

by A and B, trustees," may be explained by reference to the articles of such organization for the purpose of showing that A and B are the proper persons in whose name to bring an action.¹⁵ But in Indiana, while a note signed by the name of the corporation, followed by the name of one officer, imports signature as agent only, a signature of the corporate name followed by the names of two officials, imports personal liability so clearly that extrinsic evidence is inadmissible, even if "Mngr." and "Pres." are added to the names.¹⁶ If one of the memoranda of a written contract is signed, "X, by A," and another memorandum is signed, "A," extrinsic evidence is admissible to show that A signed as agent for X, and did not intend to incur personal liability.¹⁷ A contract consisting of writings on two pieces of paper, each headed, "Neubauer Decorating Company," one signed, "D. E. L., mfg. agt. and supt. of contracts," and the other, "Neubauer Decorating Company, D. E. L., supt. of contracts," may be explained by extrinsic evidence to show that no personal liability was intended.¹⁸

§ 2208. Extrinsic evidence to enable principal to sue. If the real principal, X, wishes to sue upon the contract, the parol evidence rule does not prevent him from showing that A was his agent and that X is the real party adversary to B.¹ Such evidence is admissible to enable the principal to sue in his own name.² If he

¹⁵ *Simson v. Klipstein*, 88 N. J. Eq. 229, 102 Atl. 242.

¹⁶ *Albany Furniture Co. v. Bank*, 17 Ind. App. 531, 60 Am. St. Rep. 178, 47 N. E. 227.

But extrinsic evidence was admitted under a similar form of signature in *Holt v. Sweetzer*, 23 Ind. App. 237, 55 N. E. 254.

¹⁷ *W. C. Dean Jewelry Co. v. Storm*, — Okla. —, 166 Pac. 1046.

¹⁸ *Keeley Brewing Co. v. Decorating Co.*, 194 Ill. 580, 62 N. E. 923.

¹ *United States. New Jersey, etc., Co. v. Bank*, 47 U. S. (6 How.) 344, 12 L. ed. 465.

Arkansas. Frazier v. Poindexter, 78 Ark. 241, 115 Am. St. Rep. 33, 94 S. W. 464.

Illinois. Conklin v. Leeds, 58 Ill. 178.

Iowa. Harrington v. Foley, 108 Ia. 287, 79 N. W. 64.

Massachusetts. Taunton, etc., Turnpike v. Whiting, 10 Mass. 328.

New Hampshire. Elkins v. Ry., 19 N. H. 337, 51 Am. Dec. 184.

New York. Beebe v. Robert, 12 Wend. (N. Y.) 413, 27 Am. Dec. 132.

Oklahoma. Rankin v. Blaine County Bank, 20 Okla. 68, 18 L. R. A. (N.S.) 512, 93 Pac. 536.

Pennsylvania. Elkinton v. Newman, 20 Pa. St. 281.

Washington. Belt v. Water Power Co., 24 Wash. 387, 64 Pac. 525.

West Virginia. Coulter v. Blatchley, 51 W. Va. 163, 41 S. E. 133.

² *Simson v. Klipstein*, 88 N. J. Eq. 229, 102 Atl. 242; *Rankin v. Blaine County Bank*, 20 Okla. 68, 18 L. R. A. (N.S.) 512, 93 Pac. 536; *Mercer v. Germania Fire Insurance Co.*, 88 Or. 410, 171 Pac. 412.

sues in his own name, the principal is, however, subject to defenses which might have been made against the agent,³ such as set-off.⁴

The fact that the contract is one of those required by law to be proved in writing does not prevent the principal from showing that he is the real party in interest and enforcing the contract in his own right.⁵ A different principle applies if the contract is one of those which by law must be in writing.⁶ Questions involving the right of the adversary party to go outside the writing and hold the real principal thereon have been discussed elsewhere.⁷ The name of an individual signed to a contract may be shown to be the name of a partnership,⁸ but a contract signed by the names of two individuals can not be shown to be the contract of a partnership composed of those individuals and others.⁹

The right of the principal to sue in his own name upon a contract is said not to extend to his right to maintain an action in tort upon such transaction,¹⁰ as for deceit practiced upon his agent.¹¹

§ 2209. Extrinsic evidence to impose liability on principal. If A signs a written contract made with B on behalf of A's principal, X, and affixes his own name thereto without apt words to show that he is acting only as agent, B may undoubtedly hold A on such contract. If, however, B wishes to hold the real principal, X, his right to do so is not inconsistent with his right to hold A, since both rights may exist together until B has made his election between them.¹ Accordingly, it does not contradict the legal effect of such instrument to show that X is the real party in interest. If B wishes to sue X, the real principal, the parol evidence rule does not, therefore, prevent B from showing that A signed on behalf of X. Such evidence is admissible, therefore, where the contract is in writing, but is not required by law to be in writing or to be proved by writing.² If A makes a contract as managing agent of a steam-

³ *Frazier v. Poindexter*, 78 Ark. 241, 115 Am. St. Rep. 33, 94 S. W. 464.

⁴ *Frazier v. Poindexter*, 78 Ark. 241, 115 Am. St. Rep. 33, 94 S. W. 464.

⁵ *Donahue v. Rafferty*, 82 W. Va. 535, 96 S. E. 935. See § 1332.

⁶ See §§ 1429 et seq.

⁷ As to contracts which must be proved in writing, see § 1332. As to contracts which must be in writing, see § 2312.

⁸ *Butterfield v. Hemsley*, 78 Mass. (12 Gray) 226.

⁹ *New England Dredging Co. v. Granite Co.*, 149 Mass. 381, 21 N. E. 947.

¹⁰ *Crowder v. Yovovich*, 84 Or. 41, 164 Pac. 576.

¹¹ *Crowder v. Yovovich*, 84 Or. 41, 164 Pac. 576.

¹ See §§ 1332 and 1775 et seq.

² *United States. Nash v. Towne*, 72 U. S. (5 Wall.) 689, 18 L. ed. 527; *Great*

ship, evidence is admissible to show who A's principal is.³ If A signs a contract assuming a certain note, evidence is admissible to show that A signed such contract for A, B and C.⁴ One who deposits money in a bank and takes receipts given by the cashier in his own name, without any official designation, may show that the bank was the real party to the contract.⁵ The fact that a warehouse receipt is declared negotiable by statute does not make it negotiable within the meaning of this rule. The holder of the receipt may show who the real principal is and hold him on the receipt.⁶ In an action on a non-negotiable note the maker may show that the nominal payee was the agent of the real payee, and thus show the dealings between the maker and the real payee to show failure of consideration.⁷

§ 2210. Effect of knowledge of identity of principal. In many of the cases some emphasis is laid on the fact that the principal was not disclosed when the agent entered into the contract with the adversary party. The importance of this fact is the same in written and unwritten contracts and may be briefly stated as follows:

Lakes Towing Co. v. Mills Transportation Co., 155 Fed. 11, 83 C. C. A. 607, 22 L. R. A. (N.S.) 769; **Walker v. Hafer**, 170 Fed. 37, 96 C. C. A. 311, 24 L. R. A. (N.S.) 315.

Connecticut. **Merrill v. Kenyon**, 48 Conn. 314, 40 Am. Rep. 174.

Illinois. **Daugherty v. Heckard**, 189 Ill. 239, 59 N. E. 569 [affirming, 89 Ill. App. 544].

Massachusetts. **Byington v. Simpson**, 134 Mass. 169, 45 Am. Rep. 314.

Minnesota. **Davidson v. Hurty**, 116 Minn. 280, 39 L. R. A. (N.S.) 324, 133 N. W. 862.

Missouri. **Jones v. Williams**, 139 Mo. 1, 61 Am. St. Rep. 436, 37 L. R. A. 682, 39 S. W. 486, 40 S. W. 353.

New York. **Kayton v. Barnett**, 116 N. Y. 625, 23 N. E. 24.

North Dakota. **Patrick v. Mercantile Co.**, 13 N. D. 12, 99 N. W. 55.

Ohio. **Aetna Ins. Co. v. Church**, 21 O. S. 492.

Oregon. **Barbre v. Goodale**, 28 Or. 465, 38 Pac. 67, 43 Pac. 378; **Anderson**

v. Flouring Mills, 37 Or. 483, 82 Am. St. Rep. 771, 50 L. R. A. 235, 60 Pac. 839; **Riddle State Bank v. Link**, 78 Or. 498, 153 Pac. 1192; **Smith v. Campbell**, 85 Or. 420, 166 Pac. 546; **Alvord v. Banfield**, 85 Or. 49, 166 Pac. 549.

Pennsylvania. **Hubbard v. Tenbrook**, 124 Pa. St. 291, 10 Am. St. Rep. 585, 2 L. R. A. 823, 16 Atl. 817.

Washington. **Landers v. Foster**, 34 Wash. 674, 76 Pac. 274.

³ **Great Lakes Towing Co. v. Mills Transportation Co.**, 155 Fed. 11, 83 C. C. A. 607, 22 L. R. A. (N.S.) 769.

⁴ **Riddle State Bank v. Link**, 78 Or. 498, 153 Pac. 1192.

⁵ **Hanson v. Heard**, 69 N. H. 190, 38 Atl. 788 [citing, **Van Leuven v. First Nat. Bank**, 54 N. Y. 671; **Pierson v. Atlantic Nat. Bank**, 77 N. Y. 304].

⁶ **Anderson v. Flouring Mills Co.**, 37 Or. 483, 82 Am. St. Rep. 771, 50 L. R. A. 235, 60 Pac. 839.

⁷ **Stockton, etc., Society v. Giddings**, 96 Cal. 84, 31 Am. St. Rep. 181, 21 L. R. A. 406, 30 Pac. 1016.

If the parties agree orally that the agent is acting on behalf of his principal, there is no question then in oral contracts as to the right of the adversary party to enforce the contract against the principal.¹ In written contracts not required to be in writing or to be proved in writing, the only question raised by attempting to enforce the contract against the real principal is that of the effect of the parol evidence rule. But if identity and existence of the principal are alike undisclosed, the additional question has been raised, whether the adversary party can properly be said to have contractual relations with this unknown principal. As this is the most extreme case, most stress has been laid upon it. The courts have held that whether the contract is oral or written, as long as it is not of the class of contracts which must be in writing, the real principal may be shown and held liable on the contract.² Some courts, however, have misunderstood the reason for emphasizing the fact that the principal is unknown, and have said that the rule allowing the real principal to be held on a written contract by which he is not in terms made liable, is limited to cases where the real principal is unknown to the adversary party at the time of making the contract; and that if the real principal is known, and the adversary party accepts a written contract which by terms and legal effect binds the agent, this is an election to hold the agent and not the principal.³ An examination of the authorities cited in *Chandler v. Coe*,⁴ will show that those sustaining the proposition are cases of negotiable instruments—that is, of contracts which must be in writing. A number of the cases which are cited in other authorities in support of this proposition are of the same type.⁵

¹ See § 1759.

² England. *Trueman v. Loder*, 11 A. & E. 589.

United States. *Ford v. Williams*, 62 U. S. (21 How.) 287, 16 L. ed. 36.

Georgia. *Merchants' Bank v. Bank*, 1 Ga. 418, 44 Am. Dec. 665.

Massachusetts. *Williams v. Robbins*, 82 Mass. (16 Gray) 77, 77 Am. Dec. 396.

New Jersey. *Borcherling v. Katz*, 37 N. J. Eq. 150.

New York. *Brady v. Nally*, 151 N. Y. 258, 45 N. E. 547.

Virginia. *Waddill v. Sebree*, 88 Va.

1012, 29 Am. St. Rep. 766, 14 S. E. 849.

Washington. *Brewster v. Baxter*, 2 Wash. Terr. 135, 3 Pac. 844. The general question of the liability of principal or agent to third parties on contracts in which the principal is not disclosed is considered elsewhere. See §§ 1775 et seq.

³ *Chandler v. Coe*, 54 N. H. 561 [obiter to the same effect in *Heffron v. Pollard*, 73 Tex. 96, 15 Am. St. Rep. 764, 11 S. W. 165].

⁴ 54 N. H. 561.

⁵ *Merrell v. Witherby*, 120 Ala. 418, 74 Am. St. Rep. 39, 23 So. 994, 26 So.

They come, therefore, under the operation of a different principle from that here discussed.

In cases involving contracts not required to be in writing, many fail to indicate whether the principal was known or unknown to the adversary party when the contract was entered into, and by fair inference, treat such fact as immaterial. Where the courts have discussed the effect of the adversary party's knowing who the real principal is when he accepts a contract signed by the agent alone, the weight of authority is that he can hold the real principal if the agreement between the adversary party and the agent does not provide for giving exclusive credit to the agent.⁶ If, as has been suggested, "an undisclosed principal * * * is one not disclosed in the contract,"⁷ the conflict between the two theories disappears.

If with knowledge of the facts the adversary party elects in advance to give credit to the agent exclusively, he can not hold the principal.⁸

974; *Andrews Co. v. National Bank*, 129 Ga. 53, 121 Am. St. Rep. 186, 12 Am. & Eng. Ann. Cas. 616, 58 S. E. 633.

⁶ *Higgins v. Senior*, 8 M. & W. 834; *Colder v. Dobell*, L. R. 6 C. P. 486; *Bateman v. Phillips*, 15 East. 272; *York County Bank v. Stein*, 24 Md. 447; *By-*

ington v. Simpson, 134 Mass. 169, 45 Am. Rep. 314; *Dexter-Horton National Bank v. Seattle Homeseekers' Co.*, 82 Wash. 480, 144 Pac. 691.

⁷ *Unruh v. Roemer*, 135 Minn. 127, 160 N. W. 251.

⁸ *Silver v. Jordan*, 136 Mass. 319.

CHAPTER LXX

REFORMATION

- § 2211. Relation of reformation to the parol evidence rule.
- § 2212. Discretionary power to grant reformation.
- § 2213. Adequacy of legal remedy.
- § 2214. Mutuality of mistake in reformation.
- § 2215. Mutuality of mistake as involving genuine offer and acceptance.
- § 2216. Mistake in the inducement as basis for reformation.
- § 2217. Mutuality of mistake as involving consideration.
- § 2218. Mistake on one side—Inequitable conduct on the other.
- § 2219. Effect of negligence.
- § 2220. Mistake in expression—Mistake as to words used.
- § 2221. Mistake as to legal effect of words used.
- § 2222. Intentional omission or insertion of term.
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- § 2228. Other examples of mistake.
- § 2229. What instruments may be reformed—Inoperative instruments.
- § 2230. Contracts within the Statute of Frauds or required to be in writing.
- § 2231. Reformation of mistake which may be corrected by construction.
- § 2232. Who may have reformation.
- § 2233. Effect of rights of third parties on reformation.
- § 2234. Evidence necessary for reformation.

§ 2211. Relation of reformation to the parol evidence rule. From the foregoing discussion of the parol evidence rule,¹ it appears that common law regards a simple, written contract, if valid, complete and unambiguous, as having in some respects the character of a formal contract. The actual intention of the parties ceases to be of any legal effect. The intention which the courts recognize and to which they give effect is an abstract standardized intention deduced from the words used in the written contract as explained by admissible extrinsic evidence of the surrounding facts and circumstances. In some cases this is the actual intention

¹ See ch. LXIX.

of the parties. In other cases it bears no relation to the actual intention. In either case this theoretical standardized intention is the one which is recognized and enforced at law and also in equity in all actions upon the contract itself. The law does not afford any means of ascertaining and enforcing the real intention of the parties if it differs from this standardized intention.² Extrinsic evidence may overthrow the contract as a whole,³ or it may be used to show some form of subsequent discharge,⁴ but no method has thus far been considered by which the real agreement which is often back of the written contract can be enforced. Equity, however, affords a means by which the real intention of the parties can be ascertained and effect can be given thereto in spite of the fact that the parties have attempted to express their intention in a written instrument, and because of the mistake of the parties, or because of the mistake of the party who seeks relief and the fraud or inequitable conduct of the parties against whom relief is sought, the written instrument does not express the real intention of the parties.⁵ This means is known as reformation, and a discussion of some of its general principles is necessary, since by means of this

² See § 2065 and §§ 2146 et seq.

³ See §§ 2171 et seq.

⁴ See § 2185.

⁵ **England.** Henkle v. Royal Exchange Assurance Co., 1 Ves. Sr. 317.

United States. Hunt v. Rousmanier, 21 U. S. (8 Wheat.) 174, 5 L. ed. 589; Ackert v. United States, 49 Ct. Cl. 635.

Alabama. Holland Blow Stave Co. v. Barclay, 193 Ala. 200, 69 So. 118.

Idaho. Bowers v. Bennett, 30 Ida. 188, 164 Pac. 93.

Illinois. Silurian Oil Co. v. Neal, 277 Ill. 45, 115 N. E. 114.

Iowa. Day v. Dyer, 171 Ia. 437, 152 N. W. 53; Kinman v. Hill, — Ia. —, 156 N. W. 168; Buck Auto, Carriage & Implement Co. v. Tietge, 174 Ia. 103, 156 N. W. 313.

Kansas. Proctor v. Fife, 97 Kan. 431, 155 Pac. 931.

Kentucky. Cecil v. Kentucky Livestock Insurance Co., 165 Ky. 211, 176 S. W. 986; Scott v. Spurr, 169 Ky. 575, 184 S. W. 866.

Louisiana. Louisiana Sulphur Mining

Co. v. Brimstone R. & Canal Co., 143 La. 743, 79 So. 324.

Maryland. White v. Shaffer, 130 Md. 351, 99 Atl. 66.

Massachusetts. Aradalou v. New York, N. H. & H. R. Co., 225 Mass. 235, 114 N. E. 297.

Minnesota. Mahoney v. Minnesota Farmers' Mutual Insurance Co., 136 Minn. 34, 161 N. W. 217.

New Jersey. Moore v. Brennon Distributing Corporation, — N. J. Eq. —, 105 Atl. 592.

New Mexico. Cleveland v. Bateman, 21 N. M. 675, 158 Pac. 648.

New York. MacDonald v. Crissey, 215 N. Y. 609, 109 N. E. 609.

North Carolina. Ray v. Patterson, 170 N. Car. 226, 87 S. E. 212; Sills v. Ford, 171 N. Car. 733, 88 S. E. 636; America Potato Co. v. Jeanette Bros. Co., 174 N. Car. 236 [sub nomine, American Potato Co. v. Jennette Potato Co., 93 S. E. 795]; Caffey v. Oak Furniture Co., 175 N. Car. 387, 95 S. E. 619.

Oklahoma. Cleveland v. Rankin, 48 Okla. 99, 149 Pac. 1131.

form of relief, equity can in proper cases and under proper limitations, unhampered by the parol evidence rule, enforce the oral contract which the parties, through mistake in the expression, have not reduced to writing correctly.⁶

Oregon. Coates v. Smith, 81 Or. 556, 160 Pac. 517.

West Virginia. Melott v. West, 76 W. Va. 739, 86 S. E. 759.

Wisconsin. Pedersen v. Hansen, 161 Wis. 355, 154 N. W. 363; Van Brunt v. Ferguson, 163 Wis. 540 [sub nomine, Van Brunt v. Wisconsin Consistory Home Association, 158 N. W. 295].

***United States.** Newton v. Wooley, 105 Fed. 541; Brown v. Meserve, 91 Fed. 229, 33 C. C. A. 472; Brent v. Simpson, 238 Fed. 285, 151 C. C. A. 301; Ackerlind v. United States, 49 Ct. Cl. 635.

Alabama. Wright v. Wright, 180 Ala. 343, 60 So. 931; Holland Blow Stave Co. v. Barclay, 193 Ala. 200, 69 So. 118.

Arkansas. Deniston v. Phillips, 121 Ark. 550, 181 S. W. 911.

California. Horton v. Winbigler, 175 Cal. 149, 165 Pac. 423.

Colorado. Arbaney v. Usel, 61 Colo. 311, 157 Pac. 204.

Idaho. Allen v. Kitchen, 16 Ida. 133, L. R. A. 1917A, 563, 100 Pac. 1052; Bowers v. Bennett, 30 Ida. 188, 164 Pac. 93.

Illinois. Silurian Oil Co. v. Neal, 277 Ill. 45, 115 N. E. 114; McGinnis v. Boyd, 279 Ill. 283, 116 N. E. 672.

Indiana. Schlosser v. Nicholson, 184 Ind. 233, 111 N. E. 13.

Iowa. Day v. Dyer, 171 Ia. 437, 152 N. W. 53; Kinman v. Hill (Ia.), 156 N. W. 168; Buck Auto, Carriage & Implement Co. v. Tietge, 174 Ia. 103, 156 N. W. 313.

Kansas. Proctor v. Fife, 97 Kan. 431, 155 Pac. 931; Minneapolis Steel & Machinery Co. v. Schalansky, 100 Kan. 562, 165 Pac. 289.

Kentucky. Lindley v. Sharp, 46 Ky. (7 T. B. Mon.) 248; Kentucky, etc., Association v. Lawrence, 106 Ky. 88, 49 S. W. 1059; Cecil v. Kentucky Live-

stock Insurance Co., 165 Ky. 211, 176 S. W. 986; Scott v. Spurr, 169 Ky. 575, 184 S. W. 866; Lamastus v. Morgan's Committee, 178 Ky. 805, 200 S. W. 32.

Louisiana. Louisiana Sulphur Mining Co. v. Brimstone R. & Canal Co., 143 La. 743, 79 So. 324.

Maryland. Conner v. Groh, 90 Md. 674, 45 Atl. 1024; White v. Shaffer, 130 Md. 351, 99 Atl. 66.

Massachusetts. Kennedy v. Poole, 213 Mass. 495, L. R. A. 1917A, 600, 100 N. E. 635; Aradalou v. New York, N. H. & H. R. Co., 225 Mass. 235, 114 N. E. 297.

Minnesota. Mahoney v. Minnesota Farmers' Mutual Insurance Co., 136 Minn. 34, 161 N. W. 217.

New Jersey. Moore v. Brennon Distributing Corporation, — N. J. Eq. —, 105 Atl. 592.

New York. MacDonald v. Crissey, 215 N. Y. 609, 109 N. E. 609.

North Carolina. Ray v. Patterson, 170 N. Car. 226, 87 S. E. 212; Sills v. Ford, 171 N. Car. 733, 88 S. E. 636; Freeman v. Croom, 172 N. Car. 524, 90 S. E. 523; America Potato Co. v. Jeanette Bros. Co., 174 N. Car. 236 [sub nomine, American Potato Co. v. Jeanette Bros. Co., 93 S. E. 795]; Maxwell v. Wayne National Bank, 175 N. Car. 387, 95 S. E. 147.

Oklahoma. Cleveland v. Rankin, 48 Okla. 99, 149 Pac. 1131.

Oregon. Coates v. Smith, 81 Or. 556, 160 Pac. 517.

Pennsylvania. Sidney School Furniture Co. v. School District, 130 Pa. St. 76, 18 Atl. 604.

West Virginia. Melott v. West, 76 W. Va. 739, 86 S. E. 759.

Wisconsin. Pedersen v. Hansen, 161 Wis. 355, 154 N. W. 363; Van Brunt v. Ferguson, 163 Wis. 540 [sub nomine, Van Brunt v. Wisconsin Consistory Home Association, 158 N. W. 295].

§ 2212. Discretionary power to grant reformation. The fact that the original transaction was valid and enforceable at law does not of itself oblige a court of equity to grant reformation in every case in which the written instrument does not conform to the actual oral agreement. Reformation is a very extreme remedy. By its means equity compels a person to perform a promise which he has made, it is true, but which has not been put into such a form as to be enforceable at law. It is a more extreme illustration of the power of equity than rescission itself. Equity, accordingly, has power to withhold such remedy where inequitable results will be reached by granting it, even though the original contract might have been enforceable at law.¹ This discretionary power of equity is not the arbitrary discretion of the individual chancellor, but, nevertheless, it is a power, the limits of which can not as yet, at least, be fixed by definite and rigid rules. One who seeks reformation is not bound to restore what he has received under the transaction as a condition precedent to such relief.² If the application for reformation is an incident to another action, a demand for reformation is not necessary as a condition precedent,³ especially if it is shown that such demand would not have been complied with.⁴

§ 2213. Adequacy of legal remedy. While equity denies relief where the remedy at law is full, adequate and complete, it does not necessarily follow that the existence of a defense at law will prevent equity from granting relief to one who wishes to take advantage of the transaction in question, and who does not wish to defend against liability arising thereunder. One who has been induced to enter into a written contract through fraudulent repre-

In some jurisdictions reformation can not be given where the mistake has been carried into judicial proceedings and a decree and a conveyance thereunder, so as to correct all of such mistakes. At best, only the original instrument can be reformed; and new proceedings brought on the instrument as reformed. *Fisher v. Villamil*, 62 Fla. 472, 39 L. R. A. (N.S.) 90, 56 So. 559.

See also, *Schwartz v. Cahill*, 220 N. Y. 174, 115 N. E. 451.

¹**Florida.** *Phenix Ins. Co. v. Hilliard*, 59 Fla. 590, 138 Am. St. Rep. 171, 52 So. 799; *Baldwin v. Christopher*, — Fla. —, 79 So. 339.

Indiana. *Ray v. Ferrell*, 127 Ind. 570, 27 N. E. 159.

Michigan. *Harlow v. Jaseph*, 183 Mich. 500, 149 N. W. 1047.

New York. *Welles v. Yates*, 44 N. Y. 525.

Virginia. *Tazewell Coal and Iron Co. v. Gillespie*, 114 Va. 141, 75 S. E. 757 [affirming on rehearing, *Tazewell Coal and Iron Co. v. Gillespie*, 113 Va. 134, 75 S. E. 757].

Wisconsin. *Moore v. Michaelson*, 152 Wis. 352, 140 N. W. 28.

²*Bowers v. Bennett*, 30 Ida. 188, 164 Pac. 93.

³*Bowers v. Bennett*, 30 Ida. 188, 164 Pac. 93.

⁴*Bowers v. Bennett*, 30 Ida. 188, 164 Pac. 93.

sentations by the adversary party as to the contents of such contract, may avoid liability upon such contract at law, if he wishes to set up such fraud as a defense,¹ and he could set up such defense at common law, even if the contract were under seal.² The party who has thus been deceived may, however, wish to enforce the contract in accordance with the terms which the adversary party represented to him were inserted in the written contract. In such cases the fact that he could have avoided liability at law under the contract does not prevent his obtaining reformation in equity,³ if the other elements which justify reformation are present.⁴

If relief can be had by applying to a public officer who is bound in law to correct such mistake, and such application is not made, equity will not grant reformation.⁵

§ 2214. Mutuality of mistake in reformation. It is generally said that reformation is given either (a) when the mistake is mutual, or (b) when there is mistake on the one side and fraud or unfair dealing on the other. By mutual mistake is meant that the parties must have come to a genuine and valid oral agreement before they have attempted to reduce it to writing, and that as this attempt fails by reason of mistake, equity, by its remedy of reformation, enforces the original contract. The rule that mistake in expression must be mutual means, therefore, that to obtain reformation the parties must show that there was a valid contract between them, which contract is not correctly set forth in the writ-

¹ See §§ 229 et seq.

² See §§ 229 et seq.

³ California. *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630.

Georgia. *Hansford v. Freeman*, 99 Ga. 376, 27 S. E. 706.

Iowa. *Williams v. Hamilton*, 104 Ia. 423, 65 Am. St. Rep. 475, 73 N. W. 1029; *Stead v. Sampson*, — Ia. —, 155 N. W. 978.

Kansas. *Wait v. McKibben*, 92 Kan. 394, 140 Pac. 860.

Kentucky. *Scott v. Spurr*, 169 Ky. 575, 184 S. W. 866.

Minnesota. *Barnum v. White*, 128 Minn. 58, 150 N. W. 227.

Nebraska. *Sailing v. Morrell*, 97 Neb. 454, 150 N. W. 195.

New Jersey. *Lloyd v. Hulick*, 69 N. J. Eq. 784, 115 Am. St. Rep. 624, 63 Atl. 616; *Smith-Austermuhl Co. v. Jer-*

sey Rys. Advertising Co., 12 N. J. Eq. 89, 103 Atl. 388; *Zarecki v. Realty Co.*, 82 N. J. Eq. 489, 89 Atl. 513.

North Carolina. *Torrey v. McFadyn*, 165 N. Car. 237, 81 S. E. 296.

Oregon. *Bradshaw v. Trust Co.*, 81 Or. 55, 158 Pac. 274.

Rhode Island. *Bowen v. Wolff*, 23 R. I. 56, 49 Atl. 395.

Texas. *Conn v. Hagan*, 93 Tex. 334, 55 S. W. 323; *Aetna Ins. Co. v. Brannon*, 99 Tex. 391, 2 L. R. A. (N.S.) 548, 89 S. W. 1057; *American, etc., Co. v. Pace*, 23 Tex. Civ. App. 222, 56 S. W. 377; *Pioneer, etc., Co. v. Baumann* (Tex. Civ. App.), 58 S. W. 49.

⁴ For a discussion of this subject and for illustrations of the application of this principle, see § 241.

⁵ *Baker v. Jane*, 82 Kan. 715, 28 L. R. A. (N.S.) 405, 100 Pac. 182.

ing to be reformed.¹ In granting reformation, therefore, equity is not making a new contract for the parties, but it is establishing the real contract between the parties which, under the technical rules of law, could not be enforced but for such reformation.²

1 England. *Henkle v. Royal Exchange Assurance Co.*, 1 Ves. Sr. 317; *Townshend v. Stangroom*, 6 Ves. Jr. 328; *Shelburne v. Inchiquin*, 1 Bro. Ch. 338; *Stone v. Godfrey*, 5 DeG. M. & G. 76.

United States. *Sun Co. v. Vinton Petroleum Co.*, 248 Fed. 623; *Ackerlind v. United States*, 49 Ct. Cl. 635.

Arkansas. *Louis Werner Sawmill Co. v. Sessoms*, 120 Ark. 105, 179 S. W. 185; *Connecticut Fire Insurance Co. v. Wigginton*, 134 Ark. 152, 203 S. W. 844.

California. *Harding v. Robinson*, 175 Cal. 534, 166 Pac. 808; *Burt v. Los Angeles Olive Growers' Association*, 175 Cal. 668, 166 Pac. 993.

Illinois. *Leuer v. Kunz*, 274 Ill. 523, 113 N. E. 878; *Silurian Oil Co. v. Neal*, 277 Ill. 45, 115 N. E. 114.

Iowa. *Day v. Dyer*, 171 Ia. 437, 152 N. W. 53.

Kansas. *Haddon v. Neighbarger*, 9 Kan. App. 529, 58 Pac. 568.

Kentucky. *Royer Wheel Co. v. Miller (Ky.)*, 50 S. W. 62; *Lamastus v. Morgan's Committee*, 178 Ky. 805, 200 S. W. 32.

Louisiana. *Louisiana Sulphur Mining Co. v. Brimstone R. & Canal Co.*, 143 La. 743, 79 So. 324.

Maryland. *Conner v. Groh*, 90 Md. 674, 45 Atl. 1024.

Michigan. *Ludington v. Ford*, 33 Mich. 123; *Robertson v. Smith*, 191 Mich. 660, 158 N. W. 207; *Schlossman v. Rouse*, 197 Mich. 399, 163 N. W. 889.

Missouri. *Scheer v. Scheer*, 148 Mo. 447, 50 S. W. 111 [affirming, 67 Mo. App. 371]; *Benn v. Pritchett*, 163 Mo. 560, 63 S. W. 1103; *Stephens v. Stephens*, — Mo. —, 183 S. W. 572.

Nebraska. *Nebraska, etc., Co. v. Ignowski*, 54 Neb. 398, 74 N. W. 852.

Nevada. *Wilson v. Wilson*, 23 Nev. 267, 45 Pac. 1000.

New Jersey. *Green v. Stone*, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 34 Atl. 1099 [reversing, 32 Atl. 706]; *Koch v. Commonwealth Insurance Co.*, 87 N. J. Eq. 90, 99 Atl. 920.

New Mexico. *Cleveland v. Bateman*, 21 N. M. 675, 158 Pac. 648.

New York. *Salomon v. North British & Mercantile Ins. Co.*, 215 N. Y. 214, L. R. A. 1917C, 106, 109 N. E. 121 (obiter).

North Carolina. *Ray v. Durham County*, 110 N. Car. 169, 14 S. E. 646; *America Potato Co. v. Jeanette Bros. Co.*, 174 N. Car. 236 [sub nomine, *American Potato Co. v. Jennette Bros. Co.*, 93 S. E. 795].

Oregon. *Hyde v. Kirkpatrick*, 78 Or. 466, 153 Pac. 488 [denying rehearing, *Hyde v. Kirkpatrick*, 78 Or. 466, 153 Pac. 41]; *Bradshaw v. Provident Trust Co.*, 81 Or. 55, 158 Pac. 274; *Boardman v. Insurance Co.*, 84 Or. 60, 164 Pac. 558.

Rhode Island. *Diman v. R. R. Co.*, 5 R. I. 130.

Utah. *Deseret National Bank v. Dinwoodey*, 17 Utah 43, 53 Pac. 215.

Washington. *Anderson v. Freeman*, 88 Wash. 608, 153 Pac. 307; *Conrads v. Green*, 92 Wash. 269, 159 Pac. 102.

West Virginia. *Robinson v. Braidon*, 44 W. Va. 183, 28 S. E. 798; *R. D. Johnson Milling Co. v. Read*, 76 W. Va. 557, 85 S. E. 726.

2 California. *Harding v. Robinson*, 175 Cal. 534, 166 Pac. 808.

Indiana. *Welshbillig v. Dienhart*, 65 Ind. 94; *Roszell v. Roszell*, 109 Ind. 354, 10 N. E. 114.

Iowa. *Day v. Dyer*, 171 Ia. 437, 152 N. W. 53.

It may be added that the rule that mistake must be mutual does not, as will be seen later,³ mean necessarily that both parties must be mistaken or that they must have made the same mistake. If a genuine valid contract has been entered into and the terms of this contract are not expressed correctly in the written contract into which the parties subsequently enter, reformation will be given, whether the parties both made the same mistake in assuming that the contract was reduced to writing,⁴ or whether one party only made the mistake and the other party knowingly took advantage thereof or was otherwise guilty of unfair dealing.⁵

§ 2215. Mutuality of mistake as involving genuine offer and acceptance. In order to obtain reformation there must have been a genuine valid oral contract back of the written contract to which the written contract may be reformed.¹ The ordinary principles of offer and acceptance apply here in determining whether the oral contract was really made or not.² Reformation is often sought where A intends to have a certain stipulation in the contract, but this intent has not been communicated to B, or where B has not assented thereto. In such case, whether or not A can have rescission,³ he can not have the contract reformed so as to express his own uncommunicated intention, or to express his proposition to which B has not assented, even if A thought that such term was incorporated in the written contract.⁴ If the instrument expresses

New Jersey. *Koch v. Commonwealth Insurance Co.*, 87 N. J. Eq. 90, 99 Atl. 920.

New York. *Salomon v. North British & Mercantile Ins. Co.*, 215 N. Y. 214, L. R. A. 1917C, 106, 109 N. E. 121.

North Carolina. *American Potato Co. v. Jeanette Bros. Co.*, 174 N. Car. 236 [sub nomine, *American Potato Co. v. Jennette Bros. Co.*, 93 S. E. 795] (obiter).

Oregon. *Hyde v. Kirkpatrick*, 78 Or. 466, 153 Pac. 488 [denying rehearing, *Hyde v. Kirkpatrick*, 78 Or. 466, 153 Pac. 41].

³ See § 2128.

⁴ See §§ 2220 et seq.

⁵ See § 2128.

¹ See § 2214.

² See ch. V.

³ See §§ 251 et seq.

⁴ **United States.** *Hearne v. Ins. Co.*, 87 U. S. (20 Wall.) 488, 22 L. ed. 395; *Sun Co. v. Vinton Petroleum Co.*, 248 Fed. 623; *Ackerlind v. United States*, 49 Ct. Cl. 635.

Alabama. *Tyson v. Chestnut*, 100 Ala. 571, 13 So. 763.

Arizona. *McMillon v. Flagstaff*, 18 Ariz. 536, 164 Pac. 318; *Genardini v. Kline*, 19 Ariz. 558, 173 Pac. 882.

Arkansas. *McGuigan v. Gaines*, 71 Ark. 614, 77 S. W. 52; *Cherry v. Brizolara*, 89 Ark. 309, 21 L. R. A. (N.S.) 508, 116 S. W. 668; *Louis Werner Sawmill Co. v. Sessoms*, 120 Ark. 105, 179 S. W. 185; *Connecticut Fire Insurance Co. v. Wigginton*, 134 Ark. 152, 203 S. W. 844.

California. *Crane v. McCormick*, 92 Cal. 176, 28 Pac. 222; *Loftus v. Fischer*, 106 Cal. 616, 39 Pac. 1064; *Ward v.*

the actual intention of one of the parties, but not the actual intention of the other, reformation can not be granted so as to make it conform to the intention of such other party,¹ unless the adversary

Yorba. 123 Cal. 447, 56 Pac. 58; *Harding v. Robinson*, 175 Cal. 534, 166 Pac. 908; *Burt v. Los Angeles Olive Growers' Association*, 175 Cal. 668, 166 Pac. 993.

Illinois. *Bivins v. Kerr*, 268 Ill. 164, 108 N. E. 996; *Silurian Oil Co. v. Neal*, 277 Ill. 45, 115 N. E. 114.

Iowa. *Breja v. Pryne*, 94 Ia. 755, 64 N. W. 669; *Simpson v. Kane*, 98 Ia. 271, 67 N. W. 247; *Bigelow v. Wilson*, 99 Ia. 456, 68 N. W. 798; *Williams v. Hamilton*, 104 Ia. 423, 65 Am. St. Rep. 475, 73 N. W. 1029; *Bowman v. Besley*, 122 Ia. 42, 97 N. W. 60; *Laackmann v. Glasshoff*, 182 Ia. 993, 164 N. W. 768.

Kentucky. *Buckley v. Frankfort (Ky.)*, 44 S. W. 139; *J. G. Mattingly Co. v. Mattingly*, 96 Ky. 430, 27 S. W. 985 [rehearing denied, 31 S. W. 279]; *Combs v. Ison*, 168 Ky. 728, 182 S. W. 953; *Lamastus v. Morgan's Committee*, 178 Ky. 806, 200 S. W. 32.

Louisiana. *Louisiana Sulphur Mining Co. v. Brimstone R. & Canal Co.*, 143 La. 743, 79 So. 324.

Maryland. *Byrne v. Gunning*, 75 Md. 30, 23 Atl. 1; *White v. Shaffer*, 130 Md. 351, 99 Atl. 66.

Massachusetts. *Page v. Higgins*, 150 Mass. 27, 5 L. R. A. 152, 22 N. E. 63; *Chute v. Quincy*, 156 Mass. 189, 30 N. E. 550; *Whitworth v. Lowell*, 178 Mass. 43, 59 N. E. 760.

Michigan. *Schlossman v. Rouse*, 197 Mich. 399, 163 N. W. 889.

Montana. *R. M. Cobban Realty Co. v. Chicago, M. & St. P. Ry. Co.*, 52 Mont. 256, 157 Pac. 173; *Parchen v. Chessman*, 53 Mont. 430, 164 Pac. 531.

New Jersey. *Miller v. Ins. Co.*, 42 N. J. Eq. 450, 7 Atl. 895; *Atkinson v. Farrington Co. (N. J. Eq.)*, 28 Atl. 315; *Green v. Stone*, 54 N. J. Eq. 387, 55

Am. St. Rep. 577, 34 Atl. 1099 [reversing, 32 Atl. 706]; *Ocean Beach Association v. Trenton Trust & Safe-Deposit Co. (N. J. Eq.)*, 48 Atl. 559.

New York. *Syms v. New York*, 105 N. Y. 153, 11 N. E. 369; *Harbeck v. Pupin*, 145 N. Y. 70, 39 N. E. 722.

North Carolina. *Floars v. Aetna L. Ins. Co.*, 144 N. Car. 232, 11 L. R. A. (N.S.) 357, 56 S. E. 915; *Shook v. Love*, 170 N. Car. 99, 86 S. E. 1007; *Allen v. Roanoke R. & Lumber Co.*, 171 N. Car. 339, 88 S. E. 492.

Oklahoma. *Bell v. Bancroft*, 55 Okla. 306, 155 Pac. 594.

Oregon. *Mitchell v. Holman*, 30 Or. 230, 47 Pac. 616 [citing, *Kleinsorge v. Rohse*, 25 Or. 51, 34 Pac. 874; *Epstein v. Ins. Co.*, 21 Or. 179, 27 Pac. 1045; *Stephens v. Murton*, 6 Or. 193; *Lewis v. Lewis*, 5 Or. 169]; *Hyde v. Kirkpatrick*, 78 Or. 466, 153 Pac. 488 [denying rehearing, *Hyde v. Kirkpatrick*, 78 Or. 466, 153 Pac. 41]; *Boatman v. Insurance Co.*, 84 Or. 60, 164 Pac. 558; *Manley v. Smith*, 88 Or. 176, 171 Pac. 897; *Turner v. Hartog*, 88 Or. 477, 172 Pac. 484.

Tennessee. *Pittsburg Lumber Co. v. Shell*, 136 Tenn. 466, 189 S. W. 879.

Washington. *Phillips v. Port Townsend Lodge*, 8 Wash. 529, 36 Pac. 476; *Anderson v. Freeman*, 88 Wash. 608, 153 Pac. 307.

West Virginia. *Smith v. Board of Education*, 76 W. Va. 239, 85 S. E. 513.

Wisconsin. *Coates v. Buck*, 93 Wis. 128, 67 N. W. 23; *Kropp v. Kropp*, 97 Wis. 137, 72 N. W. 381; *Grant Marble Co. v. Abbott*, 142 Wis. 279, 124 N. W. 264.

¹ **California.** *Woerner v. Woerner*, 171 Cal. 298, 152 Pac. 919.

Maryland. *White v. Shaffer*, 130 Md. 351, 99 Atl. 66.

party has been guilty of inequitable conduct in taking advantage of such mistake.⁶ If A's offer is in writing and by the mistake of A's agent it does not express A's true intention, A can not have reformation as against B, who has accepted such offer without knowledge of such mistake.⁷ If A has intended to make use of the language which actually was employed; the fact that such intention was induced by mistake as to some feature of the transaction does not entitle A to reformation,⁸ whether or not such mistake would entitle him to rescission. If by mistake as to the language used in describing a tract of land A believes that he is conveying that part of such tract which came to him by descent, while B believes that he is obtaining both that part which came to A by descent and also that part which A acquired by purchase, reformation can not be granted so as to make the instrument conform to the views of the party who seeks relief.⁹ If a tract is omitted from a conveyance because the parties believe that title thereto has passed by other means, the deed can not be reformed so as to include such tract.¹⁰ If A agrees to pay a certain proportion of the cost of excavating a street to a specified grade, A can not show that he thought that a different grade from that specified in the contract was agreed upon between the parties.¹¹

Where the grantee assumes a specific mortgage, and a second mortgage exists of which the grantor was in ignorance when he executed the conveyance, the deed will not be reformed so as to require the grantee to assume such second mortgage.¹² Thus where A intended that a clause should be inserted in a contract allowing

Missouri. *Stephens v. Stephens* (Mo.), 183 S. W. 572.

North Carolina. *Shook v. Love*, 170 N. Car. 99, 86 S. E. 1007; *Allen v. Roanoke R. & Lumber Co.*, 171 N. Car. 339, 88 S. E. 492.

Oklahoma. *Bell v. Bancroft*, 55 Okla. 306, 155 Pac. 594.

Oregon. *Hyde v. Kirkpatrick*, 78 Or. 466, 153 Pac. 41 [rehearing denied, *Hyde v. Kirkpatrick*, 78 Or. 466, 153 Pac. 488]; *Turner v. Hartog*, 88 Or. 477, 172 Pac. 484.

Tennessee. *Pittsburg Lumber Co. v. Shell*, 136 Tenn. 466, 189 S. W. 879.

Washington. *Kelley v. Smith*, 101 Wash. 475, 172 Pac. 542.

West Virginia. *R. D. Johnson Milling Co. v. Read*, 76 W. Va. 557, 85 S. E. 726.

⁶ See § 2218.

⁷ *Newsome v. Harrell*, 146 Ga. 139, 90 S. E. 855. See §§ 270 et seq.

⁸ *Bivins v. Kerr*, 268 Ill. 164, 108 N. E. 996; *Mighill v. Rowley*, 224 Mass. 586, 113 N. E. 569; *Kelley v. Smith*, 101 Wash. 475, 172 Pac. 542.

⁹ *Bivins v. Kerr*, 268 Ill. 164, 108 N. E. 996.

¹⁰ *Mighill v. Rowley*, 224 Mass. 586, 113 N. E. 569.

¹¹ *Kelley v. Smith*, 101 Wash. 475, 172 Pac. 542.

¹² *Moore v. Graves*, 97 Ia. 4, 65 N. W. 1008.

him to draw certain additional funds;¹³ or providing for a mortgage on land sold;¹⁴ or that a greater liability should be secured by a mortgage than was in fact secured;¹⁵ or that a certain clause in the printed form of the contract should be stricken out;¹⁶ or where A meant to have an assignment made to B and himself jointly, and by inadvertence had it made to B alone;¹⁷ or where A thinks that the price fixed in the contract is for a part of the buildings contracted for, when in fact it is for all the buildings;¹⁸ or where A does not understand the provision of the contract as to the time at which interest should begin to run;¹⁹ or thinks that certain goods are to be invoiced at the actual wholesale cost, when the contract provides for invoice "at wholesale cost as shown by cost marks on the goods";²⁰ or that the area of a lot, which he offers for sale, is less than it really is, so that he offers it for sale for less than it is worth;²¹ or that land conveyed by a mortgage does not include certain lots actually covered by it;²² or that the amount of goods covered by his order is different from that expressed therein;²³ or that a deed to him does not contain a clause whereby he assumes a mortgage, the grantor not knowing of such mistake;²⁴ or where A thinks that his conveyance will be subject to an outstanding lease and the grantee believes that such conveyance will include a covenant of warranty against such lease;²⁵ or where A thinks that he is buying from B a larger tract than B

¹³ *Mitchell v. Holman*, 30 Or. 280, 47 Pac. 616.

¹⁴ *Breja v. Pryne*, 94 Ia. 755, 64 N. W. 669.

¹⁵ *Conrads v. Green*, 92 Wash. 269, 159 Pac. 102.

¹⁶ *Crane v. McCormick*, 92 Cal. 176, 28 Pac. 222.

¹⁷ *Kropp v. Kropp*, 97 Wis. 137, 72 N. W. 381.

¹⁸ *Whitworth v. Lowell*, 178 Mass. 43, 59 N. E. 760.

¹⁹ *Laackmann v. Glasshoff*, 182 Ia. 993, 164 N. W. 768.

²⁰ *Simpson v. Kane*, 98 Ia. 271, 67 N. W. 247.

²¹ *Chute v. Quincy*, 156 Mass. 189, 30 N. E. 550.

See also, *McMillon v. Flagstaff*, 18 Ariz. 536, 164 Pac. 318; *Harding v.*

Robinson, 175 Cal. 534, 166 Pac. 808; *Schlossman v. Rouse*, 197 Mich. 399, 163 N. W. 889.

²² *Ocean Beach Association v. Safe Deposit Co.* (N. J. Eq.), 48 Atl. 559.

²³ *Coates v. Buck*, 93 Wis. 128, 67 N. W. 23.

²⁴ *Green v. Stone*, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 34 Atl. 1099 [reversing, 32 Atl. 706, and distinguishing *Bull v. Titsworth*, 29 N. J. Eq. 73, on the ground that in the earlier case the grantee had demanded rescission promptly].

See also, *Manley v. Smith*, 88 Or. 176, 171 Pac. 897.

²⁵ *Weinhard v. Summerville*, 46 Wash. 127, 13 L. R. A. (N.S.) 1089, 89 Pac. 490.

thinks he is selling;²⁸ or where A believes that he is to convey an easement and B believes that he is to acquire the realty itself,²⁷ he can not have the contract reformed to express his intention if B did not acquiesce therein. So a term to which B did not assent and which was inadvertently omitted from the written contract, can not be inserted by reformation, though A had offered such term and it was accepted by B's attorney, since the attorney had no authority to do anything but advise B, and he did not in fact communicate such offer to B.²⁸ So if there is a mistake as to the identity of the realty conveyed,²⁹ or leased,³⁰ rescission may be had in a proper case, but not reformation. Reformation is even more clearly denied where one party believes that he will receive more than the contract provides for and the adversary party does not know of such mistake. Thus A agreed to convey to B four acres along a section line. B assumed that this excluded the area of a highway along such line, though there was nothing in the contract or negotiations to warrant such belief. Reformation was denied.³¹ Even if each party had intended that certain realty should be included in a given conveyance, reformation will not be given if such intention was not communicated by each to the other.³² Still less can the erroneous understanding of the parties after the execution of a contract, as to the legal effect thereof, give the right to reformation.³³

²⁸ *Page v. Higgins*, 150 Mass. 27, 5 L. R. A. 152, 22 N. E. 63. The court said that this was "not one and the same mistake * * * but two different mistakes." In this case A and B owned tracts near each other but not adjoining, and A thought that B owned an intermediate tract, while B thought C owned it. Hence in their negotiations both referred to B's tract as beginning at A's boundary. A drew the deed and inserted the description and B, being illiterate, thought that the land conveyed was what he had agreed to sell, namely, "what he owned" east of a given wall.

²⁷ *Louisiana Sulphur Mining Co. v. Brimstone R. & Canal Co.*, 143 La. 743, 79 So. 324.

²⁸ *Ward v. Yorba*, 123 Cal. 447, 56 Pac. 58.

²⁹ *Cherry v. Brizzolara*, 89 Ark. 309, 21 L. R. A. (N.S.) 508, 116 S. W. 688; *Page v. Higgins*, 150 Mass. 27, 5 L. R. A. 152, 22 N. E. 63; *R. M. Cobban Realty Co. v. Chicago, M. & St. P. Ry. Co.*, 52 Mont. 256, 157 Pac. 173; *Stewart v. Gordon*, 60 O. S. 170, 53 N. E. 797.

³⁰ *Morris v. Kettle*, 56 N. J. Eq. 826, 34 Atl. 376.

³¹ *Clark v. Mossman*, 58 Neb. 87, 78 N. W. 399 [citing, *Huyek v. Andrews*, 113 N. Y. 81, 10 Am. St. Rep. 432, 3 L. R. A. 789, 20 N. E. 581; *Wilson v. Cochran*, 46 Pa. 229; *Scribner v. Holmes*, 16 Ind. 142; *Kutz v. McCune*, 22 Wis. 628, 99 Am. Dec. 85].

³² *Citizens' National Bank v. Judy*, 146 Ind. 322, 43 N. E. 259.

³³ *Gaffney Mercantile Co. v. Hopkins*, 21 Mont. 13, 52 Pac. 561.

§ 2216. Mistake in the inducement as basis for reformation.

Where the parties have, through mistake as to some collateral fact, entered into a valid contract, the terms of which are reduced correctly to writing, equity can not reform such contract so as to express what the court thinks the parties would have agreed upon but for such mistake.¹ Thus where two adjoining land owners, through mistake as to the true location of the boundary line, fix a line erroneously, and put this contract into writing, equity can not reform the contract to fix the boundary at the true line;² nor can the lessee of certain mineral rights have reformation because he took the lease in ignorance of an ancient reservation in a deed, giving him the right to such minerals.³ So where an assignee in insolvency represented to A that a certain sum was due on a certain claim, and unknown to such assignee, a payment had been made thereon, leaving the amount due less than that represented, no reformation reducing the amount to be paid for such claim could be made, since the contract of assignment was exactly what the parties had agreed upon and no fraud intervened.⁴ Where A agreed to buy the interest of his partner, B, and an invoice was made, in which a mistake of five hundred dollars was made, and a price was agreed upon, on the basis of such invoice, no reformation can be had.⁵ So where A expressly released all partners except B from liability, and subsequently learned that X was a dormant partner, X being financially responsible, A can not have the release reformed to exclude X.⁶ The reason underlying the rule last given is that equity will not make a new contract for the parties imposing on one of them terms which he did not assume and did not

¹ England. *Duke of Sutherland v. Heathcote* [1892], 1 Ch. 475 [affirming (1891), 3 Ch. 504].

Indiana. *Phillip Zorn Brewing Co. v. Malott*, 151 Ind. 371, 51 N. E. 471 [reversing, 46 N. E. 23].

Kentucky. *Dever v. Dever* (Ky.), 44 S. W. 986.

Mississippi. *Wise v. Brooks*, 69 Miss. 891, 13 So. 836.

New York. *Curtis v. Albee*, 167 N. Y. 360, 60 N. E. 660.

Oregon. *Coates v. Smith*, 81 Or. 556, 160 Pac. 517; *Manley v. Smith*, 88 Or. 176, 171 Pac. 897.

Wisconsin. *De Voin v. De Voin*, 76 Wis. 66, 44 N. W. 839.

² *Phillip Zorn Brewing Co. v. Malott*, 151 Ind. 371, 51 N. E. 471 [reversing, 46 N. E. 23].

³ *Duke of Sutherland v. Heathcote* [1892], 1 Ch. 475 [affirming (1891), 3 Ch. 504].

⁴ *Curtis v. Albee*, 167 N. Y. 360, 60 N. E. 660.

⁵ *De Voin v. De Voin*, 76 Wis. 66, 44 N. W. 839.

⁶ *Harbeck v. Pupin*, 145 N. Y. 70, 39 N. E. 722.

intend to assume when he made the contract.⁷ It seems, however, that by some statutes equity may have power to reform a contract because of mistake in the inducement.⁸

§ 2217. Mutuality of mistake as involving consideration. A simple executory contract is enforceable only if it is supported by a valuable consideration.¹ If reformation is sought as against the promisor or the grantor where the original transaction is gratuitous, it is ordinarily held that such relief must be denied, since there is no valid oral agreement to which to reform the deed or other written instrument.²

⁷ *New York Life Ins. Co. v. McMaster*, 87 Fed. 63, 30 C. C. A. 532; *Rider v. Powell*, 28 N. Y. 310; *Nevins v. Dunlap*, 33 N. Y. 676; *Welles v. Yates*, 44 N. Y. 525; *Jackson v. Andrews*, 59 N. Y. 244; *Moran v. McLarty*, 75 N. Y. 25; *Whittemore v. Farrington*, 76 N. Y. 452. "The court could not make a new contract for the parties but could only cause their actual agreement to be expressed according to its terms; nor could it reform the instrument according to the terms in which (A) understood it, unless it should be shown that (B) also had the same understanding of its terms." *Ward v. Yorba*, 123 Cal. 447, 449, 56 Pac. 58.

⁸ *Du Bois v. Waterworks Co.*, 176 Pa. St. 430, 53 Am. St. Rep. 678, 34 L. R. A. 92, 35 Atl. 248. The statute authorized the court on bill filed by any citizen who used the water, alleging impurity or deficiency, to compel the water company to correct the evil complained of and to make "such order in the premises as may seem just and equitable." Under this statute, the supreme court said the lower court might proceed "even to the reformation of the contract upon a basis just and equitable to both parties, where, as here, it was made in mutual mistake as to an essential fact, and a remedy for the difficulty may be found without violation of the main intent of

both parties in the original instrument."

These remarks are obiter, as the question was as to the right of the borough to rescind the contract because the water supply was defective owing to a mistake in the capacity of the stipulated source of supply. Rescission was denied.

See also, *United States Water Works Co. v. Du Bois*, 176 Pa. St. 439, 35 Atl. 251, to the effect that the borough can not rescind by ordinance annulling such contract.

¹ See ch. XIX.

² *England. Bonham v. Newcomb*, 2 Vent. 364.

Arkansas. *Peters v. Priest*, 134 Ark. 161, 203 S. W. 1042.

Illinois. *Strayer v. Dickerson*, 205 Ill. 257, 68 N. E. 767.

Massachusetts. *Richardson v. Adams*, 171 Mass. 447, 50 N. E. 941.

Michigan. *Redding v. Rozell*, 59 Mich. 476, 26 N. W. 677; *Shears v. Westover*, 110 Mich. 505, 68 N. W. 266; *Miller v. Beardslee*, 175 Mich. 414, 141 N. W. 566.

Nebraska. *Gwyer v. Spaulding*, 33 Neb. 573, 50 N. W. 681.

New Jersey. *Miller v. Savage*, 62 N. J. Eq. 746, 48 Atl. 1004.

North Carolina. *Powell v. Morisey*, 98 N. Car. 426, 2 Am. St. Rep. 343, 4 S. E. 185.

Two exceptions to this principle have been recognized in some jurisdictions. If the original transaction is gratuitous and the grantee has taken possession of the realty and constructed valuable improvements in reliance upon the gratuitous promise of the grantor, equity has given reformation of such conveyance as against the grantor so as to make it conform to his gratuitous promise.³ This, however, is one of the cases in which equity gives specific performance of a gratuitous promise upon which the adversary party has so acted that he will be seriously prejudiced if the gratuitous promise is not enforced.⁴ This can only mean that a contract means something in equity different from its meaning at law, or else that consideration has an entirely different meaning at equity from its meaning at law.⁵

The other exception which is recognized in some jurisdictions exists where reformation is sought by a gratuitous grantee not against the grantor himself, but against one who has succeeded to the rights of the grantor without paying value therefor. In some jurisdictions it seems to be held that although reformation could not be had against the grantor, it can be had as against all who claim under him and who have not given value for such interest.⁶ It has been sought to justify this result on the theory that the grantor himself might have assented to reformation if his attention had been called to the mistake in time; and that since the grantor is no longer in a position in which he can assent to reformation, equity will enforce reformation as against a volunteer who claims under the original grantor by a gratuitous conveyance. This result is contrary to a considerable mass of authority, for in many of the cases already cited,⁷ relief was denied as against the heirs of the grantor, although they were volunteers. It is also difficult to see upon what theory an executory promise to make a present can be enforced as against the estate of the deceased promisor, even though the deceased promisor might have kept his promise voluntarily if he had lived.

If a gratuitous conveyance is so drawn by mistake as not to express the intention of the grantor, reformation may be had in a

Oregon. Langley v. Kesler, 57 Or. 281, 110 Pac. 401, 111 Pac. 246.

Wisconsin. Willey v. Hodge, 104 Wis. 81, 76 Am. St. Rep. 852, 80 N. W. 75.

³ Cummings v. Freer, 26 Mich. 128.

⁴ See § 524.

⁵ See § 524.

⁶ Lister v. Hodgson, L. R. 4 Eq. 30; Lackersteen v. Lackersteen, 30 L. J. Rep. (N. S. Ch. Div.) 5; Wyche v. Greene, 16 Ga. 49; Spencer v. Spencer, 115 Miss. 71, 75 So. 770.

⁷ See note 2 in this section.

suit by the grantor against the grantee.⁶ No attempt is made in cases of this sort, it will be noticed, to enforce any executory gratuitous promise. The only effect of such reformation is to keep a gratuitous grantee from acquiring greater interest than the grantor had intended to convey.

§ 2218. Mistake on one side—Inequitable conduct on the other.

Where A is entering into a written contract under mistake as to its contents, and the circumstances are such that if B, too, were mistaken, reformation would be given on A's application, a still clearer case for reformation exists where B knew of A's mistake and took advantage of it, or by his own conduct or representations led him into such mistake.¹ The difference between this class of cases and the general types of cases where reformation is allowed, is that there is no valid oral prior agreement here, to which both parties have really assented and to which the written contract is to be reformed to conform. However, the party who led the other into mistake or took advantage of the mistake, is not allowed to deny that the contract which he induced the adversary party to think he was making, is not in force, as it would have been had the mistake not been made. It is in cases of this sort that equity comes the nearest to making a new contract for the parties. Thus where B misleads A as to the description of the specific property

⁶ James v. Couchman, 20 Ch. Div. 212; Deischer v. Price, 148 Ill. 383, 36 N. E. 105; Van Brunt v. Wisconsin Consistory Home Association, 163 Wis. 540, 158 N. W. 295.

¹ United States. Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 35 L. ed. 1063; Bowers v. Ins. Co., 68 Fed. 785; Home Ins. Co. v. Chemical Co., 109 Fed. 681.

Alabama. Jones v. Johnston, 193 Ala. 265, 69 So. 427.

California. Higgins v. Parsons, 65 Cal. 280, 3 Pac. 881.

Illinois. Deischer v. Price, 148 Ill. 383, 36 N. E. 105; Koch v. Streuter, 218 Ill. 546, 2 L. R. A. (N.S.) 210, 75 N. E. 1049.

Indiana. Roszell v. Roszell, 109 Ind. 354.

Iowa. Winans v. Huyck, 71 Ia. 459, 32 N. W. 422; Williams v. Hamilton, 104 Ia. 423, 65 Am. St. Rep. 475, 73 N. W. 1029; Sutton v. Risser, 104 Ia. 631, 74 N. W. 23.

Kentucky. Scott v. Spurr, 169 Ky. 575, 184 S. W. 866.

Michigan. Goodenow v. Curtis, 18 Mich. 298.

Minnesota. Smith v. Jordan, 13 Minn. 264, 97 Am. Dec. 232; Crookston Imp. Co. v. Marshall, 57 Minn. 333, 47 Am. St. Rep. 612, 50 N. W. 294; Stanek v. Libera, 73 Minn. 171, 75 N. W. 1124.

Mississippi. Becker v. Dunagin, 113 Miss. 338, 74 So. 275.

Montana. Sanford v. Gates, 21 Mont. 277, 53 Pac. 749.

New Jersey. Smith-Austermuhl Co. v. Jersey Rys. Advertising Co., 89 N. J. Eq. 12, 103 Atl. 388.

contracted for;² or as to the amount to be paid;³ or as to the time for which the contract is to run;⁴ or where A is a member of a firm which has made an oral contract with B, and on reducing it to writing B inserts a term and falsely represents to A that his co-partner has assented thereto;⁵ or where the lessee in preparing the lease omits a covenant with reference to cultivation, presents it to the lessor's agent and induces him to sign when he is so engrossed in business so as not to notice such omission,⁶ A may have the mistake corrected and the contract, as reformed, enforced with the mistake eliminated, though B did not intend to be bound thereby. Reformation may be given for a mistake caused by an innocent misrepresentation by the adversary party.⁷ Reformation may also be given where A understands that he is contracting for a given subject-matter and the adversary party, B, knows that A will not receive such property by the terms of the contract as executed.⁸ So where the grantee knows that the grantor believes that a coal vein under the realty conveyed is excepted from the operation of such conveyance, when in fact it is not, and grantee knows that it is not, reformation will be granted.⁹

New Mexico. *Cleveland v. Bateman*, 21 N. M. 675, 158 Pac. 648.

New York. *Welles v. Yates*, 44 N. Y. 525; *Husted v. Van Ness*, 158 N. Y. 104, 52 N. E. 645.

North Carolina. *Day v. Day*, 84 N. Car. 408; *Jones v. Warren*, 134 N. Car. 390, 46 S. E. 740; *Sills v. Ford*, 171 N. Car. 733, 88 S. E. 636; *America Potato Co. v. Jeanette Bros. Co.*, 174 N. Car. 236 [sub nomine, *American Potato Co. v. Jennette Bros. Co.*, 93 S. E. 795].

North Dakota. *M. Sigbert Awes Co. v. Haslam*, 37 N. D. 122, 163 N. W. 265.

Oregon. *Archer v. Lumber Co.*, 24 Or. 341, 33 Pac. 526; *Markwart v. Kliewer*, 75 Or. 574, 147 Pac. 553; *Bradshaw v. Provident Trust Co.*, 81 Or. 55, 158 Pac. 274.

South Dakota. *McCormick, etc., Co. v. Woulph*, 11 S. D. 252, 76 N. W. 939.

Tennessee. *Graham v. Guinn* (Tenn. Ch. App.), 43 S. W. 749; *McCormick v. Ratcliffe* (Tenn. Ch. App.), 64 S. W. 332.

West Virginia. *Smith v. Board of Education*, 76 W. Va. 230, 85 S. E. 513.

Wisconsin. *Dane v. Derber*, 28 Wis. 216; *James v. Cutler*, 54 Wis. 172, 10 N. W. 147; *Kyle v. Fehley*, 81 Wis. 67, 29 Am. St. Rep. 866, 51 N. W. 257.

²*Jones v. Johnston*, 193 Ala. 265, 69 So. 427; *Becker v. Dunagin*, 113 Miss. 338, 74 So. 275; *McCormick, etc., Co. v. Woulph*, 11 S. D. 252, 76 N. W. 939; *McCormick v. Ratcliffe* (Tenn. Ch. App.), 64 S. W. 332.

³*Sanford v. Gates*, 21 Mont. 277, 53 Pac. 749; *Graham v. Guinn* (Tenn. Ch. App.), 43 S. W. 749.

⁴*Smith-Austermuhl Co. v. Jersey Rys. Advertising Co.*, 89 N. J. Eq. 12, 103 Atl. 388.

⁵*Sutton v. Risser*, 104 Ia. 631, 74 N. W. 23.

⁶*Scott v. Spurr*, 169 Ky. 575, 184 S. W. 866.

⁷*Bush v. Merriman*, 87 Mich. 260, 49 N. W. 567.

⁸*Stevens v. Holman*, 112 Cal. 345, 53 Am. St. Rep. 216, 44 Pac. 670.

⁹*Cook v. Liston*, 192 Pa. St. 19, 43 Atl. 389.

Since reformation will not be granted unless the instrument as reformed would be operative,¹⁰ it has been held that reformation will not be given in cases in which the grantor or vendor points out property to which he has no title and which does not conform to the description in the contract or conveyance.¹¹ The reason for refusing reformation in such a case is that the party who has been misled can not recover the property itself by reason of the instrument as reformed, since such property does not belong to the grantor or vendor, and reformation as against the grantor or vendor can not operate as against the owner of such property. Accordingly, the grantee or vendee can recover only damages and he is entitled to damages without reformation.¹² If the period of limitations for the action for damages for such deceit has not yet run, the plaintiff has nothing to gain by reformation. If the period of limitations had run when the fraud was discovered, it might make a very serious difference to the party who seeks relief, whether he can change the contract by reformation and bring an action upon such contract or upon the covenants in such deed for damages, or whether he is to be limited to his action in tort.

If from the entire contract it can be seen that a certain clause does not express the real intention of the parties, reformation can be had without showing specifically that the parties had a mutual understanding of what the term in question should really be. Thus where A took thirteen shares in a building and loan association, the by-laws of which, being a part of the contract, required a payment of one dollar per share per month, a clause in the note requiring a payment of twenty-six dollars per month on such shares may be corrected.¹³ This is really a question of construction, not reformation, and involves the principle that the paramount general intent prevails over an inconsistent subordinate particular intent.¹⁴

Under guise of reformation, equity can not make a new contract for the parties upon terms which it thinks fair and just.¹⁵

¹⁰ See § 2220.

¹¹ *Jahnke v. Seydel*, 178 Ia. 363, 159 N. W. 986; *Macey v. Furman*, 90 Wash. 580, 156 Pac. 548. If the injured party seeks rescission, the party who is guilty of such fraud can not raise the objection that reformation should have been sought. *Macey v. Furman*, 90 Wash. 580, 156 Pac. 548.

¹² *Jahnke v. Seydel*, 178 Ia. 363, 159 N. W. 986.

¹³ *Abbott v. Loan Association*, 86 Tex. 467, 25 S. W. 620 [reversing, 23 S. W. 620].

¹⁴ See § 2039.

¹⁵ *Hyde v. Kirkpatrick*, 78 Or. 466, 153 Pac. 488 [denying rehearing, *Hyde v. Kirkpatrick*, 78 Or. 466, 153 Pac. 41]. See §§ 2214 et seq.

§ 2219. Effect of negligence. In a number of cases language is used which seems to imply that a party can not have reformation if the mistake for which he seeks relief has been due in any part to his negligence.¹ Failure on the part of the party who seeks relief to read the instrument which he seeks to have reformed, has been said to be such a mistake as to prevent him from obtaining reformation.² It has been said that failure to read a contract so as to comprehend its terms is a mistake of this sort,³ and it has even been suggested that a party who had an opportunity to inform himself of the contents of the instrument, can not have reformation, although the adversary party knew of the mistake and took advantage thereof.⁴

The courts which have laid down this principle have apparently failed to distinguish between the cases in which the parties entered into a valid contract and by mistake failed to set forth the terms of such contract in the writing to which they attempted to reduce

¹ **Arkansas.** *Cherry v. Brizzolara*, 89 Ark. 309, 21 L. R. A. (N.S.) 508, 116 S. W. 668 (obiter).

California. *Burt v. Los Angeles Olive Growers' Association*, 175 Cal. 668, 166 Pac. 993. (Under California statute.)

Oregon. *Hyde v. Kirkpatrick*, 78 Or. 466, 153 Pac. 41 [rehearing denied, *Hyde v. Kirkpatrick*, 78 Or. 466, 153 Pac. 488]; *Manley v. Smith*, 88 Or. 176, 171 Pac. 897.

Washington. *Conrads v. Green*, 92 Wash. 269, 159 Pac. 102.

Wyoming. *Grieve v. Grieve*, 15 Wyom. 358, 9 L. R. A. (N.S.) 1211, 80 Pac. 569.

² *Hyde v. Kirkpatrick*, 78 Or. 466, 153 Pac. 41 [rehearing denied, *Hyde v. Kirkpatrick*, 78 Or. 466, 153 Pac. 488]; *Manley v. Smith*, 88 Or. 176, 171 Pac. 897; *Conrads v. Green*, 92 Wash. 269, 159 Pac. 102; *Grieve v. Grieve*, 15 Wyom. 358, 9 L. R. A. (N.S.) 1211, 80 Pac. 569.

³ *Bailey v. Lisle Manufacturing Co.*, 238 Fed. 257, 152 C. C. A. 3; *Burt v. Los Angeles Olive Growers' Association*, 175 Cal. 668, 166 Pac. 993. (Under California statute.)

"It is the duty of one, when he becomes a party to a written contract, to examine its provisions and determine for himself what obligations and what liabilities it imposes, and, if need be, to seek legal advice upon that subject. It is negligence, and clear failure to exercise ordinary care or diligence, for intelligent business men (one of whom is a lawyer) holding in their hands and reading a written contract which clearly states their agreement, to rely on any statement or assent made by the opposite party regarding the terms or obligation of the agreement, rather than upon the written terms themselves, and 'courts of equity will not relieve parties from the consequences of their own folly, or assist them when their condition is attributable to a failure to exercise ordinary care for their own protection.'" *Bailey v. Lisle Manufacturing Co.*, 238 Fed. 257, 152 C. C. A. 3.

⁴ *Cherry v. Brizzolara*, 89 Ark. 309, 21 L. R. A. (N.S.) 508, 116 S. W. 668 (obiter).

it, and the cases in which an offeror has by mistake included terms in his offer which he did not mean to include, or in which the offeror has used the words in his offer which he meant to use, but in which he has been induced to make such offer by reason of mistake. In the cases of the two latter groups it is generally held that if the offeree does not know of the mistake and does not take advantage of it, the offer and acceptance amount to a valid contract, since the offeree is entitled to rely upon the offer as it is communicated to him by the offeror without any regard to the actual state of mind of the offeror.⁵ If a valid oral contract has been entered into and reformation is granted, the party against whom such relief is granted does not lose any of the benefits of the bargain into which he entered, but he only loses the unfair advantage which he is seeking to gain by reason of the mistake of the adversary party. For these reasons some of the courts which appear to insist upon the theory that negligence on the part of the plaintiff will prevent reformation, have modified this principle so as to leave a number of cases in which negligence may exist and yet reformation may be granted. The existence of a mistake does not prevent reformation, since mistake is the basis of the right to reformation.⁶ Failure to read the instrument is said not to amount to negligence such as will prevent reformation, although the party who seeks relief could read and had an opportunity to read.⁷

The true rule is said to be whether the party who seeks relief acted as a man of ordinary prudence in view of all the circumstances.⁸ The fact that the draftsman was a man of high repute

⁵ See §§ 270 et seq.

⁶ *American Mining Co. v. Basin & Bay State Mining Co.*, 39 Mont. 476, 24 L. R. A. (N.S.) 305, 104 Pac. 525.

⁷ *Cox v. Hall*, 54 Mont. 154, 168 Pac. 519; *Lloyd v. Hulick*, 69 N. J. Eq. 784, 115 Am. St. Rep. 624, 63 Atl. 616; *Bank v. Redwine*, 171 N. Car. 559, 88 S. E. 878.

"When a complaint proceeding on the theory of mutual mistake alleges facts which command the inference of such mistake, unless deliberate fraud is imputed, such complaint sufficiently alleges mistake; that the term 'mistake' always involves the conception that the victim has been guilty of some degree of negligence which may or may not

be excusable in the circumstances of the particular case; and that courts of equity are not bound by cast-iron rules, but are governed by rules which are flexible and adapt themselves to particular exigencies, so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." *Cox v. Hall*, 54 Mont. 154, 168 Pac. 519 [citing, *Hennessey v. Holmes*, 46 Mont. 89, 125 Pac. 132; *Parchen v. Chessman*, 49 Mont. 326, Ann. Cas. 1916A, 681, 142 Pac. 631, 146 Pac. 469; *Brundy v. Canby*, 50 Mont. 454, 148 Pac. 315].

⁸ *Bank v. Redwine*, 171 N. Car. 559, 88 S. E. 878.

and that he stated that the provision which was in fact omitted from the written contract had been interlined therein, was held to be sufficient to show that the party who sought relief had acted as a reasonably prudent man would act.⁹ Failure to read an instrument so as to comprehend it is accordingly held not to amount to negligence of itself.¹⁰ The result of these qualifications and exceptions is to leave comparatively little of the rule that negligence on the part of the person who seeks relief will prevent him from obtaining reformation.

The great majority of the courts recognize the distinctions between a mistake which it is claimed prevents the contract from existing in the first instance, or which makes it voidable at best, and a mistake which is ground for reformation;¹¹ and they hold that where reformation is sought, negligence on the part of the party who seeks relief does not prevent him from having the written contract reformed so as to express the terms of the actual agreement.¹² Where this theory is in force, failure to read the contract,¹³ or failure to read it so as to comprehend the provisions thereof,¹⁴ does not prevent reformation. If a party to a contract assumes that the subsequent instruments have been prepared in accordance with the terms of the contract, he is not guilty of such negligence as

⁹ *Bank v. Redwine*, 171 N. Car. 559, 88 S. E. 878.

¹⁰ *American Mining Co. v. Basin & Bay State Mining Co.*, 39 Mont. 476, 24 L. R. A. (N.S.) 305, 104 Pac. 525.

¹¹ *Perkins v. Kirby*, 39 R. I. 343, 97 Atl. 884.

¹² *Iowa. Stead v. Sampson*. — Ia. —, 155 N. W. 978.

Maryland. Coggins v. Carey, 106 Md. 204, 10 L. R. A. (N.S.) 1191, 66 Atl. 173.

North Carolina. America Potato Co. v. Jeanette Bros. Co., 174 N. Car. 236 [sub nomine, *American Potato Co. v. Jennette Bros. Co.*, 93 S. E. 795].

Oregon. Bradshaw v. Provident Trust Co., 81 Or. 55, 158 Pac. 274.

Rhode Island. Perkins v. Kirby, 39 R. I. 343, 97 Atl. 884.

The negligence which precludes reformation is said to be negligence

which amounts to "a violation of a positive duty." *Welch v. Johnson*, — Or. —, 184 Pac. 280.

¹³ *Iowa. Pyne v. Knight*, 130 Ia. 113, 106 N. W. 505; *Stead v. Sampson*, — Ia. —, 155 N. W. 978.

New Jersey. Lloyd v. Hulick, 69 N. J. Eq. 784, 115 Am. St. Rep. 624, 63 Atl. 616.

New York. Albany City Savings Institution v. Burdick, 87 N. Y. 40.

Oregon. Bradshaw v. Provident Trust Co., 81 Or. 55, 158 Pac. 274.

Rhode Island. Perkins v. Kirby, 39 R. I. 343, 97 Atl. 884.

¹⁴ *Coggins v. Carey*, 106 Md. 204, 10 L. R. A. (N.S.) 1191, 66 Atl. 673; *America Potato Co. v. Jeanette Bros. Co.*, 174 N. Car. 236 [sub nomine, *American Potato Co. v. Jennette Bros. Co.*, 93 S. E. 795]; *Perkins v. Kirby*, 39 R. I. 343, 97 Atl. 884.

to prevent reformation.¹⁵ The fact that the party who seeks relief prepared the instrument himself, does not prevent him from having such instrument reformed so as to express the actual agreement of the parties.¹⁶

§ 2220. Mistake in expression—Mistake as to words used. The typical form of mistake in expression is found where the parties have agreed orally upon the terms of a contract, have then attempted to express these terms in writing, and have, through inadvertence, omitted or misstated terms, or inserted some stipulation which was not agreed upon. Mistake of this sort does not affect the validity of the contract. The question presented to the courts is whether upon these facts the original contract can be enforced or whether the parties are bound by the written stipulations. This question is answered at law by the rule that oral evidence of prior or contemporaneous negotiations can not contradict the terms of a written contract. This is really a rule of substantive law, though stated as a rule of evidence.¹ Hence, there can be no reformation at law.² In equity, subject to proper limitations to be discussed hereafter,³ a contract of the type under discussion may be reformed so as to express the actual agreement of the parties.⁴

¹⁵ *Stead v. Sampson*, — Ia. —, 155 N. W. 978.

¹⁶ *Perkins v. Kirby*, 39 R. I. 343, 97 Atl. 884.

¹ See §§ 2137 et seq.

² *American, etc., Ins. Co. v. Simpson*, 43 Ill. App. 98; *Nance v. Metcalf*, 19 Mo. App. 183; *Winnipiseogee Paper Co. v. Eaton*, 64 N. H. 234, 9 Atl. 221.

³ See §§ 2221 et seq.

⁴ *United States. Bradford v. Bank*, 54 U. S. (13 How.) 57, 14 L. ed. 49; *Hearne v. Ins. Co.*, 87 U. S. (20 Wall.) 488, 22 L. ed. 395; *Equitable Ins. Co. v. Hearne*, 87 U. S. (20 Wall.) 494, 22 L. ed. 398; *Adams v. Henderson*, 168 U. S. 573, 42 L. ed. 584; *Ackerlind v. United States*, 240 U. S. 531, 60 L. ed. 783; *Western Assurance Co. v. Ward*, 75 Fed. 338; *New York Life Ins. Co. v. McMaster*, 87 Fed. 63, 30 C. C. A. 532.

Alabama. Wright v. Wright, 180 Ala. 343 60 So. 931; *Consumers' Coal &*

Fuel Co. v. Yarbrough, 194 Ala. 482, 69 So. 897.

Arkansas. State v. Paup, 13 Ark. 129, 56 Am. Dec. 303.

Connecticut. Newell v. Smith, 53 Conn. 72, 3 Atl. 674; *West v. Suda*, 69 Conn. 60, 36 Atl. 1015.

Florida. Jackson v. Magbee, 21 Fla. 622; *Franklin v. Jones*, 22 Fla. 526; *Fisher v. Villamil*, 62 Fla. 472, 39 L. R. A. (N.S.) 90, 56 So. 559; *Rosenthal v. First National Fire Insurance Co.*, — Fla. —, 77 So. 92.

Idaho. Carroll v. Hartford Fire Insurance Co., 28 Ida. 466, 154 Pac. 985.

Illinois. Lindsay v. Davenport, 18 Ill. 375; *Snell v. Snell*, 123 Ill. 403, 5 Am. St. Rep. 526, 14 N. E. 684.

Indiana. Zenor v. Johnson, 107 Ind. 69, 7 N. E. 751; *Roszell v. Roszell*, 109 Ind. 354, 10 N. E. 114.

Iowa. Huston v. Fumas, 31 Ia. 154; *Green v. Dempster Mill Mfr. Co. (Ia.)*,

Equity may reform the contract, and enforce it in the same action.⁵

§ 2221. Mistake as to legal effect of words used. A form of mistake, which involves different principles from the form already discussed, exists where the parties to a written contract know the

82 N. W. 483; *Welch v. Schappi*, 179 Ia. 474, 161 N. W. 442; *Farmers' Loan & Trust Co. v. Brown*, 182 Ia. 1044, 165 N. W. 70.

Kentucky. *Scott v. Spurr*, 169 Ky. 575, 184 S. W. 866.

Maryland. *Stiles v. Willis*, 66 Md. 552, 8 Atl. 353.

Massachusetts. *Page v. Higgins*, 150 Mass. 27, 5 L. R. A. 152, 22 N. E. 63.

Michigan. *Isberg v. Miller*, 176 Mich. 677, 142 S. W. 1060.

Minnesota. *Mahoney v. Minnesota Farmers' Mutual Ins. Co.*, 136 Minn. 34, 161 N. W. 217.

Missouri. *Griffith v. Townley*, 69 Mo. 13, 33 Am. Rep. 476; *Stephens v. Stephens*, — Mo. —, 183 S. W. 572.

Montana. *Parchen v. Chessman*, 49 Mont. 326, Ann. Cas. 1916A, 681, 142 Pac. 631, 146 Pac. 469; *Parchen v. Chessman*, 53 Mont. 430, 164 Pac. 531.

Nebraska. *Beall v. Martin*, 48 Neb. 479, 67 N. W. 433.

New Hampshire. *Minot v. Tilton*, 64 N. H. 371, 10 Atl. 682; *Searles v. Churchill*, 69 N. H. 530, 43 Atl. 184.

New Jersey. *Green v. Stone*, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 34 Atl. 1099.

New York. *Lyman v. Ins. Co.*, 17 Johns. (N. Y.) 373; *McHugh v. Ins. Co.*, 48 How. Pr. (N. Y.) 230; *Hall v. Reed*, 2 Barb. Ch. (N. Y.) 500; *Kent v. Manchester*, 29 Barb. (N. Y.) 595; *Botsford v. McLean*, 45 Barb. (N. Y.) 478; *Gillespie v. Moon*, 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559; *Curtis v. Leavitt*, 15 N. Y. 1; *Rider v. Powell*, 28 N. Y. 310; *Nevins v. Dunlap*, 33 N. Y. 676; *Welles v. Yates*, 44 N. Y. 525;

Bryce v. Ins. Co., 55 N. Y. 240, 14 Am. Rep. 249; *Jackson v. Andrews*, 59 N. Y. 244; *Moran v. McLarty*, 75 N. Y. 25; *Whittemore v. Farrington*, 76 N. Y. 452; *McDonald v. Crissey*, 215 N. Y. 609, 109 N. E. 609.

North Carolina. *Jones v. Warren*, 134 N. Car. 390, 46 S. E. 740.

Ohio. *Evants v. Strode*, 11 Ohio 480, 38 Am. Dec. 744; *Neininger v. State*, 50 O. S. 394, 40 Am. St. Rep. 674, 34 N. E. 633.

Oklahoma. *Atwood v. Mikeska*, 29 Okla. 69, L. R. A. 1917A, 602, 115 Pac. 1011; *State Mutual Insurance Co. v. Green*, — Okla. —, L. R. A. 1917F, 663, 166 Pac. 105.

Pennsylvania. *Wanner v. Lundis*, 137 Pa. St. 61, 20 Atl. 950; *Baab v. Houser*, 203 Pa. St. 470, 53 Atl. 344.

Tennessee. *Graham v. Guinn* (Tenn. Ch. App.), 43 S. W. 749.

Texas. *Kelley v. Ward*, 94 Tex. 289, 60 S. W. 311 [affirming, 58 S. W. 207].

Utah. *Griffin v. Salt Lake City*, 18 Utah 132, 55 Pac. 383.

Vermont. *Hoyt v. Hoyt*, 77 Vt. 244, 59 Atl. 845.

West Virginia. *Pennybacker v. Laidley*, 33 W. Va. 624, 11 S. E. 39.

§ *Rosenthal v. First National Fire Insurance Co.*, — Fla. —, 77 So. 92; *Carroll v. Hartford Fire Insurance Co.*, 28 Ida. 466, 154 Pac. 985; *Scott v. Spurr*, 169 Ky. 575, 184 S. W. 866.

Reformation has been granted by the court in an action for reformation and for judgment on the contract as reformed. *State Mutual Insurance Co. v. Green*, — Okla. —, L. R. A. 1917F, 663, 166 Pac. 105.

very words which they insert in the contract, but do not intend that it shall have the legal effect which it actually has. This form of mistake is, of course, due to ignorance or mistake of law. The question of the right of either party to reformation in such cases depends in the first instance on whether the parties had a prior valid oral contract which they have attempted to reduce to writing, differing from the written contract. If there has been no prior valid oral contract, differing from the written contract, one party can not have reformation to make the contract express his intention, since this would be to substitute his intention for the contract between the two parties.¹ Illustrations of mistake of this sort where reformation has been refused are as follows: where the

¹ **United States.** *Hunt v. Rousmanier*, 21 U. S. (8 Wheat.) 174, 5 L. ed. 589; *Hunt v. Rousmanier*, 26 U. S. (1 Pet.) 1, 7 L. ed. 27; *Bank v. Daniel*, 37 U. S. (12 Pet.) 33, 9 L. ed. 989; *Snell v. Ins. Co.*, 98 U. S. 85, 25 L. ed. 52; *Illingworth v. Spaulding*, 43 Fed. 827; *Travelers' Ins. Co. v. Henderson*, 69 Fed. 762, 16 C. C. A. 390; *Goodno v. Hotchkiss*, 237 Fed. 696.

Alabama. *Ohlander v. Dexter*, 97 Ala. 476, 12 So. 51; *Tyson v. Chestnut*, 100 Ala. 571, 13 So. 763.

Arkansas. *Hershey v. Luce*, 56 Ark. 320, 323, 19 S. W. 963, 20 S. W. 6; *Louis Werner Sawmill Co. v. Sessoms*, 120 Ark. 105, 179 S. W. 185.

California. *Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540; *Loftus v. Fischer*, 106 Cal. 616, 39 Pac. 1064.

Georgia. *Porter v. Wright*, 145 Ga. 787, 89 S. E. 838.

Illinois. *Calverly v. Harper*, 40 Ill. App. 96; *Wolsey v. Neeley*, 46 Ill. App. 387; *Hackemack v. Wiebrock*, 172 Ill. 98, 49 N. E. 984 [affirming, 71 Ill. App. 170]; *Silurian Oil Co. v. Neal*, 277 Ill. 45, 115 N. E. 114.

Iowa. *Brintnall v. Briggs*, 87 Ia. 538, 54 N. W. 531; *Jurgensen v. Carlsen*, 97 Ia. 627, 66 N. W. 877; *Marshall v. Westrope*, 98 Ia. 324, 67 N. W. 257.

Louisiana. *Bellande's Succession*, 42 La. Ann. 241, 7 So. 535.

Massachusetts. *Canedy v. Marcy*, 79 Mass. (13 Gray) 373; *Taylor v. Buttrick*, 165 Mass. 547, 52 Am. St. Rep. 530, 43 N. E. 507.

Michigan. *Renard v. Clink*, 91 Mich. 1, 30 Am. St. Rep. 458, 51 N. W. 692.

Minnesota. *Benson v. Markoe*, 37 Minn. 30, 5 Am. St. Rep. 816, 33 N. W. 38.

Missouri. *McIntyre v. Casey*, — Mo. —, 182 S. W. 966.

Montana. *Gaffney Mercantile Co. v. Hopkins*, 21 Mont. 13, 52 Pac. 561.

New Hampshire. *Mullin v. Eaton* (N. H.), 19 Atl. 371.

New Jersey. *Ordway v. Chace*, 57 N. J. Eq. 478, 42 Atl. 149.

New York. *Berry v. Ins. Co.*, 132 N. Y. 49, 28 Am. St. Rep. 548, 30 N. E. 254.

Oklahoma. *Campbell v. Newman*, 51 Okla. 121, 151 Pac. 602.

Oregon. *Archer v. Lumber Co.*, 24 Or. 341, 33 Pac. 526; *Kleinsorge v. Rohse*, 25 Or. 51, 34 Pac. 874; *Mitchell v. Holman*, 30 Or. 280, 47 Pac. 616; *King v. Holbrook*, 38 Or. 452, 63 Pac. 651.

Pennsylvania. *Cochran v. Pew*, 159 Pa. St. 184, 28 Atl. 219.

Tennessee. *Schmid v. Ins. Co.* (Tenn. Ch. App.), 37 S. W. 1013.

Utah. *Deseret National Bank v. Dinwoodey*, 17 Utah 43, 53 Pac. 215.

parties execute an irrevocable power of attorney, thinking it will operate as a mortgage;² or a bill of sale, thinking that it will operate as a chattel mortgage;³ or a contract for the surrender of a lease, thinking that it will operate as an option, to be accepted at the election of one party;⁴ where an insurance policy is taken in the name of a mortgagee, who applies for it, thinking that it will operate as if taken out by the owner of the building with a clause making the loss payable to the mortgagee;⁵ or in the name of the husband who effects it, thinking that it will protect the interest of his wife, the real owner of the building;⁶ or payable to the owner who takes it, thinking that it will protect the interest of the contractor who is erecting the building;⁷ or a contract which a party to it executes, believing that it does not make him liable as partner.⁸ So if the parties know and intend the very words used, the fact that such words do not pass the estate intended, owing to mistake of law, does not justify reformation. Thus where a deed is made to A and his "minor heirs," under the belief that "heirs" is equivalent to "children";⁹ or A deeds land to B, his daughter, and C, her husband, "and their bodily heirs," thinking that this includes all the heirs of her body;¹⁰ or A conveys all his interest in certain realty to B, thinking that he has only a life interest, whereas he has a fee,¹¹ no relief can be given. Rescission is also refused in cases of this sort. Thus where A deeded a right of way to a railroad, not knowing that it would prevent him from recovering damages inflicted on the rest of his property by the operation of the railroad, he can not avoid his contract, at least where the railroad company did not know of his mistake and take advantage of it.¹²

Washington. Phillips v. Port Townsend Lodge, 8 Wash. 529, 36 Pac. 476

Wisconsin. St. Clara Female Academy v. Ins. Co., 93 Wis. 57, 66 N. W. 1140.

²Hunt v. Rousmanier, 21 U. S. (8 Wheat.) 174, 5 L. ed. 589.

³Hershey v. Luce, 56 Ark. 320, 323, 19 S. W. 963, 20 S. W. 6.

⁴Ohlander v. Dexter, 97 Ala. 476, 12 So. 51.

⁵Ordway v. Chace, 57 N. J. Eq. 478, 42 Atl. 149.

⁶Schmid v. Ins. Co. (Tenn. Ch. App.), 37 S. W. 1013.

⁷St. Clara Female Academy v. Ins. Co., 93 Wis. 57, 66 N. W. 1140.

⁸Woolworth v. McPherson, 55 Fed. 558.

⁹Seymour v. Bowles, 172 Ill. 521, 50 N. E. 122.

¹⁰Atherton v. Roche, 192 Ill. 252, 55 L. R. A. 591, 61 N. E. 357.

¹¹Campbell v. Newman, 51 Okla. 121, 151 Pac. 602.

¹²Eldridge v. R. R., 88 Me. 191, 33 Atl. 974.

If on the other hand, there has been a valid oral contract prior to the written contract which the parties have failed to reduce to writing correctly because of mistake as to the legal effect of the words used in the written contract, reformation can be had and the written contract thus made to conform to the oral agreement.¹³ The intention of the parties may be expressed in writing by many different combinations of words, and if the real intention of the parties is not set forth in the combination which they have inserted in the contract, reformation may be given without regard to the motive which caused such mistake.¹⁴ Thus where A and B agreed that a certain debt should bear interest, but omitted reference thereto from the note given for such debt, thinking it would bear interest without a provision therefor,¹⁵ or agreed orally that B would accept such amount of tool steel prior to January 1, 1890,

¹³ **United States.** *Hunt v. Rousmanier*, 26 U. S. (1 Pet.) 1, 7 L. ed. 27.

Alabama. *Skidmore v. Stewart*, — Ala. —, 75 So. 1.

Arkansas. *Spaulding Manufacturing Co. v. Godbold*, 92 Ark. 63, 29 L. R. A. (N.S.) 282, 121 S. W. 1063.

Connecticut. *Palmer v. Ins. Co.*, 54 Conn. 488, 9 Atl. 248; *Park v. Blodgett*, 64 Conn. 28, 29 Atl. 133.

Georgia. *Loudermilk v. Loudermilk*, 98 Ga. 780, 25 S. E. 927; *Dolvin v. American Harrow Co.*, 125 Ga. 699, 28 L. R. A. (N.S.) 785, 54 S. E. 706.

Iowa. *Stafford v. Fetters*, 55 Ia. 484, 8 N. W. 322; *Reed v. Root*, 59 Ia. 359, 13 N. W. 323; *Lee v. Percival*, 85 Ia. 639, 52 N. W. 543; *Williams v. Everham*, 90 Ia. 420, 57 N. W. 901; *Williams v. Hamilton*, 104 Ia. 423, 65 Am. St. Rep. 475, 73 N. W. 1020; *Turpin v. Gresham*, 106 Ia. 187, 76 N. W. 680; *Pierce v. Houghton*, 122 Ia. 477 [sub nomine, *Fierce v. Houghton*, 98 N. W. 306]; *Bonbright v. Bonbright*, 123 Ia. 305, 98 N. W. 784; *Hyde Park Investment Co. v. Glenwood Coal Co.*, 170 Ia. 593, 153 N. W. 181.

Massachusetts. *Sparks v. Pittman*, 51 Mass. 511; *Holdsworth v. Tucker*, 143 Mass. 369, 9 N. E. 764.

Michigan. *McGraw v. Muma*, 164 Mich. 117, 129 N. W. 20.

Minnesota. *Wall v. Meilke*, 89 Minn. 232, 94 N. W. 688; *Nelson v. Vassenden*, 115 Minn. 1, 35 L. R. A. (N.S.) 1167, 131 N. W. 794.

Missouri. *Corrigan v. Tiernay*, 100 Mo. 276, 13 S. W. 401; *Michigan Buggy Co. v. Woodson*, 59 Mo. App. 550.

New Hampshire. *Eastman v. Provident, etc., Association*, 65 N. H. 176, 23 Am. St. Rep. 29, 5 L. R. A. 712, 18 Atl. 745.

New York. *Maher v. Ins. Co.*, 67 N. Y. 283; *Avery v. Society*, 117 N. Y. 451, 23 N. E. 3.

North Carolina. *Lutz v. Thompson*, 87 N. Car. 334; *Kornegay v. Everett*, 99 N. Car. 30, 5 S. E. 418.

Rhode Island. *Sprague v. Thurber*, 17 R. I. 454, 22 Atl. 1057.

Vermont. *Beardsley v. Knight*, 10 Vt. 185, 33 Am. Dec. 193.

Wisconsin. *Wisconsin, etc., Bank v. Mann*, 100 Wis. 596, 76 N. W. 777 [questioning, *Neff v. Rains*, 33 Wis. 689].

¹⁴ *Nelson v. Vassenden*, 115 Minn. 1, 35 L. R. A. (N.S.) 1167, 131 N. W. 794.

¹⁵ *Loudermilk v. Loudermilk*, 98 Ga. 780, 25 S. E. 927.

as he needed in his work, not to exceed fifteen tons, and by mistake as to the effect of the written contract worded it so that B was to take fifteen tons of tool steel prior to January 1, 1890,¹⁶ reformation may be had to make the written contract express the oral agreement. So if the contract provides for a conveyance to A and B, and by mistake as to the legal effect of the deed conveyance is made to A only,¹⁷ or if the contract requires a conveyance of an undivided four-fifths interest in certain realty and by mistake as to its legal effect the grantee accepts a deed which conveys only "three-fifths" thereof,¹⁸ reformation may be had. Where an instrument intended as a receipt for an advancement has by mistake as to the legal effect thereof been drawn in the form of a note, reformation may be given.¹⁹ A written agreement "to receipt" to the maker of a note "for note given me to-day," may be reformed so as to conform to the real agreement to receipt for the obligation represented by the note and to cancel it upon performance of certain specified conditions.²⁰ Where specific property is agreed upon, a misdescription thereof may be reformed even if the parties know the very form of expression which they have used to describe it.²¹ Reformation will be given where a mortgage is drawn covering "fixtures and furniture," under the belief that such description includes property which in law comes under neither of these terms.²² So where the parties agreed on specific property to be covered by insurance, a mistake in describing it, due to a mistake as to the effect of the terms used in describing it, may be corrected by reformation.²³ Where a husband and wife have agreed to convey a homestead and by mistake as to the legal effect of the conveyance the husband alone executes it, reformation may be had.²⁴

In a number of cases it is said that equity will not reform contracts or deeds for a mistake of law.²⁵ In many of the cases in

¹⁶ *Park v. Blodgett*, 64 Conn. 28, 29 Atl. 133.

¹⁷ *Corrigan v. Tiernay*, 100 Mo. 276, 13 S. W. 401.

¹⁸ *Parish v. Camplin* 130 Ind. 1, 37 N. E. 607.

¹⁹ *Hausbrandt v. Hofer*, 117 Ia. 103, 94 Am. St. Rep. 289, 90 N. W. 494.

²⁰ *Dolvin v. American Harrow Co.*, 125 Ga. 699, 28 L. R. A. (N.S.) 785, 54 S. E. 706.

²¹ *Walden v. Skinner*, 101 U. S. 577, 25 L. ed. 963; *Eberle v. Heaton*, 124 Mich. 205, 82 N. W. 820; *Jenkins v.*

Jenkins University, 17 Wash. 173, 50 Pac. 785 [modifying on rehearing, 17 Wash. 160, 49 Pac. 247]; *State v. Lorenz*, 22 Wash. 289, 60 Pac. 644.

²² *Ryder v. Ryder*, 10 R. I. 188, 32 Atl. 919.

²³ *Maher v. Ins. Co.*, 67 N. Y. 283.

²⁴ *Whitmore v. Hay*, 85 Wis. 240, 39 Am. St. Rep. 838, 55 N. W. 708.

²⁵ *Louis Werner Sawmill Co. v. Sessions*, 120 Ark. 105, 179 S. W. 185; *Schlösser v. Nicholson*, 184 Ind. 283, 111 N. E. 13.

which this principle is laid down, the courts avoid its application to the particular case and give reformation on other grounds. In some jurisdictions it is said that this principle "is confined to mistakes as to the general rules of law, but has no application to mistakes of persons as to their own private rights and interests."²⁶ By the application of this principle a mistake of a non-resident as to the law of the forum is regarded as a mistake of fact.²⁷ Accordingly, a non-resident may have reformation of a written contract so as to make it conform to the oral contract as to the payment of taxes by the grantee, although such mistake was due to a mistake as to the law of the place where the land was situated.²⁸ There are, however, cases in which reformation has been denied where the parties have deliberately chosen language which does not express their intention as embodied in their oral contract, and where the mistake is not as to the words used, but only as to their legal effect. Reformation has been denied where a guardian under these circumstances executes a mortgage intended to bind his ward's property only, and instead makes himself personally liable.²⁹ So if the parties intend to convey a fee, but deliberately select words which pass a lesser estate, reformation has been denied.³⁰

§ 2222. Intentional omission or insertion of term. If the parties purposely omitted a part of their oral agreement from their written contract, no mistake exists except possibly in their belief that they can prove the oral contract and enforce it as well as the written one. In cases of this sort equity does not grant reformation.¹ If the written contract is complete upon its face and the

²⁶ *McIntyre v. Casey*, — Mo. —, 182 S. W. 966.

²⁷ *Schlosser v. Nicholson*, 184 Ind. 283, 111 N. E. 13.

²⁸ *Schlosser v. Nicholson*, 184 Ind. 283, 111 N. E. 13.

²⁹ *Andrus v. Blazzard*, 23 Utah 233, 54 L. R. A. 354, 63 Pac. 888.

³⁰ *Wilson v. Watkins*, 48 S. Car. 341, 26 S. E. 663.

¹ *Alabama*. *Ware v. Cowles*, 24 Ala. 446, 60 Am. Dec. 482; *Holland Blow Stave Co. v. Barclay*, 193 Ala. 200, 69 So. 118.

Connecticut. *Dunham v. New Britain*, 55 Conn. 378, 11 Atl. 354.

Kentucky. *Pickrell & Craig Co. v. Castleman-Blakemore Co.*, 174 Ky. 1, 191 S. W. 680.

Maryland. *White v. Shaffer*, 130 Md. 351, 99 Atl. 66.

Massachusetts. *Dwight v. Pomeroy*, 17 Mass. 303, 9 Am. Dec. 148.

Michigan. *Martin v. Hamlin*, 18 Mich. 354, 100 Am. Dec. 181; *Wood v. Standard Drug Store*, 192 Mich. 453, 158 N. W. 844.

Missouri. *Regal Realty & Investment Co. v. Gallagher*, — Mo. —, 188 S. W. 151.

New Jersey. *Seitz Brewing Co. v. Ayres*, 60 N. J. Eq. 190, 46 Atl. 535.

parties understand the language used in such contract and its legal effect, reformation can not be granted on the ground that an oral term of such contract which was omitted intentionally was not performed.² Reformation can not be had for the purpose of correcting the nature of the estate conveyed;³ or for the purpose of inserting reservations,⁴ or exceptions to covenants,⁵ or covenants which have been intentionally omitted;⁶ or for the purpose of reforming receipts,⁷ since no mistake can be shown to exist and the effect of reformation will be to enforce oral provisions in violation of the parol evidence rule. Reformation is refused where a party to a deed discovers the mistake after execution but before delivery, but the deed is, nevertheless, delivered in the form in which it was originally drawn.⁸ Elementary as this proposition may seem in view of the so-called parol evidence rule,⁹ there is some authority for allowing an oral term of a contract agreed upon before the rest of the contract was reduced to writing and executed, to be added thereto by reformation.¹⁰ If the parties to a written contract have intentionally inserted terms therein in reliance upon an oral agreement that such terms shall not be enforced, the only mistake which exists is possibly the mistaken belief of the parties that such oral agreement can be enforced against the express terms of the written contract. Accordingly, in many jurisdictions equity will not grant reformation so as to eliminate from the written contract such term which has been inserted intentionally. In some jurisdictions, however, it is held that equity will enforce the real agreement of the parties and that it will eliminate

Virginia. *Meade v. Ry.*, 89 Va. 296, 15 S. E. 497.

Washington. *Weinhard v. Summerville*, 46 Wash. 127, 13 L. R. A. (N.S.) 1089, 89 Pac. 490.

Wisconsin. *Braun v. Rendering Co.*, 92 Wis. 245, 66 N. W. 196; *In re Pullen's Will*, 166 Wis. 254, 165 N. W. 25.

"It was a mere simultaneous parol agreement which can not be resorted to to vary or control the written contract." *Braun v. Rendering Co.*, 92 Wis. 245, 249; 66 N. W. 196.

² *Pickrell & Craig Co. v. Castleman-Blakemore Co.*, 174 Ky. 1, 191 S. W. 680.

³ *Regal Realty & Investment Co. v. Gallagher*, — Mo. —, 188 S. W. 151.

⁴ *Holland Blow Stave Co. v. Barclay*, 193 Ala. 200, 69 So. 118.

⁵ *Weinhard v. Summerville*, 46 Wash. 127, 13 L. R. A. (N.S.) 1089, 89 Pac. 490.

⁶ *Wood v. Standard Drug Store*, 192 Mich. 453, 158 N. W. 844.

⁷ *In re Pullen's Will*, 166 Wis. 254, 165 N. W. 25.

⁸ *McMillon v. Flagstaff*, 18 Ariz. 536, 164 Pac. 318; *White v. Shaffer*, 130 Md. 351, 99 Atl. 66.

⁹ See ch. LXIX.

¹⁰ *Quinn v. Roath*, 37 Conn. 16; *Coger v. McGee*, 5 Ky. (2 Bibb.) 321, 5 Am. Dec. 610; *Taylor v. Gilman*, 25 Vt. 411.

from the contract the term which the parties agreed not to enforce.¹¹ In jurisdictions in which this result is reached there is practically nothing left of the parol evidence rule in equity. A consistent application of this principle would require a court of equity to enforce the oral agreement of the parties without reference to the written contract, except in so far as it might impose a higher degree of proof upon the party who is seeking to reform the written contract. It would not be necessary to show mistake of any sort in order to obtain reformation. A written contract can not be reformed by adding a provision agreed upon by the parties orally after the written contract was made.¹²

§ 2223. Controlling effect of paramount intent. In reformation as in construction,¹ the question is sometimes presented as to the effect of a contract containing inconsistent provisions, where the predominant general intent is apparently contradicted by some subordinate particular intent. When this question is presented in reformation, the general intent, if clear, is enforced and reformation is given by disregarding the inconsistent subordinate intent when due to mistake.² Thus where A intended to sell and B to buy one half of A's tract, which they think is lot 4, A owning lots 4 and 5, but lot 4 is much larger than lot 5, a contract to sell lot 4 will be reformed to transfer one half of the entire tract.³ Where A agrees to mortgage to B all his land, not exempt, and by mistake of law both parties believe that A has an exempt homestead in a certain tract, and accordingly omit such tract from the description of the realty mortgaged,⁴ or where A agrees to pay B a certain sum per yard for excavation, but in reducing the contract to writing the total amount was incorrectly stated because of a mistake in computing the number of yards,⁵ reformation may be had and the real intention of the parties expressed and enforced. In applying this principle care must be taken not to make a new

¹¹ *Coger v. McGee*, 5 Ky. (2 Bibb.) 321, 5 Am. Dec. 610; *Meacham Contracting Co. v. Hopkinsville*, 164 Ky. 703, 176 S. W. 187 (obiter); *Martin v. Hamlin*, 18 Mich. 354, 100 Am. Dec. 181; *Stevens v. Cooper*, 1 Johns. Ch. (N. Y.) 425, 7 Am. Dec. 499.

¹² *Wilson v. Moriarity*, 88 Cal. 207, 26 Pac. 85 [apparently ignoring *Murray v. Dake*, 46 Cal. 644].

¹ See § 2039.

² *Thompson v. Ladd*, 169 Ill. 73, 48 N. E. 174; *Dunn v. O'Mara*, 70 Ill. App. 609; *Lear v. Prather*, 89 Ky. 501, 12 S. W. 946.

³ *Thompson v. Ladd*, 169 Ill. 73, 48 N. E. 174.

⁴ *Lear v. Prather*, 89 Ky. 501, 12 S. W. 946.

⁵ *Dunn v. O'Mara*, 70 Ill. App. 609.

contract for the parties under guise of enforcing the predominant intent. Thus where the parties agreed on a specific boundary line, thinking it the true one, the court will not assume that their paramount intent was to locate the boundary at the true line and reform the contract so as to show that intention.⁶

§ 2224. Illustrations of mistake in expression—Property conveyed. Among the many forms of mistake in expression of the type referred to, the following are given as illustrations: Where the parties have agreed for the sale, lease or mortgage of a specific tract of realty, and by mistake such property is erroneously described in the written contract or conveyance, equity will reform such instrument.¹ Mistake of this sort may be made in countless

⁶ *Phillip Zorn Brewing Co. v. Malott*, 151 Ind. 371, 51 N. E. 471 [reversing, 46 N. E. 23].

¹ *United States. Walden v. Skinner*, 101 U. S. 577, 25 L. ed. 963; *Wasatch Mining Co. v. Mining Co.*, 148 U. S. 293, 37 L. ed. 454; *Adams v. Henderson*, 168 U. S. 573, 42 L. ed. 584; *Hill v. Kuhlman*, 87 Fed. 498.

Alabama. *Parker v. Parker*, 88 Ala. 362, 16 Am. St. Rep. 52, 6 So. 740; *Fields v. Clayton*, 117 Ala. 538, 67 Am. St. Rep. 189, 23 So. 530; *Green v. Dickson*, 119 Ala. 346, 24 So. 422; *Jones v. Johnston*, 193 Ala. 265, 69 So. 427; *Hataway v. Carnley*, — Ala. —, 73 So. 382.

Arkansas. *Deniston v. Phillips*, 121 Ark. 550, 181 S. W. 911; *Rix v. Peters*, 135 Ark. 193, 204 S. W. 845.

California. *Sullivan v. Moorhead*, 99 Cal. 157, 33 Pac. 796; *Stonesifer v. Kilburn*, 122 Cal. 659, 55 Pac. 587; *Busey v. Moraga*, 130 Cal. 586, 62 Pac. 1081.

Connecticut. *Blakeman v. Blakeman*, 39 Conn. 320.

District of Columbia. *Manogue v. Bryant*, 15 D. C. App. 245.

Florida. *Fisher v. Villamil*, 62 Fla. 472, 39 L. R. A. (N.S.) 90, 56 So. 559.

Georgia. *Allen v. Elder*, 76 Ga. 674, 2 Am. St. Rep. 63; *Phillips v. Roquemore*, 96 Ga. 719, 23 S. E. 855.

Illinois. *Halliday v. Hess*, 147 Ill. 588, 35 N. E. 380; *Henderson v. Mc-*

Kernan, 151 Ill. 273, 37 N. E. 867; *Kelly v. Galbraith*, 186 Ill. 593, 58 N. E. 431 [affirming, 87 Ill. App. 63].

Indiana. *Merchants', etc., Association v. Scanlan*, 144 Ind. 11, 42 N. E. 1008.

Iowa. *Reed v. Root*, 59 Ia. 359, 13 N. W. 323; *Herring v. Peaslee*, 92 Ia. 391, 60 N. W. 650.

Kansas. *Burton, etc., Co. v. Handy*, 54 Kan. 13, 37 Pac. 108.

Kentucky. *Moye v. Lane* (Ky.), 12 S. W. 154; *Tichenor v. Yankey*, 89 Ky. 508, 12 S. W. 947; *Wilson v. Jasper*, 90 Ky. 211, 13 S. W. 885.

Louisiana. *Frantom v. Nelson*, 142 La. 850, 77 So. 767.

Maine. *Perry v. Knight*, 85 Me. 184, 27 Atl. 96.

Massachusetts. *Goode v. Riley*, 153 Mass. 585, 28 N. E. 228.

Michigan. *Burke v. Clixby*, 75 Mich. 311, 42 N. W. 1135; *Conlin v. Masecar*, 80 Mich. 139, 45 N. W. 67; *Metropolitan Lumber Co. v. Iron Co.*, 101 Mich. 577, 60 N. W. 278; *Judson v. Miller*, 106 Mich. 140, 63 N. W. 965; *Perkins v. Canine*, 113 Mich. 72, 71 N. W. 457; *Eberle v. Heaton*, 124 Mich. 205, 82 N. W. 820.

Minnesota. *Olson v. Erickson*, 42 Minn. 440, 44 N. W. 317; *Layman v. Realty Co.*, 60 Minn. 136, 62 N. W. 113; *Lindell v. Peters*, 129 Minn. 288, 152 N. W. 648.

ways: land which was to have been conveyed may be omitted;² land which was not to be conveyed may be included;³ field notes may be reversed;⁴ the quarter section may be misnamed;⁵ an erroneous number of the lot⁶ or block,⁷ or an erroneous street

Mississippi. *Brinson v. Berry* (Miss.), 7 So. 322.

Missouri. *Ezell v. Peyton*, 134 Mo. 484, 36 S. W. 35; *Henderson v. Beasley*, 137 Mo. 199, 38 S. W. 950; *Harding v. Wright*, 138 Mo. 11, 39 S. W. 456; *Epperson v. Epperson*, 161 Mo. 577, 61 S. W. 853.

Oregon. *Sellwood v. Henneman*, 36 Or. 575, 60 Pac. 12.

Pennsylvania. *Haines v. Stare*, 249 Pa. St. 494, 95 Atl. 81.

Texas. *Elder v. Bank*, 91 Tex. 423, 44 S. W. 62; *First State Bank v. Jones*, 107 Tex. 623, 183 S. W. 874; *American, etc., Co. v. Pace*, 23 Tex. Civ. App. 222, 56 S. W. 377; *Avery v. Hunton*, 23 Tex. Civ. App. 353, 56 S. W. 210.

Washington. *Jenkins v. Jenkins University*, 17 Wash. 160, 49 Pac. 247 [modified on rehearing, 17 Wash. 173, 50 Pac. 785]; *State v. Lorenz*, 22 Wash. 289, 60 Pac. 644; *Land Mortgage Bank v. Nicholson*, 24 Wash. 258, 64 Pac. 156.

West Virginia. *Baxter v. Tanner*, 35 W. Va. 60, 12 S. E. 1094.

Wisconsin. *Fischer v. Laack*, 85 Wis. 280, 55 N. W. 398; *Ingles v. Merriman*, 96 Wis. 400, 71 N. W. 368; *Gimbel v. Tolman*, 161 Wis. 382, 154 N. W. 628.

Omission of the description of part of the realty may be corrected by reformation. *Varner-Collins Hardware Co. v. New Milford Security Co.*, 49 Okla. 613, 153 Pac. 667.

² **United States.** *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 35 L. ed. 1063.

California. *Stevens v. Holman*, 112 Cal. 345, 53 Am. St. Rep. 216, 44 Pac. 670; *Stonesifer v. Kilburn*, 122 Cal. 659, 55 Pac. 587.

Indiana. *Smith v. Schweigerer*, 129 Ind. 363, 28 N. E. 696.

Mississippi. *Brinson v. Berry* (Miss.), 7 So. 322.

Missouri. *Ezell v. Peyton*, 134 Mo. 484, 36 S. W. 35; *Epperson v. Epperson*, 161 Mo. 577, 61 S. W. 853.

Oklahoma. *Varner-Collins Hardware Co. v. New Milford Security Co.*, 49 Okla. 613, 153 Pac. 667.

Washington. *Land Mortgage Bank v. Nicholson*, 24 Wash. 258, 64 Pac. 156.

Wisconsin. *Gimbel v. Tolman*, 161 Wis. 382, 154 N. W. 628.

³ **Illinois.** *Thompson v. Ladd*, 169 Ill. 73, 48 N. E. 174.

Iowa. *Jordan v. Walters* (Ia.), 80 N. W. 530.

Michigan. *Conlin v. Masecar*, 80 Mich. 139, 45 N. W. 67.

Montana. *Cox v. Hall*, 54 Mont. 154, 168 Pac. 519.

Ohio. *Stites v. Widener*, 35 O. S. 555.

Pennsylvania. *Haines v. Stare*, 249 Pa. St. 494, 95 Atl. 81.

Texas. *Elder v. Bank*, 91 Tex. 423, 44 S. W. 62; *American, etc., Co. v. Pace*, 23 Tex. Civ. App. 222, 56 S. W. 377.

West Virginia. *Baxter v. Tanner*, 35 W. Va. 60, 12 S. E. 1094.

⁴ *Hill v. Kuhlman*, 87 Fed. 498.

⁵ *Epperson v. Epperson*, 161 Mo. 577, 61 S. W. 853; *McCormick, etc., Co. v. Woulph*, 11 S. D. 252, 76 N. W. 939.

⁶ *Skerrett v. Society*, 41 O. S. 606; *Avery v. Hunton*, 23 Tex. Civ. App. 353, 56 S. W. 210.

⁷ *Busey v. Moraga*, 130 Cal. 586, 62 Pac. 1081.

number,⁸ may be inserted; the wrong point be taken as a corner;⁹ or the length of a boundary line may be misstated.¹⁰ If a specific tract of land is sold and conveyed, the statement of the area in the deed may be reformed so as to show that it is a matter of description by inserting the words "more or less."¹¹ An easement may be omitted,¹² or only partially conveyed;¹³ or a reservation, as of timber,¹⁴ coal,¹⁵ or growing crops,¹⁶ may be omitted; or a reservation may be inserted by mistake.¹⁷ So a release intended to cover only part of the realty mortgaged may by mistake be so drawn as to include all the realty.¹⁸ The fact that land is described as containing a certain area "more or less," does not prevent reformation of a mistake in description by which the conveyance includes land which it was not intended to convey.¹⁹

§ 2225. Mistake as to grantee. Where by mistake an estate which by agreement should have passed to A alone is conveyed to A and B,¹ or one which should have passed to A and B, is conveyed to A alone,² or where property was to be settled on a married woman to her separate use, and by mistake is so conveyed as to be part of her general property,³ reformation may be had. So if the name of the grantee corporation is erroneously stated, reformation may be had.⁴ If a conveyance is taken in the name of a partner-

⁸ Kelly v. Galbraith, 186 Ill. 593, 58 N. E. 431 [affirming, 87 Ill. App. 63].

⁹ Moyer v. Lane (Ky.), 12 S. W. 154; Eberle v. Heaton, 124 Mich. 205, 82 N. W. 820.

¹⁰ Manogue v. Bryant, 15 D. C. App. 245.

A line of the boundary may be omitted. Rix v. Peters, 135 Ark. 193, 204 S. W. 845.

¹¹ Hataway v. Carnley, — Ala. —, 73 So. 382.

¹² Blakeman v. Blakeman, 39 Conn. 320; Schautz v. Keener, 87 Ind. 258; Howard v. Britton, 67 N. H. 484, 41 Atl. 269.

¹³ State v. Lorenz, 22 Wash. 289, 60 Pac. 644.

¹⁴ Fero v. Lumber Co., 101 Mich. 319, 59 N. W. 603; Smith v. Wakeman, 114 Mich. 611, 72 N. W. 599.

¹⁵ Cook v. Liston, 192 Pa. St. 19, 43 Atl. 389.

¹⁶ Warrick v. Smith, 137 Ill. 504, 27 N. E. 709; Hendrickson v. Ivins, 1 N. J. Eq. 562.

¹⁷ Stockbridge Iron Co. v. Iron Co., 107 Mass. 290.

¹⁸ First State Bank v. Jones, 107 Tex. 623, 183 S. W. 874; Kane v. Williams, 99 Wis. 65, 74 N. W. 570.

¹⁹ Cox v. Hall, 54 Mont. 154, 168 Pac. 519.

¹ Stedwell v. Anderson, 21 Conn. 139; McLeod v. Free, 96 Mich. 57, 55 N. W. 685.

² Corrigan v. Tierney, 100 Mo. 276, 13 S. W. 401.

So where notes and stock to be transferred to A and B are transferred to B alone. Kropp v. Kropp, 97 Wis. 137, 72 N. W. 381.

³ Stone v. Hill, 17 Ala. 557, 52 Am. Dec. 185; Larkins v. Biddle, 21 Ala. 252.

⁴ Rosser v. Ry., 102 Ga. 164, 29 S. E. 171.

ship as the grantee, it may be reformed by inserting the names of the partners.⁵

§ 2226. Mistake as to estate. If, by mistake, words are omitted or inserted, creating a greater,¹ or less,² estate than that agreed upon, reformation may be given. So where words creating a fee,³ such as "and their heirs forever,"⁴ are omitted; or where the phrase, "their bodily heirs," was used by mistake for "their heirs";⁵ or "successors" is used by mistake for "heirs";⁶ or an instrument whereby a means to reserve to himself a life estate, passing the fee to B, is by mistake so worded as to constitute a will;⁷ or a deed meant to pass an undivided interest in realty is by mistake so drawn as to pass the entire realty,⁸ reformation can be had. So reformation may be given where by mistake a condition subsequent has been omitted.⁹

§ 2227. Mistake as to effect of signature. If A, not meaning to bind himself personally, signs the contract in such a way as to bind himself, the question of his right to reformation depends on substantially the same principles as those governing a mistake as to the legal effect of the words employed.¹ If there has been a prior

⁵ *Spaulding Manufacturing Co. v. Godbold*, 92 Ark. 63, 29 L. R. A. (N.S.) 282, 121 S. W. 1063.

¹ *Dulo v. Miller*, 112 Ala. 687, 20 So. 981; *Purvines v. Harrison*, 151 Ill. 219, 37 N. E. 705; *Cooke v. Husbands*, 11 Md. 492; *Clayton v. Freet*, 10 O. S. 544 (as failing to reserve a life-estate as intended).

² *Illinois. Kyner v. Ball*, 182 Ill. 171, 54 N. E. 925.

Indiana. Nicholson v. Caress, 59 Ind. 39.

New Jersey. Holme v. Shinn, 62 N. J. Eq. 1, 49 Atl. 151.

North Carolina. Vickers v. Leigh, 104 N. Car. 248, 10 S. E. 308.

South Carolina. Brock v. O'Dell, 44 S. Car. 22, 21 S. E. 976.

Wisconsin. Lardner v. Williams, 98 Wis. 514, 74 N. W. 346.

³ *Trusdell v. Lehman*, 47 N. J. Eq. 218, 20 Atl. 391; *Springs v. Harven*, 3

Jones Eq. (N. Car.) 96; *Brock v. O'Dell*, 44 S. Car. 22, 21 S. E. 976.

⁴ *Vickers v. Leigh*, 104 N. Car. 248, 10 S. E. 308.

⁵ *Kyner v. Ball*, 182 Ill. 171, 54 N. E. 925. (Thus creating what at common law was a fee-tail, but under the Illinois statutes was a life-estate in the first taker and a fee in his descendants.)

⁶ *M. E. Church v. Town*, 47 N. J. Eq. 400, 20 Atl. 488.

⁷ *Pinkham v. Pinkham*, 60 Neb. 600, 83 N. W. 837 [affirmed on rehearing, 61 Neb. 336, 85 N. W. 285].

⁸ *Canedy v. Marcy*, 79 Mass. (13 Gray) 373; *Green Bay, etc., Co. v. Hewitt*, 62 Wis. 316, 21 N. W. 216, 22 N. W. 588.

⁹ *Hamilton County v. Owens*, 138 Ind. 183, 37 N. E. 602.

¹ See § 2221.

valid contract between the parties, by the terms of which no personal liability was fixed on A, and in attempting to reduce this to writing, A, by mistake as to the legal effect of the method of executing the contract employed by himself, signs it so as to incur a personal liability, he may have reformation.² Thus where A is agent for X, and signs, "A, agent of X," he may have reformation so as to relieve himself from personal liability.³ Conversely, in an action against X, reformation may be had so as to make him personally liable on the written contract.⁴ Thus where the name of the corporation was printed at the top of the contract, followed by the words, "we promise," and signed, "R. J. Beatty, president," reformation was allowed in a suit against the corporation.⁵ So where A signs as township trustee when he means to sign as trustee for the school township, the latter office being held by A, ex-officio as township trustee, reformation may be had to make the school township liable.⁶ Further, if A does not sign so as to assume the liability intended by the oral contract, reformation may be had against him on B's application. This rule has been applied where the parties meant to sign an injunction bond so as to make it valid, though probably they had no specific intention to seal, as they did not know that it was necessary, but the bond purported on its face to be a sealed instrument.⁷ Some authorities seem to deny the

² Illinois. *Fisher v. Barnett*, 56 Ill. App. 649.

Indiana. *Sparta School Township v. Mendell*, 138 Ind. 188, 37 N. E. 604; *Second National Bank v. Steel Co.*, 155 Ind. 581, 52 L. R. A. 307, 58 N. E. 833; *Prescott v. Hixon*, 22 Ind. App. 139, 72 Am. St. Rep. 291, 53 N. E. 391.

Iowa. *Lee v. Percival*, 95 Ia. 639, 52 N. W. 543.

Oregon. *Richmond v. Ry.*, 44 Or. 48, 74 Pac. 333.

Pennsylvania. *Moser v. Libenguth*, 2 Rawle (Pa.) 428.

³ *Western Wheeler Scraper Co. v. Stickleman*, 122 Ia. 396, 98 N. W. 139; *Western Wheeler Scraper Co. v. McMillen*, 71 Neb. 686, 99 N. W. 512.

Thus a signature in the following form has been corrected by reformation: "O. O. Prescott, Pres. Mid. B. & Cheese Co.; M. A. Cordrey, Sec. Cr. & Cheese Co." *Prescott v. Hixon*, 22 Ind.

App. 139, 72 Am. St. Rep. 291, 53 N. E. 391.

⁴ *Second National Bank v. Steel Co.*, 155 Ind. 581, 52 L. R. A. 307, 58 N. E. 833; *McNaughton v. Partridge*, 11 Ohio 223, 38 Am. Dec. 731; *Moser v. Libenguth*, 2 Rawle (Pa.) 428.

⁵ *Second National Bank v. Steel Co.*, 155 Ind. 581, 52 L. R. A. 307, 58 N. E. 833.

⁶ *Sparta School Township v. Mendell*, 138 Ind. 188, 37 N. E. 604.

While in some of these cases the party signing the contract might be shown in an action at law on the contract to be the real principal (see §§ 1332, and 2205 et seq), reformation may be had in cases where the real principal could not be held in an action at law.

⁷ *Henkleman v. Peterson*, 154 Ill. 419, 40 N. E. 359 [reversing, 50 Ill. App. 601].

right of equity to reform so as to give relief against a mistake as to the legal effect of a signature.⁸ In these cases, however, though it is not always clear from the report, the decision is often based on the other branch of the principle under discussion: that if there is no prior oral contract reformation can not be given to a party who makes himself personally liable when he did not intend to. Thus where A signs a contract so as to bind himself personally, though he thinks he is liable as guardian only;⁹ or officers of a corporation, meaning to bind the corporation, sign a note so as to bind themselves personally;¹⁰ or A, on depositing money in a bank, accepts as security therefor the individual notes of the president and the cashier, thinking they were certificates of deposit,¹¹ reformation has been refused.

§ 2228. Other examples of mistake. A mistake in the date;¹ in the rate of interest;² or in the amount on which interest is to be computed;³ or the mistaken addition,⁴ or omission⁵ of a clause whereby the grantee assumes a mortgage; the omission of a clause deducting the amount of the mortgage from the purchase price;⁶ or excepting the principal of a prior mortgage from the covenants

Omission of a seal may be corrected. *Probate Court v. May*, 52 Vt. 182.

So where a seal was omitted from a mortgage. *Allen v. Elder*, 76 Ga. 674, 2 Am. St. Rep. 63. (Possibly this may have been a mistake of fact.)

⁸ *San Bernardino National Bank v. Andreson* (Cal.), 32 Pac. 168; *Mabb v. Merriam*, 129 Cal. 663, 62 Pac. 212; *Murphy v. Bank*, 95 Ia. 325, 63 N. W. 702; *Morehead Banking Co. v. Morehead*, 124 N. Car. 622, 32 S. E. 967 [denying rehearing, 122 N. Car. 318, 30 S. E. 331]; *Andrus v. Blazzard*, 23 Utah 233, 54 L. R. A. 354, 63 Pac. 888.

⁹ *Andrus v. Blazzard*, 23 Utah 233, 54 L. R. A. 354, 63 Pac. 888.

¹⁰ *San Bernardino National Bank v. Andreson* (Cal.), 32 Pac. 168.

¹¹ *Murphy v. Bank*, 95 Ia. 325, 63 N. W. 702. A's belief was due to the fraud of the president and the cashier. A could read, however, and kept the notes until the president and cashier

had become insolvent, before seeking relief.

¹ *Lewiston v. Gagne*, 89 Me. 395, 56 Am. St. Rep. 432, 36 Atl. 629; *O'Donnell v. Harmon*, 3 Daly (N. Y.) 424; *First National Bank v. Pearson*, 119 N. Car. 494, 26 S. E. 46; *Cameron v. White*, 71 Wis. 425, 5 L. R. A. 493, 43 N. W. 155.

² *Loudermilk v. Loudermilk*, 98 Ga. 780, 25 S. E. 927; *Greene v. Smith*, 160 N. Y. 533, 55 N. E. 210.

³ *Rider v. Powell*, 28 N. Y. 310.

⁴ *Adams v. Wheeler*, 122 Ind. 251, 23 N. E. 760; *Jones v. Price* (Ia.), 86 N. W. 219; *Stead v. Sampson*, — Ia. —, 155 N. W. 978.

⁵ *Williams v. Everham*, 90 Ia. 420, 57 N. W. 901. (Where the property was conveyed "subject" to a mortgage, the parties intending that the grantee should assume it.) *Stephenson v. Elliott*, 53 Kan. 550, 36 Pac. 980.

⁶ *Burns v. Caskey*, 100 Mich. 94, 58 N. W. 642.

of a second mortgage;⁷ or the omission of a clause providing for a vendor's lien,⁸ may be reformed in equity. So other omissions,⁹ as in a clause intended to provide that a bond "shall be and remain a special lien upon the said property above described, and for the payment" of the note in question, the omission of "the said property above described";¹⁰ the omission of the consideration¹¹ from a deed; the omission of a provision for ascertaining the amount of corn to be delivered as rent for the land lease;¹² an erroneous statement of a consideration in a deed, as love and affection, when in reality it is on a valuable consideration;¹³ an omission of the time for which a teacher is employed;¹⁴ an erroneous statement in a mortgage of the time at which the debt secured thereby matures;¹⁵ an omission of statutory requirements in a bill of sale of a vessel necessary to enable vendee to have it registered in his name as an American vessel;¹⁶ or the omission of some of the descriptive marks identifying some of the logs sold,¹⁷ are all mistakes for which reformation is allowed. The contracts hitherto discussed have been chiefly contracts for conveying some interest in realty. Reformation, while more often needed in such contracts, is not confined to them. A contract of insurance may be reformed where there is a mistake in the expression,¹⁸ as where there is a mistake in the description of the property insured,¹⁹ or in the name

⁷ *Allis v. Hall*, 76 Conn. 322, 56 Atl. 637.

⁸ *Worley v. Tuggle*, 67 Ky. (4 Bush.) 168.

⁹ *England. Viditz v. O'Hagan* [1899], 2 Ch. 560.

Kentucky. Rice v. Hall (Ky.), 42 S. W. 99.

Minnesota. Smith v. Jordan, 13 Minn. 264, 97 Am. Dec. 232.

New York. Pitcher v. Hennessey, 48 N. Y. 415.

Ohio. Young v. Miller, 10 Ohio 85.

¹⁰ *Smith v. Brunk*, 14 Colo. 75, 23 Pac. 325.

¹¹ *Huss v. Morris*, 63 Pa. St. 367.

¹² *Reid v. Cook*, 88 Ia. 717, 54 N. W. 353.

Reformation may supply the omission of a provision by which the lessee was to pay taxes. *Perkins v. Kirby*, 39 R. I. 343, 97 Atl. 684.

¹³ *Orr v. Echols*, 119 Ala. 340, 24 So. 357.

¹⁴ *Marion School Township v. Carpenter*, 12 Ind. App. 191, 30 N. E. 878.

¹⁵ *Commercial National Bank v. Johnson*, 16 Wash. 536, 48 Pac. 267.

¹⁶ *Sprague v. Thurber*, 17 R. I. 454, 22 Atl. 1057.

¹⁷ *Smith v. Jordan*, 13 Minn. 264, 97 Am. Dec. 232.

¹⁸ *Equitable Safety Ins. Co. v. Hearne*, 87 U. S. (20 Wall.) 494, 22 L. ed. 398; *Western Assurance Co. v. Ward*, 75 Fed. 338; *State Mutual Insurance Co. v. Green*, — Okla. —, L. R. A. 1917F, 663, 166 Pac. 105.

¹⁹ *Home Ins. Co. v. Myer*, 93 Ill. 271; *German Fire Ins. Co. v. Gueck*, 130 Ill. 345, 6 L. R. A. 835, 23 N. E. 112; *Maher v. Ins. Co.*, 67 N. Y. 283; *State Mutual Insurance Co. v. Green*, — Okla. —, L. R. A. 1917F, 663, 166 Pac. 105.

of the beneficiary.²⁰ An assignment of an insurance policy may be reformed,²¹ so as to include a condition which has been omitted therefrom.²² A contract executed by a surety may be reformed for mistake in expression, like any other contract.²³ So the use of "heretofore" instead of "hereafter," referring to certain lots to be released from lien and mortgage upon payment;²⁴ the insertion of the name of the holder of the legal title instead of that of the equitable owner in a clause imposing penalties for non-performance;²⁵ a misstatement as to the kind of money in which the instrument is payable;²⁶ a covenant for "a semi-annual rent of three hundred dollars," instead of for an annual rent of three hundred dollars payable in semi-annual installments;²⁷ or a covenant to pay five dollars per cubic foot when the real agreement was to pay five dollars per one hundred cubic feet,²⁸ are all mistakes for which reformation can be had. Reformation may be given where by mistake an indorsement intended to be made without recourse is not so made.²⁹ An executor's bond which by mistake misstates the name of the decedent, whose estate is being administered, may be reformed to correct such mistake.³⁰ A contract for work and labor may be reformed.³¹

§ 2229. What instruments may be reformed—Inoperative instruments. Reformation will not be given when the instrument as reformed would not be operative.¹ If the instrument is a nul-

²⁰ *United States*. *Snell v. Ins. Co.*, 98 U. S. 85, 25 L. ed. 52.

Connecticut. *Woodbury, etc., Association v. Ins. Co.*, 31 Conn. 517.

Illinois. *Keith v. Ins. Co.*, 52 Ill. 518, 4 Am. Rep. 624; *German Ins. Co. v. Gueck*, 130 Ill. 345, 6 L. R. A. 835, 23 N. E. 112.

Nebraska. *Cook v. Ins. Co.*, 60 Neb. 127, 82 N. W. 315.

New Hampshire. *Scott v. Association*, 63 N. H. 556, 4 Atl. 792.

²¹ *Perry v. Young*, 133 Tenn. 522, L. R. A. 1917B, 385, 182 S. W. 577.

²² *Perry v. Young*, 133 Tenn. 522, L. R. A. 1917B, 385, 182 S. W. 577.

²³ *Henkleman v. Peterson*, 154 Ill. 419, 40 N. E. 359 [s. c., 50 Ill. App. 601]; *State v. Frank*, 51 Mo. 98; *Neininger v. State*, 50 O. S. 394, 40 Am. St. Rep. 674, 34 N. E. 633.

²⁴ *Johnson v. Wilson*, 111 Mich. 114, 69 N. W. 149.

²⁵ *Smith v. Watson*, 88 Ia. 73, 55 N. W. 68.

²⁶ *Burdett v. Sims*, 26 Ky. (3 J. J. Mar.) 190; *Talley v. Courtney*, 48 Tenn. (1 Heisk.) 715.

²⁷ *Snyder v. May*, 19 Pa. St. 235.

²⁸ *Wright v. Wright*, 180 Ala. 343, 60 So. 931.

²⁹ *Stafford v. Fetters*, 55 Ia. 484, 8 N. W. 322.

³⁰ *Foley v. Hamilton*, 80 Ia. 686, 57 N. W. 439.

³¹ *Wright v. Wright*, 180 Ala. 343, 60 So. 931.

¹ *United States*. *Thompson v. Ins. Co.*, 25 Fed. 296.

Illinois. *East St. Louis v. Mfg. Co.*, 34 Ill. App. 458.

Indiana. *Williamson v. Hitner*, 79 Ind. 233.

lity,² or if it can not operate by reason of the special circumstances of the case,³ reformation will not be given. If the parties have agreed that the grantor shall reserve certain interests, the mistake of the grantee or the misrepresentation of the grantor as to the rights of third persons in the interests thus reserved is not ground for reformation.⁴ Although a provision for reserving certain interests for a specified time is omitted by mistake, reformation will not be given after the lapse of such period of time.⁵ No reformation will be given of a mortgage intended to prefer creditors.⁶ A bond given to settle a balance due on mutual accounts, which had been kept so loosely that it was impracticable to ascertain the true balance, will not be reformed to show such true balance.⁷ Hence, an instrument which does not purport to be a contract and was not meant as a contract, can not be reformed so as to be a contract. Thus a resolution by a council, directing the mayor to make a purchase from A, can not be reformed at A's instance so as to stand as a contract between the city and A.⁸ So where a married woman can be bound only in compliance with statute, reformation will not be given for deeds of married women.⁹ This rule is in force only where a married woman has no power whatever to bind herself

Kansas. *Pennington v. Tolle*, 99 Kan. 436, 162 Pac. 316.

New Mexico. *Cleveland v. Bateman*, 21 N. M. 675, 158 Pac. 648.

South Carolina. *Williams v. Cudd*, 26 S. Car. 213, 4 Am. St. Rep. 714, 2 S. E. 14.

Virginia. *Persinger v. Chapman*, 93 Va. 349, 25 S. E. 5 [citing, *Foster v. Ritson*, 58 Va. (17 Gratt.) 321]; *Chapman v. Persinger*, 87 Va. 581, 13 S. E. 549.

² *Cleveland v. Bateman*, 21 N. M. 675, 158 Pac. 648.

³ *Holland Blow Stave Co. v. Barclay*, 193 Ala. 200, 69 So. 118.

⁴ *Pennington v. Tolle*, 99 Kan. 436, 162 Pac. 316.

⁵ *Holland Blow Stave Co. v. Barclay*, 193 Ala. 200, 69 So. 118.

⁶ *Miller v. Savage*, 62 N. J. Eq. 746, 48 Atl. 1004.

A deed in part for love and affection and in part on valuable consideration may be reformed. *Smith v. Barksdale*, 110 Ga. 278, 34 S. E. 582.

⁷ *Persinger v. Chapman*, 93 Va. 349, 25 S. E. 5.

⁸ *Carskaddon v. South Bend*, 141 Ind. 596, 39 N. E. 667 [affirmed on rehearing, 141 Ind. 601, 41 N. E. 1].

⁹ **Arkansas.** *Bowden v. Bland*, 53 Ark. 53, 22 Am. St. Rep. 179, 13 S. W. 420.

California. *Leonis v. Lazzarovich*, 55 Cal. 52.

Illinois. *Stodolka v. Novatny*, 144 Ill. 125, 33 N. E. 534.

Iowa. *Heaton v. Fryberger*, 38 Ia. 185.

Missouri. *McReynolds v. Grubb*, 150 Mo. 352, 73 Am. St. Rep. 448, 51 S. W. 822.

Rhode Island. *Cannon v. Beatty*, 19 R. I. 524, 34 Atl. 1111.

other than in the manner provided for by statute. If a married woman has a wider power of making contracts, her contracts and conveyances may be reformed for mutual mistake like those of persons of normal status.¹⁰

§ 2230. Contracts within the Statute of Frauds or required to be in writing. If the contract is one which is required by statute to be proved by writing, the attempt to reform such a contract in equity by the use of oral evidence presents a close and interesting question, on which there is a conflict of judicial opinion. On the one hand, it is felt by many courts that in view of the safeguards thrown about reformation by the amount of evidence required to obtain such relief, it would merely offer a shelter to fraud to deny reformation in such cases, and accordingly reformation is allowed.¹ A contract for the sale of land or of some interest therein may be reformed.² Where by mistake an option of purchase is omitted

¹⁰ **Alabama.** Tillis v. Smith, 108 Ala. 264, 19 So. 374.

California. Hayford v. Kocher, 65 Cal. 389, 4 Pac. 350; Savings & Loan Society v. Meeks, 66 Cal. 371, 5 Pac. 624; Stevens v. Holman, 112 Cal. 345, 53 Am. St. Rep. 216, 44 Pac. 670.

Idaho. Christensen v. Hollingsworth, 6 Ida. 87, 53 Pac. 211.

Indiana. Hamar v. Medsker, 60 Ind. 413; Carper v. Munger, 62 Ind. 481; Collins v. Cornwell, 131 Ind. 20, 30 N. E. 796; Parish v. Camplin, 139 Ind. 1, 37 N. E. 607.

Kentucky. Tichenor v. Yankey, 89 Ky. 508, 12 S. W. 947.

Washington. Murdoch v. Leonard, 15 Wash. 142, 45 Pac. 751.

¹ **United States.** Bradford v. Bank, 54 U. S. (13 How.) 57, 14 L. ed. 49.

Alabama. Jones v. Johnston, 193 Ala. 265, 69 So. 427.

Illinois. Schwass v. Hershey, 125 Ill. 653, 18 N. E. 272; McGinnis v. Boyd, 279 Ill. 283, 116 N. E. 672.

Iowa. Welch v. Schlappi, 179 Ia. 474, 161 N. W. 442.

Kentucky. McMee v. Henry, 163 Ky. 729, 174 S. W. 746; Castleman-Blake-

more Co. v. Pickrell & Craig Co., 163 Ky. 750, 174 S. W. 749.

Minnesota. Smith v. Jordan, 13 Minn. 264, 97 Am. Dec. 232.

Mississippi. Mosby v. Wall, 23 Miss. 81, 55 Am. Dec. 71.

New York. Gillespie v. Moon, 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559.

North Dakota. Sigbert Awes Co. v. Haslam, 37 N. D. 122, 163 N. W. 265.

Ohio. Davenport v. Sovil, 6 O. S. 459.

Oklahoma. Atwood v. Mikeska, 29 Okla. 69, L. R. A. 1917A, 602, 115 Pac. 1011.

Pennsylvania. Caley v. R. R., 80 Pa. St. 363.

South Dakota. Hughes v. Payne, 22 S. D. 293, 117 N. W. 363.

Vermont. Redfield v. Gleason, 61 Vt. 220, 15 Am. St. Rep. 889, 17 Atl. 1075.

West Virginia. Fishack v. Ball, 34 W. Va. 644, 12 S. E. 856.

² **Consumers' Coal & Fuel Co. v. Yarbrough,** 194 Ala. 482, 69 So. 897; **Stromberg v. Alexander,** 171 Ia. 707, 154 N. W. 414; **Atwood v. Mikeska,** 29 Okla. 69, L. R. A. 1917A, 602, 115 Pac. 1011.

from a lease, such option may be inserted by reformation.³ If a covenant on the part of a lessee to pay taxes upon the realty is omitted by mistake, such covenant may be added by reformation.⁴ A deed or mortgage may accordingly be reformed;⁵ and a mortgage may be reformed and foreclosed in one action.⁶ A guaranty may be reformed by oral evidence.⁷

In other jurisdictions it is felt that "in case of an executory agreement, first to reform, then to decree an execution of it, would be virtually to repeal the Statute of Frauds."⁸ Accordingly, reformation is denied.⁹ Thus in a contract for the sale of realty, reformation of a defective description has been denied.¹⁰ Refor-

³ *Butler v. Threlkeld*, 117 Ia. 116, 90 N. W. 584.

⁴ *Perkins v. Kirby*, 39 R. I. 343, 97 Atl. 884.

⁵ *Alabama*. *Tillis v. Smith*, 108 Ala. 264, 19 So. 374; *Jones v. Johnston*, 193 Ala. 265, 69 So. 427; *Consumers' Coal & Fuel Co. v. Yarbrough*, 194 Ala. 482, 69 So. 897; *Hataway v. Carnley*, — Ala. —, 73 So. 382.

Arkansas. *Fuller v. Hawkins*, 60 Ark. 304, 30 S. W. 34; *Rix v. Peters*, 135 Ark. 193, 204 S. W. 845.

California. *Horton v. Winbigler*, 175 Cal. 149, 165 Pac. 423.

Colorado. *Arbaney v. Usel*, 61 Colo. 311, 157 Pac. 204.

Iowa. *Kinman v. Hill*, — Ia. —, 156 N. W. 168.

Kentucky. *Lamastus v. Morgan's Committee*, 178 Ky. 805, 200 S. W. 32.

Louisiana. *Frantom v. Nelson*, 142 La. 850, 77 So. 767.

Missouri. *Stephens v. Stephens* (Mo.), 183 S. W. 572.

North Carolina. *Maxwell v. Wayne National Bank*, 175 N. Car. 180, 95 S. E. 147.

Oklahoma. *Atwood v. Mikeska*, 29 Okla. 69, L. R. A. 1917A, 602, 115 Pac. 1011.

Oregon. *Webster v. Rogers*, 87 Or. 547, 171 Pac. 197.

Wisconsin. *Burmeister v. Olson*, 102 Wis. 677, 79 N. W. 1127.

⁸ *Christensen v. Hollingsworth*, 6 Ida. 87, 96 Am. St. Rep. 256, 53 Pac. 211;

Fifth National Bank v. Pierce, 117 Mich. 376, 75 N. W. 1058.

⁷ *Welch v. Schlappi*, 179 Ia. 474, 161 N. W. 442.

⁸ *Townshend v. Strangroom*, 6 Ves. Jr. 328; *Schwartzman v. Creveling*, 85 N. J. Eq. 402, 96 Atl. 896.

⁹ *England*. *Woollam v. Hearn*, 7 Ves. Jr. 211; *Attorney General v. Sitwell*, 1 Younge & C. Ex. 559.

Connecticut. *Osborn v. Phelps*, 19 Conn. 63, 48 Am. Dec. 133.

Idaho. *Allen v. Kitchen*, 16 Ida. 133, L. R. A. 1917A, 563, 100 Pac. 1052.

Maine. *Elder v. Elder*, 10 Me. 80, 25 Am. Dec. 205.

Massachusetts. *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418.

Nevada. *De Remer v. Anderson*, 41 Nev. 287, 169 Pac. 737.

North Carolina. *Davis v. Ely*, 104 N. Car. 16, 17 Am. St. Rep. 667, 5 L. R. A. 810, 10 S. E. 138.

Oregon. *Whiteaker v. Vanschoiack*, 5 Or. 113.

Pennsylvania. *Safe Deposit & Trust Co. v. Diamond Coal & Coke Co.*, 234 Pa. St. 100, L. R. A. 1917A, 596, 83 Atl. 54.

Washington. *Mead v. White*, 53 Wash. 638, 23 L. R. A. (N.S.) 1197, 102 Pac. 753.

¹⁰ *Davis v. Ely*, 104 N. Car. 16, 17 Am. St. Rep. 667, 5 L. R. A. 810, 10 S. E. 138; *Safe Deposit & Trust Co. v. Diamond Coal & Coke Co.*, 234 Pa. St. 100, L. R. A. 1917A, 596, 83 Atl. 54.

mation has been refused where it was sought to add the name of the city, county, and state to a description which consisted of a lot number and the name of a subdivision.¹¹ A defective memorandum of a contract of suretyship can not be reformed by adding thereto the oral provisions which had not been reduced to writing.¹² If reformation of a conveyance of realty can be given, as is often done,¹³ no good reason appears why reformation should be denied in case of executory contracts.

An attempt has been made to distinguish between cases in which extrinsic evidence is used for the purpose of adding to the legal effect of the written memorandum or, as it is sometimes used, for the purpose of adding words thereto, and the cases in which it is sought by oral evidence to exclude from the effect of the written memorandum provisions which otherwise would be evidenced thereby, or, as is sometimes said, to strike words from the written memorandum or contract. It has been suggested that if this distinction could be made, it would not violate the Statute of Frauds to limit the operation of the written memorandum by excluding therefrom provisions which otherwise would be evidenced thereby, since the Statute of Frauds does not attempt to make the written evidence conclusive, but merely attempts to prevent the enforcement of the contracts enumerated in the statute, unless such written evidence is offered to establish the existence of such contracts. Accordingly, it has been said that reformation may be granted if it is sought to restrict the operation of the written memorandum,¹⁴ although the same evidence would be inadmissible to add to the scope and effect of the written memorandum, since such evidence would violate the Statute of Frauds.¹⁵ Where the parties by mistake executed a mortgage when it was intended to execute a deed, reformation has been granted by striking out the clause of defeasance on the theory that "no attempt is made to insert a parcel of land that was omitted from the writing, or to construct any agreement by introducing a new element that is required by the statute to be reduced to writing in order to make the agreement binding."¹⁶ It seems easier to justify the refusal of the courts of equity

¹¹ *Allen v. Kitchen*, 16 Ida. 133, L. R. A. 1917A, 600, 100 N. E. 635; *R. A. 1917A, 563, 100 Pac. 1052.*

¹² *Mead v. White*, 53 Wash. 638, 23 L. R. A. (N.S.) 1197, 102 Pac. 753.

¹³ See §§ 2224 et seq.

¹⁴ *Worley v. Tuggle*, 67 Ky. (4 Bush.) 168; *Kennedy v. Poole*, 213 Mass. 495,

L. R. A. 1917A, 600, 100 N. E. 635; *Gillespie v. Moon*, 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559.

¹⁵ See note 9, this section.

¹⁶ *Kennedy v. Poole*, 213 Mass. 495, L. R. A. 1917A, 600, 100 N. E. 635 [citing, *Canedy v. Marcy*, 79 Mass. (13

to reform a written memorandum which is so incomplete as to be insufficient under the Statute of Frauds by adding the omitted provisions of the oral contract, since this is the very case to which the Statute of Frauds was intended to apply.¹⁷ The only theory upon which reformation could be granted in such cases is that the high degree of proof required in reformation lessens the chance of fraud and perjury; but unless any court has power to ignore the Statute of Frauds whenever it requires a higher degree of proof than a mere preponderance of evidence, no justification for such a violation of the statute can be found. It has, however, been pointed out that there is no real difference between these two classes of cases, since if the scope of the written memorandum is restricted, the party against whom such reformation is granted will receive less because of such reformation than he would have received by the terms of the written memorandum as originally signed; and this is as much a violation of the parol evidence rule as adding to the effect of the written memorandum.¹⁸ In any event, it may be added, even if such distinction is to be recognized, the true basis for the distinction is whether the reformation will add to the scope and effect of the written memorandum, and not whether it will add words thereto or eliminate words therefrom, since it is frequently possible to broaden the scope and effect of the written memorandum by eliminating certain words.¹⁹

If, by mistake, a seal is omitted from a contract which is required by law to be under seal, equity may grant relief by compelling a seal to be affixed.²⁰ Whether reformation can be granted where the instrument, from its nature or by reason of positive provisions of law, must be in writing as distinguished from the cases in which the contract must be proved by writing, is a question upon which there is some difference of authority. It is gen-

Gray) 373]; *Sawyer v. Hovey*, 85 Mass. (3 Allen) 331, 81 Am. Dec. 659; *Goode v. Riley*, 153 Mass. 585, 28 N. E. 228].

¹⁷ *Mead v. White*, 53 Wash. 638, 23 L. R. A. (N.S.) 1197, 102 Pac. 753.

¹⁸ *Vogt v. Mullin*, 82 N. J. Eq. 452, 89 Atl. 533.

¹⁹ *Macomber v. Peckham*, 16 R. I. 485, 17 Atl. 910.

²⁰ *United States. Bernard's Township v. Stebbins*, 109 U. S. 341, 27 L. ed. 956.

Massachusetts. *Springfield Five*

Cents Sav. Bank v. South Congregational Soc., 127 Mass. 516; *Gaylord v. Pelland*, 169 Mass. 356, 47 N. E. 1019; *Parsons v. Parsons*, 230 Mass. 544, 119 N. E. 1020.

Minnesota. *Lebanon Sav. Bank v. Hollenbeck*, 29 Minn. 322, 13 N. W. 145.

New Jersey. *Conover v. Brown*, 49 N. J. Eq. 156, 23 Atl. 507.

New York. *Chase v. Peck*, 21 N. Y. 581.

Rhode Island. *Bullock v. Whipp*, 15 R. I. 195, 2 Atl. 309.

erally assumed that such instruments as deeds, mortgages and leases may be reformed.²¹ A mortgage may be reformed with reference to the description of the obligation which it is given to secure,²² or by striking out the defeasance clause where the parties intended to execute a deed.²³ Reformation of a promissory note may be granted.²⁴ If a contract with a government or a public corporation is required by law to be in writing, all preliminary agreements are in legal effect merely negotiations, even if the parties have attempted to enter into a binding contract by such oral agreement. To reform the written contract which is entered into by the oral agreement in such a case would seem to be a more difficult matter than to reform a written memorandum which was controlled by the Statute of Frauds. Reformation has been granted in such a case, however;²⁵ and where it has been denied it apparently has been denied rather on the ground of negligence of the party who seeks relief rather than because of the nature of the contract itself.²⁶ Reformation has been refused in such cases on the ground that the agent of the public corporation, who executed the written contract, had no power to bind the public corporation by anything but a written contract, and that accordingly there was no oral agreement by which to reform the written contract.²⁷

§ 2231. Reformation of mistake which may be corrected by construction. If the ordinary rules of construction or of admissibility of extrinsic evidence can correct the mistake, reformation is not necessary.¹ If the boundaries of realty are given correctly, reformation is not necessary to correct an erroneous statement as to the area of the realty contained in such boundaries.² If, by the mistake of the insurance company, a policy is issued upon property other than that asked for by the insured, such mistake may be

²¹ *Kennedy v. Poole*, 213 Mass. 495, L. R. A. 1917A, 600, 100 N. E. 635; *Perkins v. Kirby*, 30 R. I. 343, 97 Atl. 884.

²² *Webster v. Rogers*, 87 Or. 547, 171 Pac. 197.

²³ *Kennedy v. Poole*, 213 Mass. 495, L. R. A. 1917A, 600, 100 N. E. 635.

²⁴ *Farmers' Loan & Trust Co. v. Brown*, 182 Ia. 1044, 165 N. W. 70 (in this case not a negotiable instrument).

²⁵ *McManus v. Philadelphia*, 211 Pa. St. 394, 60 Atl. 1001.

²⁶ *Ackerlind v. United States*, 49 Ct. Cl. 635.

²⁷ *Meacham Contracting Co. v. Hopkinsville*, 164 Ky. 703, 176 S. W. 187.

¹ *Baker v. Corbin*, 148 Ga. 267, 96 S. E. 428; *Lewis v. Woodbine Savings Bank*, 182 Ia. 190, 165 N. W. 410; *Bookhout v. Vuich*, 101 Wash. 511, 172 Pac. 740.

² *Baker v. Corbin*, 148 Ga. 267, 96 S. E. 428.

corrected without formal reformation.³ If, by the ordinary rules of construction, the contract is to be deemed one of exchange rather than ordinary sale, reformation is not necessary to show that such contract is one of exchange.⁴

Whether reformation may be had on the application of one of the parties, for mistake in expression when such mistake is apparent from the entire contract and may be corrected by construction,⁵ is a question upon which the authorities are not unanimous. Some courts hold that any mistake in expression may be corrected in equity,⁶ in analogy to a bill quia timet, the question of the absolute necessity of reformation being allowed to affect only costs. A contract in which, by mistake, the date for performance is fixed at a time prior to the execution of the contract, may be reformed, even though the correct date might be inferred by persons familiar with that business.⁷ If a description of realty is defective in omitting the boundaries of the fourth side which must necessarily, from the rest of the description, be a straight line from the end of the third boundary to the place of beginning, equity may reform the instrument by adding, "thence to the place of beginning."⁸

Other courts hold that equity will not interfere unless the reformation sought will modify the legal effect of the contract,⁹ on the ground that otherwise plaintiff has an adequate remedy at law. The answer to this may well be that while adequate, the remedy may not always be clear. In any event, if the reformation sought will change the legal effect of the contract, even slightly, it will be given if otherwise proper.¹⁰ Reformation will not be given to correct the erroneous name of one of the natural boundaries of a tract of land if the tract can be identified from the rest of the description.¹¹ If it is contended that an insurance company waived a provision of a policy with reference to change of ownership

³ *Aetna Ins. Co. v. Brannon*, 99 Tex. 391, 2 L. R. A. (N.S.) 548, 89 S. W. 1057.

⁴ *Lewis v. Woodbine Savings Bank*, 182 Ia. 190, 165 N. W. 410.

⁵ See §§ 2032 and 2039.

⁶ *Rich v. Trustee of Schools*, 158 Ill. 242, 41 N. E. 924; *Jenkins v. Davis*, 141 Pa. St. 266, 21 Atl. 592; *Pittsburg Lumber Co. v. Shell*, 136 Tenn. 466, 189 S. W. 879.

⁷ *Cameron v. White*, 74 Wis. 425, 5 L. R. A. 493, 43 N. W. 155.

⁸ *Rix v. Peters*, 135 Ark. 193, 204 S. W. 845.

⁹ *Shoemaker v. Smith*, 80 Ia. 655, 45 N. W. 744; *Harm v. Voss* (Ia.), 82 N. W. 753; *King v. Brown*, 78 N. H. 470, 101 Atl. 627; *Rue v. Meirs*, 43 N. J. Eq. 377, 12 Atl. 369; *Boardman v. Insurance Co.*, 84 Or. 60, 164 Pac. 558.

¹⁰ *Stevens v. Hertzler*, 114 Ala. 563, 22 So. 121; *Ward v. Waterman*, 85 Cal. 488, 24 Pac. 930.

¹¹ *Pittsburg Lumber Co. v. Shell*, 136 Tenn. 466, 189 S. W. 879.

because of its failure to make inquiries upon such subject, such contention must be taken advantage of in an action at law and reformation will not be granted.¹² If an action at law upon a redelivery bond can be maintained in spite of an error as to name of plaintiff in the original attachment suit, equity will not correct such mistake.¹³ If the party against whom reformation is sought has voluntarily tendered a new instrument in which such mistake is corrected, equity will not grant a decree of reformation.¹⁴ If by a mistake a provision for the annual payment of interest is omitted from a contract, but the purchaser has tendered a note secured by a mortgage which provides for annual interest, equity will not correct such mistake.¹⁵

§ 2232. Who may have reformation. Reformation may be had at the suit of those who succeed to the interest of the original party against whose interest such mistake operates.¹ Accordingly, reformation may be granted to heirs who take by descent,² and to judgment creditors.³ In some jurisdictions only one who is in technical privity with the original party to the instrument may have reformation.⁴ "Privity" is said to mean that the party who seeks relief must derive his title from the party against whose interest the mistake was made and subsequent to the date of the instrument in which such mistake appears.⁵ The relation of privity does not exist between those who have different estates in the same property if the party who seeks relief is not a successor to the very estate of the party against whose interest the mistake was made originally.⁶ It has been held that a subsequent grantee can not have reformation against a prior grantee, because there is no privity between them.⁷ In other jurisdictions the second gran-

¹² Boardman v. Insurance Co., 84 Or. 60, 164 Pac. 558.

¹³ King v. Brown, 78 N. H. 470, 101 Atl. 627.

¹⁴ Haugh v. Lanz, — Ia. —, 163 N. W. 204.

¹⁵ Haugh v. Lanz, — Ia. —, 163 N. W. 204.

¹ White v. Grand Rapids & I. Ry. Co., 190 Mich. 1, 155 N. W. 719; Bank v. Redwine, 171 N. Car. 559, 88 S. E. 878; Coates v. Smith, 81 Or. 556, 160 Pac. 517.

² White v. Grand Rapids & I. Ry. Co., 190 Mich. 1, 155 N. W. 719.

³ Coates v. Smith, 81 Or. 556, 160 Pac. 517.

⁴ Garlington v. Blount, 146 Ga. 527, 91 S. E. 553; Swearengen v. Swearengen, — Mo. —, 202 S. W. 556; Sills v. Ford, 171 N. Car. 733, 88 S. E. 636.

⁵ Sills v. Ford, 171 N. Car. 733, 88 S. E. 636.

⁶ Garlington v. Blount, 146 Ga. 527, 91 S. E. 553.

⁷ Garlington v. Blount, 146 Ga. 527, 91 S. E. 553.

tee has been permitted to maintain a suit for reformation where his interest under the second deed will be affected adversely if he can not have the first deed reformed.⁸ If the first grantee does not file his deed for record until after the second deed has been filed, the first grantee may have reformation as against the second grantee.⁹ The principle that he who seeks equity must do equity has been invoked to deny reformation to one who has been guilty of inequitable conduct or will gain an unfair advantage if the decree of reformation is granted.¹⁰ A party to a contract, who has been guilty of actual fraud, can not have reformation.¹¹ Equity will not reform a conveyance by eliminating the covenant which forms the only consideration for the conveyance.¹² Reformation can not be granted as against contingent interests which have not yet vested.¹³ An instrument which conveys a life estate to A, with remainder to his children, can not be reformed so as to convey a fee to A before any children have been born, since the interests of the unborn children are not represented.¹⁴

Only a party who is prejudiced by the mistake can maintain a suit for reformation.¹⁵ He must have an interest which will be protected by the decree of reformation and which will be injured if such decree is not rendered.¹⁶ If certain property is the separate property of a married woman, her husband can not have reformation of the conveyance thereof.¹⁷ A testamentary trustee can not bring suit for reformation of a deed executed by the decedent in order to avoid the liability of the estate for breach of a covenant of warranty as to that part of the realty which was described in the deed by mistake.¹⁸ A married woman who joins in her hus-

⁸ *Spencer v. Spencer*, 115 Miss. 71, 75 So. 770.

⁹ *Sills v. Ford*, 171 N. Car. 733, 88 S. E. 636.

¹⁰ *Baker v. Corbin*, 148 Ga. 267, 96 S. E. 428; *Bliss v. Linden Cemetery Association*, 85 N. J. Eq. 501, 96 Atl. 1001 [modifying decree, *Bliss v. Linden Cemetery Association*, 83 N. J. Eq. 494, 91 Atl. 304].

¹¹ *Baker v. Corbin*, 148 Ga. 267, 96 S. E. 428.

¹² *Bliss v. Linden Cemetery Association*, 85 N. J. Eq. 501, 96 Atl. 1001 [modifying decree, *Bliss v. Linden Cemetery Association*, 83 N. J. Eq. 494, 91 Atl. 304].

¹³ *Downey v. Seib*, 185 N. Y. 427, 8 L. R. A. (N.S.) 49, 78 N. E. 66.

¹⁴ *Downey v. Seib*, 185 N. Y. 427, 8 L. R. A. (N.S.) 49, 78 N. E. 66.

¹⁵ *Miller v. Morris*, 123 Ala. 164, 27 So. 401; *Auerbach v. Healy*, 174 Cal. 60, 161 Pac. 1157; *De Veer v. Pierson*, 222 Mass. 167, 110 N. E. 154; *Minazek v. Libera*, 78 Minn. 151, 80 N. W. 866.

¹⁶ *Auerbach v. Healy*, 174 Cal. 60, 161 Pac. 1157.

¹⁷ *Auerbach v. Healy*, 174 Cal. 60, 161 Pac. 1157.

¹⁸ *De Veer v. Pierson*, 222 Mass. 167, 110 N. E. 154.

band's deed to release dower, can not have the deed reformed to correct a covenant of warranty where she was not bound by such warranty.¹⁹ So one who sues as partner for reformation of a partnership contract must show that he has an interest in such partnership.²⁰

§ 2233. Effect of rights of third parties on reformation. If intervening rights of bona fide purchasers for value will be prejudiced by reformation it will not be allowed.¹ Reformation will not be granted as against a subsequent grantee for value without notice.² or as against a judgment creditor.³ Equity will not reform a certificate of preferred stock which was really intended as a certificate of indebtedness secured by a lien upon the corporate property if the effect of such reformation will not be to prejudice the general creditors.⁴ After an insurance company has become insolvent, the holders of income certificates can not have reformation if the effect of such reformation would be to deprive the policyholders of a fund which has been reduced by the payment of their premiums and if it would apply such funds to the discharge of the income certificates.⁵ Rights of third persons acquired with actual⁶ or constructive⁷ notice of the mistake, or rights of

¹⁹ *Miller v. Morris*, 123 Ala. 164, 27 So. 401.

²⁰ *Mlnazek v. Libera*, 78 Minn. 151, 80 N. W. 866.

¹ *Colorado. Wedman v. Carpenter*, — Colo. —, 173 Pac. 57.

Georgia. Macon v. Dasher, 90 Ga. 195, 16 S. E. 75; *Jefferson Banking Co. v. Trustees of Martin Institute*, 146 Ga. 383, 91 S. E. 463.

Illinois. Harms v. Coryell, 177 Ill. 496, 53 N. E. 87.

Indiana. Roszell v. Roszell, 109 Ind. 354, 10 N. E. 114.

Louisiana. Sentell v. Randolph, 52 La. Ann. 52, 26 So. 797.

Michigan. Dunham v. Provision Co., 100 Mich. 75, 58 N. W. 627; *Robertson v. Smith*, 191 Mich. 660, 158 N. W. 207.

Minnesota. Cottrell v. Bank, 53 Minn. 201, 54 N. W. 1111.

Washington. Seward v. Spurgeon, 9 Wash. 74, 37 Pac. 303.

A lienholder has been treated as a

purchaser for value. *Lough v. Michael*, 37 W. Va. 679, 17 S. E. 181, 470.

² *Robertson v. Smith*, 191 Mich. 660, 158 N. W. 207; *Hallberg v. Harriet*, — Or. —, 184 Pac. 549.

³ *Wedman v. Carpenter*, — Colo. —, 173 Pac. 57; *White v. Denman*, 16 Ohio 59.

⁴ *Jefferson Banking Co. v. Trustees of Martin Institute*, 146 Ga. 383, 91 S. E. 463.

⁵ *Porter v. Wright*, 145 Ga. 787, 39 S. E. 838.

⁶ *California. Arp v. Ferguson*, 175 Cal. 646, 166 Pac. 803.

Illinois. Way v. Roth, 159 Ill. 162, 42 N. E. 321.

Indiana. Smith v. Schweigerer, 129 Ind. 363, 28 N. E. 696.

Missouri. Palmer v. Wood, — Mo. —, 201 S. W. 857.

Nebraska. Carpenter Paper Co. v. Wilcox, 50 Neb. 659, 70 N. W. 228.

⁷ *Elwood v. Stewart*, 5 Wash. 736, 32 Pac. 735, 1000.

third persons not purchasers for value,⁸ especially if not prejudiced by the mistake,⁹ will not prevent reformation.

§ 2234. Evidence necessary for reformation. The so-called parol evidence rule has no application in actions to reform a written contract,¹ and extrinsic evidence is always admissible.

The burden on the issue of the existence of the mistake and of the actual agreement entered into between the parties is upon the party who claims the existence of the mistake.² The existence of the instrument itself raises a presumption that it is valid and free from mistake³ and fraud.⁴ The fact that the party against whom such relief is sought denies the existence of the mistake is not, however, conclusive.⁵ If the existence of the mistake is conceded

As where such third person acquired non-negotiable mortgage notes after maturity from a party to the original transaction. *San Jose Ranch Co. v. Water Co.*, 132 Cal. 582, 64 Pac. 1097.

⁸ *Varner-Collins Hardware Co. v. New Milford Security Co.*, 49 Okla. 613, 153 Pac. 667.

Such as creditors. *Michigan Buggy Co. v. Woodson*, 59 Mo. App. 550.

Even if judgment creditors. *Citizens' National Bank v. Judy*, 146 Ind. 322, 43 N. E. 259.

A subsequent mortgagee whose mortgage is given to secure a pre-existing indebtedness. *Varner-Collins Hardware Co. v. New Milford Security Co.*, 49 Okla. 613, 153 Pac. 667.

A grantee without consideration. *Kraushaar v. Hauk*, 27 Or. 92, 39 Pac. 539.

A wife subsequently married by grantee, now claiming her dower. *Hawkins v. Pearson*, 96 Ala. 369, 11 So. 304.

⁹ *Wright v. Bank* (Tenn. Ch. App.), 60 S. W. 623.

¹ See § 2211.

² *United States. Bailey v. Lisle Manufacturing Co.*, 238 Fed. 257, 152 C. C. A. 3; *Ackerlind v. United States*, 49 Ct. Cl. 635.

Colorado. Gibbs v. Wallace, 58 Colo. 364, 147 Pac. 686.

Florida. Rosenthal v. First National Fire Insurance Co., — Fla. —, 77 So. 92.

Iowa. Noble v. Trump, 174 Ia. 320, 156 N. W. 376.

Kansas. Minneapolis Steel & Machinery Co. v. Schalansky, 100 Kan. 562, 165 Pac. 289.

Louisiana. Metcalfe v. Green, 140 La. 950, 74 So. 261.

Maryland. Hopkins v. Neal, 128 Md. 251, 97 Atl. 436.

Massachusetts. Hayes v. Penn Mutual Life Insurance Co., 222 Mass. 382, 111 N. E. 168.

Nevada. Carey v. Clark, 40 Nev. 151, 161 Pac. 713.

Oregon. Manley v. Smith, 88 Or. 176, 171 Pac. 897; *Furuset v. Aaby*, 88 Or. 278, 170 Pac. 1180, 171 Pac. 1054; *School District v. Hartong*, 89 Or. 155, 173 Pac. 570; *Peninsula Lumber Co. v. Royal Indemnity Co.*, — Or. —, 184 Pac. 562.

³ *Ackerlind v. United States*, 49 Ct. Cl. 635; *Gibbs v. Wallace*, 58 Colo. 364, 147 Pac. 686; *Hayes v. Penn Mutual Life Insurance Co.*, 222 Mass. 382, 111 N. E. 168.

⁴ *Noble v. Trump*, 174 Ia. 320, 156 N. W. 376.

⁵ *Sills v. Ford*, 171 N. Car. 733, 88 S. E. 636.

but estoppel is alleged, the burden of proof rests upon the party who alleges the estoppel.⁶ The amount of evidence necessary to entitle the party seeking reformation to the relief sought is variously stated. For the security of written transactions, it is always more than a mere preponderance. The evidence must be clearer than a mere preponderance necessarily is, to permit reformation.⁷ Even where it is said that a preponderance is necessary the context indicates that this means that less than a preponderance is insufficient, but that it does not mean that a mere preponderance is sufficient.⁸ The usual form of statement is that the evidence must be clear and convincing,⁹ though it is also said that it must be

⁶Inge v. Inge, 120 Va. 329, 91 S. E. 142.

See also, Ficks v. Purcell, 164 Wis. 596, 160 N. W. 1058.

⁷United States. Goodno v. Hotchkiss, 237 Fed. 686; Bailey v. Lisle Manufacturing Co., 238 Fed. 257, 152 C. C. A. 3; Sun Co. v. Vinton Petroleum Co., 248 Fed. 623.

Alabama. Warren v. Crow, — Ala. —, 73 So. 989; Skidmore v. Stewart, — Ala. —, 75 So. 1.

Arkansas. Welch v. Welch, 132 Ark. 227, 200 S. W. 139; Connecticut Fire Insurance Co. v. Wigginton, 134 Ark. 152, 203 S. W. 844.

California. Burt v. Los Angeles Olive Growers' Association, 175 Cal. 668, 166 Pac. 993.

Florida. Bexley v. High Springs Bank, — Fla. —, 74 So. 494; Baldwin v. Christopher, — Fla. —, 79 So. 339.

Georgia. Robertson v. Rigsby, 148 Ga. 81, 93 S. E. 973.

Illinois. Silurian Oil Co. v. Neal, 277 Ill. 45, 115 N. E. 114; Anderson v. Stewart, 281 Ill. 69, 117 N. E. 743.

Iowa. Haugh v. Lance, — Ia. —, 163 N. W. 204; Dare v. Foy, 180 Ia. 1156, 164 N. W. 179.

Kentucky. Scott v. Spurr, 169 Ky. 575, 184 S. W. 866; Johnson v. Gadberry, 174 Ky. 62, 191 S. W. 865; Vanover v. Justice, 174 Ky. 577, 192 S. W. 653.

Minnesota. Mahoney v. Minnesota

Farmers' Mutual Insurance Co., 136 Minn. 34, 161 N. W. 217.

Missouri. Bartlett v. Brown, 121 Mo. 353, 25 S. W. 1108.

Iowa. Sauer v. Nehls, 121 Ia. 184, 96 N. W. 759.

New York. Allison Brothers' Co. v. Allison, 144 N. Y. 21, 38 N. E. 956.

Oklahoma. Burch v. Staples, — Okla. —, 174 Pac. 271.

Oregon. Bott v. Campbell, 82 Or. 468, 161 Pac. 955; Boardman v. Insurance Co., 84 Or. 60, 164 Pac. 558.

Washington. Conrads v. Green, 92 Wash. 269, 159 Pac. 102.

⁸Manley v. Smith, 88 Or. 176, 171 Pac. 897; Peninsula Lumber Co. v. Royal Indemnity Co., — Or. —, 184 Pac. 562.

⁹United States. Bowers v. Ins. Co., 68 Fed. 785.

California. Burt v. Los Angeles Olive Growers' Association, 175 Cal. 668, 166 Pac. 993.

Illinois. Leuer v. Kunz, 274 Ill. 523, 113 N. E. 878; Silurian Oil Co. v. Neal, 277 Ill. 45, 115 N. E. 114.

Iowa. Haugh v. Lanz, — Ia. —, 163 N. W. 204.

Minnesota. Benson v. Markoe, 37 Minn. 30, 5 Am. Ct. Rep. 816, 33 N. W. 38.

Missouri. Hunter v. Patterson, 142 Mo. 310, 44 S. W. 250.

Oregon. Bott v. Campbell, 82 Or. 468, 161 Pac. 955; Boardman v. Insurance Co., 84 Or. 60, 164 Pac. 558.

clear; ¹⁶ clear and satisfactory; ¹¹ satisfactory; ¹² full and satisfactory; ¹³ full, clear and decisive; ¹⁴ clear, unequivocal and decisive; ¹⁵ full, clear, unequivocal and amounting to a moral certainty; ¹⁶ clear and precise; ¹⁷ clear, precise and undubitable; ¹⁸ clear and cogent, strong and convincing; ¹⁹ clear, positive and convincing; ²⁰ clear, unequivocal and convincing; ²¹ clear, convincing and satisfactory; ²² most clear and convincing; ²³ clear and most satisfactory; ²⁴ the clearest and most satisfactory evidence; ²⁵ the clearest, strongest and most irrefragable evidence; ²⁶ evidence as

Texas. *Westchester Fire Ins. Co. v. Wagner* (Tex. Civ. App.), 38 S. W. 214.

Washington. *Conrads v. Green*, 92 Wash. 269, 159 Pac. 102.

¹⁰ *Ackerlind v. United States*, 49 Ct. Cl. 635; *Skidmore v. Stewart*, — Ala. —, 75 So. 1; *Connecticut Fire Insurance Co. v. Wigginton*, 134 Ark. 152, 203 S. W. 844; *Silurian Oil Co. v. Neal*, 277 Ill. 45, 115 N. E. 114.

¹¹ *United States. Baldwin v. Fence Co.*, 67 Fed. 853.

Arkansas. *Welch v. Welch*, 132 Ark. 227, 200 S. W. 139.

California. *Hochstein v. Berghauser*, 123 Cal. 681, 56 Pac. 547.

Florida. *Rosenthal v. First National Fire Insurance Co.*, — Fla. —, 77 So. 92.

Michigan. *Robertson v. Smith*, 191 Mich. 660, 158 N. W. 207.

Wisconsin. *Seeman v. Biemann*, 108 Wis. 365, 84 N. W. 490.

"Clear proof" is the requisite in *Seeley v. Baldwin*, 185 Ill. 211, 56 N. E. 1075.

It is said that the facts must be "clearly proved" in *New York Life Ins. Co. v. McMaster*, 87 Fed. 63, 30 C. C. A. 532.

¹² *Ward v. Yorba*, 123 Cal. 447, 56 Pac. 58.

¹³ *Bexley v. High Springs Bank*, 73 Fla. 422, 74 So. 494; *Baldwin v. Christopher*, — Fla. —, 79 So. 339.

¹⁴ *Cross v. Bean*, 81 Me. 525, 17 Atl. 710.

¹⁵ *Robertson v. Rigsby*, 148 Ga. 81, 95 S. E. 973 (under local statute).

¹⁶ *Burch v. Staples*, — Okla. —, 174 Pac. 271.

¹⁷ *Liggett v. Shira*, 159 Pa. St. 350, 28 Atl. 218.

¹⁸ *Sanders v. Sharp*, 153 Pa. St. 555, 25 Atl. 524.

¹⁹ *Foster v. Schmeer*, 15 Or. 363, 15 Pac. 626.

²⁰ *Turner v. Shaw*, 96 Mo. 22, 9 Am. St. Rep. 319, 8 S. W. 897.

²¹ *Goodno v. Hotchkiss*, 237 Fed. 686; *Mahoney v. Minnesota Farmers' Mutual Insurance Co.*, 136 Minn. 34, 161 N. W. 217.

²² *Scott v. Spurr*, 169 Ky. 575, 184 S. W. 866; *Parchen v. Chessman*, 53 Mont. 430, 164 Pac. 531; *Home Fire Ins. Co. v. Wood*, 50 Neb. 381, 69 N. W. 941.

²³ *Pickrell & Craig Co. v. Castleman-Blakemore Co.*, 174 Ky. 1, 191 S. W. 680; *Vanover v. Justice*, 174 Ky. 577, 192 S. W. 653; *Clark v. Ry.*, 127 Mo. 255, 30 S. W. 121.

²⁴ *Habbe v. Viele*, 148 Ind. 116, 45 N. E. 783 [rehearing denied, 47 N. E. 1].

²⁵ *Sun Co. v. Vinton Petroleum Co.*, 248 Fed. 623; *Milligan v. Pleasants*, 74 Md. 8, 21 Atl. 695; *Hollenback's Appeal*, 121 Pa. St. 322, 15 Atl. 616; *Donaldson v. Levine*, 93 Va. 472, 25 S. E. 541.

²⁶ *Ferring v. Fleischmann* (Tenn. Ch. App.), 39 S. W. 19.

strong as if the mistake were admitted;²⁷ evidence which leaves no rational doubt;²⁸ evidence which is beyond a reasonable doubt,²⁹ or evidence which is conclusive.³⁰ In some jurisdictions, however, it is said that the requirement of evidence beyond a reasonable doubt is too high a requirement for reformation,³¹ and that such rule applies only in criminal law.³²

The application of these principles to given states of evidence results in the same divergence of opinion as the abstract statements of the principles themselves. The rule that the evidence must be clear, convincing and satisfactory is said to refer to the quality of the evidence rather than to its quantity;³³ and, accordingly, reformation may be granted upon the evidence of a single witness, although the testimony of one or more witnesses is opposed to his testimony.³⁴

²⁷ Ford v. Joyce, 78 N. Y. 618.

²⁸ Rowley v. Flannelly, 30 N. J. Eq. 613, 614 [quoted in Green v. Stone, 54 N. J. Eq. 387, 399; 55 Am. St. Rep. 577, 34 Atl. 1099; reversing, 32 Atl. 706]; Hupsch v. Resch, 37 N. J. Eq. 657, 663.

²⁹ United States. Bailey v. Lisle Manufacturing Co., 238 Fed. 257, 152 C. C. A. 3.

Florida. Baldwin v. Christopher, — Fla. —, 79 So. 339.

Illinois. Lines v. Willey, 253 Ill. 440, 97 N. E. 843; Anderson v. Stewart, 281 Ill. 69, 117 N. E. 743.

Iowa. Dare v. Foy, 180 Ia. 1156, 164 N. W. 179.

Kentucky. Johnson v. Gadberry, 174 Ky. 62, 191 S. W. 865.

³⁰ Warren v. Crow, — Ala. —, 73 So. 989.

³¹ Bowers v. Bennett, 30 Ida. 188, 164 Pac. 93.

³² Bowers v. Bennett, 30 Ida. 188, 164 Pac. 93.

³³ Parchen v. Chessman, 53 Mont. 430, 164 Pac. 531.

³⁴ Parchen v. Chessman, 53 Mont. 430, 164 Pac. 531.

PART VI

OPERATION

CHAPTER LXXI

ASSIGNMENT

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- § 2236. Assignment at common law—Original theory.
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§ 2235. Definition and nature of assignment. If A has a contract with B, and A wishes to secure the benefits arising from the performance of such contract to C, he may obtain this result in a number of different ways. A may enter into a contract with C by which A may agree to pay over to C the benefits of such performance when B performs. Under such an arrangement no attempt is made to substitute C for A or to give to C any right against B. A's right against B remains unimpaired by the contract between A and C, and C's only right is against A. Analogous to the foregoing case is the case in which A may have a contract with B, and in order to enable him to perform such contract, A may enter into a contract with C. This transaction gives C no rights against B, growing out of the agreement of the parties, and it leaves unim-

paired A's rights and liabilities as against C. If any distinctive name is given to the contract between A and C, it is called a sub-contract and it is not discussed in connection with assignment. A may attempt to transfer to C whatever rights A has against B and to substitute C in place of A, so that C may, if necessary, secure the benefits of performance on the part of B by an action which C may bring against B. It is this sort of a transaction which is usually called "assignment," and which is discussed under that title. If A has entered into a contract with B, and A has also entered into a contract with C, it is possible for A, B and C to enter into a new contract, by the terms of which A's rights and liabilities are all eliminated, and C has a contract which he may enforce against B. Because of the necessity of separate contracts in the first instance, and a new contract as a substitute for the two original contracts, this is ordinarily not classed as assignment, but it is called "novation," and it is discussed under that title.¹

Assignment in the broadest use of the term is a transfer of property or of an interest therein, by one person to another.² It ordinarily means the transfer of the entire interest of the assignor.³ In a narrower sense, it is used of a transfer of personalty.⁴

¹ See ch. LXXV.

² *Guaranteed State Bank v. D'Yarmett*, — Okla. —, 169 Pac. 639.

"The word 'assignment' has several meanings. In a broad sense it is used to signify the act by which one person transfers to another, or causes to vest in such other the entire right, interest or property which he has in any realty or personalty, in possession or in action, or some share, interest or subsidiary estate therein. It is more particularly applied to a written transfer, as distinguished from a transfer by mere delivery." *Johnson v. Brewer*, 134 Ga. 828, 31 L. R. A. (N.S.) 332, 68 S. E. 590.

See also, *Schee v. La Grange*, 78 Ia. 101, 42 N. W. 616.

"'Assignment' may be used in a statute with reference to a stock certificate in the sense of a written instrument assigning such certificate." *Burnsville Turnpike Co. v. State*, 119 Ind. 382, 3 L. R. A. 265, 20 N. E. 421.

On the general subject of assign-

ment, see *Assignability of Contract*, by Frederic C. Woodward, 18 *Harvard Law Review*, 23; *Assignment of Contract*, by Clarence D. Ashley, 19 *Yale Law Journal*, 160; *Assignment of Choses in Action*, by W. R. Anson, 17 *Law Quarterly Review*, 90, and *Assignment of Debts*, by E. Lumley, 28 *Law Quarterly Review*, 184.

See also, *Property in Chattels*, by Percy Bordwell, 29 *Harvard Law Review*, 374, 501, 731; *The Nature of a Policy of Insurance with Regard to Its Assignability*, by Chauncey G. Parker, 1 *Harvard Law Review*, 388, and *Purchasers and Mortgagees as Assignees of Fire Insurance Policies*, by James Edward Hogg, 24 *Juridical Review*, 228, 325.

³ *Guaranteed State Bank v. D'Yarmett*, — Okla. —, 169 Pac. 639.

⁴ *Loyal Mystic Legion v. Jones*, 73 Neb. 342, 102 N. W. 621.

For a distinction between a sale, an exchange and an assignment as various forms of transfer, see *Noble v. Ft.*

Assignment of a contract is the transfer by one of the parties thereto to another person not a party thereto, of his interest therein.⁵ The term "assignment" is used in this sense only of non-negotiable contracts.⁶ If a negotiable contract is transferred in such a way as to preserve its negotiability, different considerations exist.⁷

The term "assignment" is sometimes used of the legal consequences of certain facts, such as the death of one of the parties to the contract, his bankruptcy, and the like, by which his rights of action become vested in his successor without regard to the actual agreement of the parties. This is sometimes referred to as assignment by operation of law. It resembles assignment by agreement of the parties in that the right of a party to a contract may be transferred to one who was a stranger to the original contract. It differs from it in that such transfer does not depend upon the agreement of the person from whom the interest passes, but that it is effected by the law without regard to such agreement.⁸

In discussing the validity and affect of an assignment by the voluntary act of the parties, a distinction must be made between total assignments in which the assignor attempts to transfer his entire interest in the contract and partial assignment by which the assignor attempts to transfer to the assignee only a part of the interest in the contract which the assignor had originally.⁹

§ 2236. Assignment at common law—Original theory. The general rule at common law was that assignment of contractual rights, made by the voluntary act of the parties, was of no effect if the adversary party to the contract thus assigned did not consent thereto. This rule was laid down by the English courts,¹ and it became so thoroughly settled that it was adopted without question or discussion as a part of the common law of the United

Smith Wholesale Grocery Co., 34 Okla. 662, 46 L. R. A. (N.S.) 455, 127 Pac. 14; *Humphrey v. Coquillard Wagon Works*, 37 Okla. 714, 49 L. R. A. (N.S.) 600, 132 Pac. 890.

§ "The assignee of a claim has no greater rights therein than the assignor; that is, the owner of an ordinary chose in action can not sell and transfer a greater right therein than he himself has, but he can sell whatever interest he has therein, and, in the absence of fraud, the purchaser will

take whatever right the seller had at the time of the sale, and the seller may afterwards formally transfer the right pursuant to his agreement." *Vanderlip v. Barnes*, 101 Neb. 573, 163 N. W. 856.

§ *Townsend v. Carpenter*, 11 Ohio 21.

7 See §§ 2343 et seq.

8 See § 2302.

9 See § 2261.

1 *Lampet's Case*, 10 Coke 46b; *Wright v. Wright*, 1 Ves. 400; *Chandos v. Talbot*, 2 P. Wms. 601.

States,² although by the time that it was adopted in the United States it had gone a long way in its degeneration into a mere procedural rule.

The reason formerly assigned for this rule was the same as that underlying champerty—namely, the danger that causes of action might be assigned to great and influential men, and justice might therefore fail.³ This reason explains the tenacity with which the common law has clung to the rule, and the exceptions in favor of assignments to or from the crown or the state. Like many other common-law rules, however, the rule itself arose before the reason began and persisted after the reason ceased. The aversion to assignment, which persists to this day in the case of personal contracts, arose at a time when all contracts were regarded as intensely personal, and when a stranger to a contract could acquire no rights thereunder, whether by the original terms of the contract or by subsequent assignment.⁴

§ 2237. Exceptions recognizing assignment. Even at common law there were certain well-recognized exceptions to this rule. Negotiable contracts could be transferred to others than the original parties.¹ This exception may be explained by saying that negotiable instruments exist under the law-merchant and not at common law. Contracts running with the land could pass to the grantee of the land. Contracts could be assigned to or by the government,² so that the assignee could sue in his own name.³

² *United States*. *Tiernan v. Jackson*, 30 U. S. (5 Pet.) 580, 8 L. ed. 234.

Connecticut. *Brush v. Curtis*, 4 Conn. 312.

Massachusetts. *Orr v. Amory*, 11 Mass. 25.

New Jersey. *Wright v. Williamson*, 3 N. J. L. 520.

New York. *Bird v. Caritat*, 2 Johns. (N. Y.) 342, 3 Am. Dec. 433.

Virginia. *Brown v. Dickerson*, 68 Va. (27 Gratt.) 690.

Wisconsin. *Pillsbury v. Mitchell*, 5 Wis. 17.

For a discussion of the common-law theory and the modern theory, see *Atlantic & N. C. Ry. v. Atlantic & N. C. Co.*, 147 N. Car. 368, 125 Am. St. Rep. 550, 23 L. R. A. (N.S.) 223, 15 Am. & Eng. Ann. Cas. 363, 61 S. E. 185.

³ "Right might be trodden down and the weak oppressed." *Co. Litt.* 214a; *Lampet's Case*, 10 Coke 46b; *Rice v.*

Stone, 83 Mass. (1 All.) 566; *Thalhimer v. Brinckerhoff*, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308; *Webber v. Quaw*, 46 Wis. 118, 49 N. W. 830.

⁴ That the rule against assignment was not based on an aversion to maintenance originally, see *Assignment of Choses in Action in Relation to Maintenance and Champerty*, by Percy H. Winfield, 35 *Law Quarterly Review*, 143.

¹ This may not be a technical assignment, but it had the effect of passing legal title. See §§ 2343.

² *Y. B. 39 Hen. VI* 26, pl. 36. (This was said to be according to the common practice of the exchequer.) *Y. B. 2 Hen. VII* 8, pl. 25; *Allen's Case*, *Owen* 113; *Brevertton's Case*, 1 *Dyer* 30b; *Stafford v. Buckley*, 2 *Ves.* 170; *United States v. Buford*, 28 U. S. (3 Pet.) 12, 7 L. ed. 585.

³ *Brevertton's Case*, 1 *Dyer* 30b.

§ 2238. **Effect of attempted assignment at common law.** Apart from these exceptions, the common law at the outset denied legal effect to the assignment. It was not a valuable consideration which would support a promise by the assignee to the assignor,¹ unless the assignor had covenanted expressly that the money due on the claim which was assigned should be paid to the assignee, either by the assignor or by the original debtor.² The assignor could release the debt after the assignment.³ The assignee had no interest in the debt assigned, and accordingly his promise to forbear was no consideration for a promise made to him by the debtor to pay the debt to the assignee in consideration of such forbearance.⁴ On the bankruptcy of the assignor, the interest in the debt passed to his trustee in bankruptcy as against the assignee.⁵ The action upon the debt must be brought in the name of the assignor,⁶ and the assignor could interfere in such action if he chose.⁷

§ 2239. **Assignment in equity.** In equity from an early period, contracts except those in which the personality of the adversary party was material, were regarded as forms of property rather than as purely personal relations; and, accordingly, assignment was recognized in equity long before its recognition in common law,¹ though occasionally with some doubt as to the wisdom of its action.² Equity would give specific performance of the contract of assignment in favor of the assignee as against the assignor.³ In equity, rights arising under most contracts can therefore be assigned, and the assignee may enforce his rights by a suit in equity in his own name, if the facts, independent of the assignment, are such as to entitle him to equitable relief.⁴ If the remedy to which the

¹ Y. B. 37 Hen. VI 13, pl. 3.

² *Penon v. Higbed*, 4 Leon. 99. (No decision was rendered, as it did not appear clearly what was assigned.)

³ *Penon v. Higbed*, 4 Leon. 99.

⁴ Rolle's Abridgment, action sur case (V) sur assumpsit, Consideration: 20, pl. 12 (*Mowre and Edney's Case*).

⁵ *Backwell v. Litcott*, 2 Keb. 331.

⁶ Y. B. 34 Hen. VI 30, pl. 15.

⁷ Y. B. 15 Hen. VII 2, pl. 3.

¹ "Choses in action are assignable in equity though not in law." *Squib v. Wyn*, 1 P. Wms. 378.

"Though the law does not admit an

assignment of a chose in action, this court does." *Row v. Dawson*, 1 Ves. Sr. 331.

² "The court has gone a great way, perhaps too far, in permitting persons to assign over, for what is called valuable consideration, * * * rights in accounts to be taken." *Spragg v. Binkes*, 5 Ves. Jr. 583.

³ *Wright v. Wright*, 1 Ves. Sr. 409.

⁴ England. *Brown v. Heathcote*, 1 Atk. 160; *Chandos v. Talbot*, 2 P. Wms. 601.

United States. *Chicago, etc., Ry. v. Ry.*, 143 U. S. 596, 36 L. ed. 277.

assignee is entitled is equitable, such as specific performance,⁵ including specific performance against the assignor—at least if the debtor, who is a party to the action, pays his debt into court without objection,⁶ redemption from a mortgage,⁷ foreclosure,⁸ accounting,⁹ setting aside a fraudulent conveyance,¹⁰ or settling the estate of a decedent in equity,¹¹ the assignee may sue in equity in his own name.

If the cause of action against the debtor is an action at law, the assignee's remedy is to bring an action at law against the debtor in the name of the assignor in jurisdictions in which he can not sue in his own name; and he can not bring a suit in equity against the debtor, since his legal remedy, if available, is adequate.¹² If the assignee was unable to make use of the legal remedy of bringing an action at law in the name of the assignor, equity would per-

Delaware. *Illinois Finance Co. v. Interstate Rural Credit Association*, — Del. —, 101 Atl. 870 (obiter).

Illinois. *Brownell Improvement Co. v. Critchfield*, 197 Ill. 61, 64 N. E. 332.

Massachusetts. *Dix v. Cobb*, 4 Mass. 508.

Michigan. *Up River Ice Co. v. Denler*, 114 Mich. 296, 68 Am. St. Rep. 480, 72 N. W. 157.

New Jersey. *Bleakley v. Nelson*, 56 N. J. Eq. 674, 39 Atl. 912.

New York. *Chambers v. Lancaster*, 160 N. Y. 342, 54 N. E. 707.

Oregon. *Stott v. Franey*, 20 Or. 410, 23 Am. St. Rep. 132, 26 Pac. 271.

Tennessee. *Morrison v. Deaderick*, 29 Tenn. (10 Humph.) 342.

Wisconsin. *Varney v. Bartlett*, 5 Wis. 276.

⁵ *Brett v. Warnick*, 44 Or. 511, 102 Am. St. Rep. 639, 75 Pac. 1061; *Bullion v. Campbell*, 27 Tex. 653; *Hagar v. Buck*, 44 Vt. 285, 8 Am. Rep. 368.

⁶ *Brett v. Warnick*, 44 Or. 511, 102 Am. St. Rep. 639, 75 Pac. 1061.

⁷ *Mayo v. Carrington*, 60 Va. (19 Gratt.) 74.

⁸ *Caldwell v. Meshew*, 44 Ark. 564; *Slaughter v. Foust*, 4 Blackf. (Ind.) 379; *Bigelow v. Willson*, 18 Mass. (1 Pick.) 485.

⁹ *Pendleton v. Wambersie*, 8 U. S. (4 Cranch) 73, 2 L. ed. 554; *Gleason & Bailey Mfg. Co. v. Hoffman*, 168 Ill. 25, 48 N. E. 143; *Hobart v. Andrews*, 38 Mass. (21 Pick.) 526.

¹⁰ *Moorer v. Moorer*, 87 Ala. 545, 6 So. 289.

¹¹ *Blackerby v. Holton*, 35 Ky. (5 Dana) 520.

¹² **England.** *De Ghettoft v. London Assurance Co.*, 4 Brown Cases in Parl. 436 [affirming, *Dhegetoft v. London Assurance Co.*, Mosely 83]; *Rolt v. White*, 31 Beav. 520 [affirmed, *Rolt v. White*, 3 Deg. J. & S. 360]; *Rose v. Clarke*, 1 Y. & Col. Ch. 534; *Fall v. Chambers*, Mosely 193; *Cator v. Burke*, 1 Bro. Ch. 435; *Motteux v. London Assurance Co.*, 1 Atk. 545; *Hammond v. Messenger*, 9 Sim. 327.

United States. *Riddle v. Mandeville*, 9 U. S. (5 Cranch) 322, 3 L. ed. 114; *Hayward v. Andrews*, 106 U. S. 672, 27 L. ed. 271; *New York Guaranty Co. v. Memphis Water Co.*, 107 U. S. 205, 27 L. ed. 484; *Smith v. Bourbon County*, 127 U. S. 105, 32 L. ed. 73; *Glenn v. Marbury*, 145 U. S. 499, 36 L. ed. 790.

Arkansas. *Baker-Matthews Mfg. Co. v. Grayling Lumber Co.*, 134 Ark. 351, 203 S. W. 1021.

mit him to sue in his own name.¹³ If the only remedy allowed to an indorsee at law is an action against his immediate indorser, and if such indorser is insolvent, equity will permit the indorsee to file a bill in equity against a remote indorser.¹⁴ If the assignor is dead and no administrator has been appointed,¹⁵ or the administrator is a non-resident,¹⁶ or if the assignor is a corporation which has been dissolved,¹⁷ or which has expired by efflux of time,¹⁸ the remedy of bringing an action at law in the name of the assignor is not available, and the assignee may sue in his own name in equity.

Whether the refusal of the assignor to permit the assignee to make use of his name in an action at law against the debtor gives to the assignee the right to file a bill in equity against the debtor, or whether his remedy in equity is to compel the assignor to permit him to use his name, is a question upon which there is little authority, and that little is divergent. It has been said that if the

New York. *Carter v. United Ins. Co.*, 1 Johns. Ch. (N. Y.) 463.

Vermont. *Hagar v. Buck*, 44 Vt. 285, 8 Am. Dec. 368.

Virginia. *Moseley v. Boush*, 25 Va. (4 Rand.) 392.

Contra, *Dixon v. Buell*, 21 Ill. 203; *Dobyns v. McGovern*, 15 Mo. 662; *Townsend v. Carpenter*, 11 Ohio 21.

¹³ *Baker-Matthews Mfg. Co. v. Grayling Lumber Co.*, 134 Ark. 351, 203 S. W. 1021; *Walker v. Brooks*, 125 Mass. 241 (obiter).

"As was said in *Hayward v. Andrews*, 106 U. S. 672, 675, 27 L. ed. 271: 'If the assignee of the chose in action is unable to assert in a court of law the legal right of the assignor which in equity is vested in him then the jurisdiction of a court of chancery may be invoked, because it is the proper forum for the enforcement of equitable interests, and because there is no adequate remedy at law; but when, on the other hand, the equitable title is not involved in the litigation, and the remedy is sought merely for the purpose of enforcing the legal right of his assignor, there is no ground for an appeal to equity, because by an action at law in the name of the assignor the disputed

right may be perfectly vindicated, and the wrong done by the denial of it fully redressed. To hold otherwise would be to enlarge the jurisdiction of courts of equity to an extent the limits of which could not be recognized, and that in cases where the only matter in controversy would be purely legal rights.'" *Smith v. Bourbon County*, 127 U. S. 105, 32 L. ed. 73.

¹⁴ *Harris v. Johnston*, 7 U. S. (3 Cranch) 311, 2 L. ed. 450; *Riddle v. Mandeville*, 9 U. S. (5 Cranch) 322, 3 L. ed. 114.

He could not maintain assumpsit against a remote indorser. *Mandeville v. Riddle*, 5 U. S. (1 Cranch) 290, 2 L. ed. 112.

¹⁵ *Taylor v. Reese*, 44 Miss. 89. (It is said that the plaintiff could sue in equity as equitable assignee even if there were an administrator.)

¹⁶ *Cobb v. Thompson*, 8 Ky. (1 A. K. Mar.) 507.

¹⁷ *Baker-Matthews Mfg. Co. v. Grayling Lumber Co.*, 134 Ark. 351, 203 S. W. 1021; *Person v. Barlow*, 35 Miss. 174, 72 Am. Dec. 121.

¹⁸ *Lenox v. Roberts*, 15 U. S. (2 Wheat.) 373, 4 L. ed. 264.

assignor interferes, equity will permit the assignee to sue in equity to compel the debtor to pay the debt to him.¹⁹ It has been held, on the other hand, that the assignee's remedy in equity is against the assignor, to compel him to allow his name to be used, and not against the debtor to compel him to pay the debt to the assignee.²⁰

Equity would enjoin the assignor from interfering with the attempt of the assignee to enforce the contract by an action in the name of the assignor.²¹ If the assignor threatened to dismiss the action which the assignee had brought in the name of the assignor, equity would enjoin the assignor from dismissing it.²²

As far as law has adopted the theory of assignment which was held originally by the courts of equity, the classes of contracts which could be assigned at equity can be assigned at modern law;

¹⁹ "If this case were stripped of all special circumstances it would be simply a bill filed by a plaintiff who had obtained from certain persons to whom a debt was due a right to sue in their names for the debt. It is quite new to me that, in such a simple case as that, this court allows, in the first instance, a bill to be filed against the debtor by the person who has become the assignee of the debt. I admit that, if special circumstances are stated, and it is represented that, notwithstanding the right which the party has obtained to sue in the name of the creditor, the creditor will interfere and prevent the exercise of that right, this court will interpose for the purpose of preventing that species of wrong being done; and, if the creditor will not allow the matter to be tried at law in his name, this court has a jurisdiction, in the first instance, to compel the debtor to pay the debt to the plaintiff—especially in a case where the act done by the creditor is done in collusion with the debtor. If bills of this kind were allowable, it is obvious that they would be pretty frequent; but I never remember any instance of such a bill as this being filed unaccompanied by special

circumstances." *Hammond v. Messenger*, 9 Sim. 327.

This statement is obiter, since the court found no special circumstances which justified a resort to equity. It has been repeated in a number of cases in obiter. See *Walker v. Brooks*, 125 Mass. 241.

²⁰ "But if the trustee really refuses his name, this indeed is a foundation for the court to compel him, but not to decree against the debtor; his refusal can not alter the nature of the action against him. He has a right to have the witnesses examined viva voce at a trial, where their evidence can be more thoroughly sifted, and considered by a judge and jury, than on a commission." (Argument of counsel, apparently adopted by court.) *Fall v. Chambers*, Mosely 193.

The fact that the assignor "did not care to permit his name to be made use of" does not enable that assignee to sue the debtor in equity. *De Ghettoft v. London Assurance Co.*, 4 Brown Cases in Parl. 436 [affirming, *Dhegetoft v. London Assurance Co.*, Mosely 83]

²¹ *Deaver v. Eller*, 42 N. Car. (7 Ired. Eq.) 24.

²² *Deaver v. Eller*, 42 N. Car. (7 Ired. Eq.) 24.

and they will be discussed in connection with the modern-law theory.²³

In equity the assignee is the real party in interest and he can not bring a suit in equity to which he is not a party in the name of the assignor.²⁴ If the assignment is total and absolute, it is not necessary to make the assignor a party, since he has no interest in the outcome of the litigation between the assignee and the debtor.²⁵

§ 2240. Ultimate theory of assignment at common law. Under the influence of the doctrines of equity,¹ the common-law rule forbidding assignment gradually broke down and finally degenerated into a mere rule of pleading. Contracts which were assignable in equity could be sued on at law, but the action had to be brought in the name of the assignor.² Originally a power of attorney was given to the assignee to bring an action against the debtor in the name of the assignor, but eventually the assignee was allowed to bring such action without express words authorizing him to sue in the name of the assignor.³ The authority of the assignee was sufficient to justify the attorneys in bringing the action in the name of the assignor.⁴ At the same time the assignor, though a formal party, was a substantial and necessary party,⁵ and an action could

²³ See §§ 2241 et seq.

²⁴ *Plowman v. Riddle*, 14 Ala. 169; *Field v. Maghee*, 5 Paige, 539; *Rogers v. Traders' Ins. Co.*, 6 Paige 583; *Sedgwick v. Cleveland*, 7 Paige 287; *Coale v. Mildred's Admr.*, 3 Har. & J. (Md.) 278; *Varney v. Bartlett*, 5 Wis. 276.

²⁵ *England. Brace v. Harrington*, 2 Atk. 235.

United States. Boon v. Chiles, 33 U. S. (8 Pet.) 532, 8 L. ed. 1034; *O'Shaughnessy v. Humes*, 129 Fed. 953.

Massachusetts. Allyn v. Allyn, 154 Mass. 570, 28 N. E. 779.

Ohio. McGuffey v. Finley, 20 Ohio, 474

Virginia. Tatum v. Ballard, 94 Va. 370, 26 S. E. 871.

¹ See § 2239.

² *England. Master v. Miller*, 4 T. R. 320.

United States. New York Guaranty Co. v. Water Co., 107 U. S. 205, 27 L.

ed. 484; *Shaffer v. Federal Cement Co.*, 225 Fed. 893 [judgment modified, *Federal Cement Co. v. Shaffer*, 229 Fed. 1021, 143 C. C. A. 662].

Arkansas. Baker-Matthews Mfg. Co. v. Grayling Lumber Co., 134 Ark. 351, 203 S. W. 1021.

Illinois. Congress Construction Co. v. Libbey Co., 199 Ill. 398, 65 N. E. 357 [affirming, 101 Ill. App. 279].

Kentucky. Marshall v. Craig, 6 Ky. (3 Bibb.) 291.

Massachusetts. Foss v. Lowell Five Cent Savings Bank, 111 Mass. 285; *Leach v. Greene*, 116 Mass. 534.

Ohio. Townsend v. Carpenter, 11 Ohio 21.

³ *Allen's Case, Owen* 113 (a case involving an assignment by the crown).

⁴ *Massachusetts Construction Co. v. Kidd*, 142 Fed. 285.

⁵ *Karrick v. Wetmore*, 22 D. C. App. 487.

not be brought in the name of the assignor after his death;⁶ nor, if it were thus brought, could the declaration be amended by substituting the name of the executor or administrator of the assignor as the nominal plaintiff in place of the deceased assignor.⁷ The assignor had a right to security against any liability for costs,⁸ but if this were given, the assignee had sole control of the action.⁹ The assignor could not dismiss the action, and a judgment of dismissal under a collusive agreement between the assignor and the debtor, is not a bar to a subsequent action by the assignee.¹⁰ The assignor could not, by any act of his, impair the rights of the assignee, at least after notice was given to the debtor.¹¹ The assignor could not release the cause of action;¹² he could not receive payment of the debt so as to affect the rights of the assignee;¹³ nor were his declarations against interest admissible when made after assignment.¹⁴

The interest of the assignee was such that it was sufficient consideration for a promise by the debtor to the assignee to pay the debt to the assignee, and if the debtor made such promise, the assignee could maintain an action at law in his own name against the debtor.¹⁵ A promise by the debtor to the assignor to pay the

⁶ *Karrick v. Wetmore*, 22 D. C. App. 487.

⁷ *Karrick v. Wetmore*, 22 D. C. App. 487.

⁸ *Illinois*. *Chapman v. Shattuck*, 8 Ill. 49.

Maine. *Southwick v. Hopkins*, 47 Me. 362.

Massachusetts. *Fay v. Guynon*, 131 Mass. 31.

New Hampshire. *Gordon v. Drury*, 20 N. H. 353.

Texas. *Allen v. Pannell*, 51 Tex. 165.

⁹ *Welch v. Mandeville*, 14 U. S. (1 Wheat.) 233, 4 L. ed. 79; *Southwick v. Hopkins*, 47 Me. 362; *Elsberg v. Honeck*, 78 N. J. L. 181, 68 Atl. 1090.

¹⁰ *Welch v. Mandeville*, 14 U. S. (1 Wheat.) 233, 4 L. ed. 79.

¹¹ *Legh v. Legh*, 1 B. & P. 447; *Webb v. Steele*, 13 N. H. 230; *Raymond v. Squire*, 11 Johns. 47.

¹² *Ransom v. Jones*, 2 Ill. 291; *Marr v. Hanna*, 30 Ky. (7 J. J. Mar.) 642,

23 Am. Dec. 449; *Martin v. Hawkins*, 15 Johns. (N. Y.) 405. See §§ 2264 and 2277.

¹³ *England*. *Brandt v. Dunlop Rubber Co.* [1905], A. C. 454.

Iowa. *Kithcart v. Kithcart*, 145 Ia. 549, 30 L. R. A. (N.S.) 1062, 124 N. W. 305.

Massachusetts. *Buttrick Lumber Co. v. Collins*, 202 Mass. 413, 89 N. E. 138.

New York. *Ten Broeck v. DeWitt*, 10 Wend. (N. Y.) 617.

Ohio. *Welsh v. Childs*, 17 O. S. 319.

Wisconsin. *Pier v. Bullis*, 48 Wis. 429, 4 N. W. 381.

¹⁴ *Dazey v. Mills*, 10 Ill. 67; *Wing v. Bishop*, 85 Mass. (3 All.) 456; *Frear v. Evertson*, 20 Johns. (N. Y.) 142; *Hough v. Barton*, 20 Vt. 455.

¹⁵ *England*. *Israel v. Douglas*, 1 H. Bl. 239; *Wilson v. Coupland*, 5 Barn. & Ald. 228.

Florida. *Hooker v. Gallagher*, 6 Fla. 351.

debt to the order of the creditor was held to authorize a subsequent assignee to bring an action at law in his own name for money had and received to his use.¹⁶

When this stage was reached, the assignee was regarded at law, as he was in equity, as the real party in interest, but at law the old procedural rule survived and the action still had to be brought in the name of the assignor. In other respects, assignment had developed from giving to the assignee a mere personal right against the assignor to recover the proceeds of the transaction between the assignor and his debtor, to giving to the assignee a claim against the debtor directly, which the assignee could assert against the debtor, though by an action in the name of the assignor.

§ 2241. Assignment at modern law. At modern law, in most jurisdictions, a contract may be assigned as well at common law as in equity.¹ The assignee may bring an action in his own name

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| Maine. Smith v. Berry, 18 Me. 122. | Colorado. Doyle v. Nesting, 37 Colo. 522, 88 Pac. 862. |
| Massachusetts. Mowry v. Todd, 12 Mass., 281. | Connecticut. City Bank v. Thorp, 78 Conn. 211, 61 Atl. 428. |
| Michigan. Tefft v. McNoah, 9 Mich. 201. | Georgia. Covington v. Rosenbusch, — Ga. —, 97 S. E. 78. |
| New York. Jessel v. Williamsburgh Ins. Co., 3 Hill (N. Y.) 88. | Iowa. Sickles v. Lauman, — Ia. —, 169 N. W. 670. |
| Pennsylvania. De Barry v. Withers, 44 Pa. St. 356. | Kansas. Nieschburg v. Nothern, 101 Kan. 110, 165 Pac. 857. |
| Texas. Ross v. Smith, 19 Tex. 171, 70 Am. Dec. 327. | Louisiana. Dugue v. Levy, 120 La. 369, 45 So. 280. |
| ¹⁶ Weston v. Barker, 12 Johns. (N. Y.) 276, 7 Am. Dec. 319. | Maine. Sleeper v. Gagne, 99 Me. 306, 59 Atl. 472; Rogers v. Brown, 103 Me. 478, 70 Atl. 206. |
| ¹ England. Tolhurst v. Associated Portland Cement Mfrs. [1903], A. C. 414. | Massachusetts. Bryne v. Dorey, 221 Mass. 399, 109 N. E. 146. |
| Scotland. Asphaltic Limestone & Concrete Co. v. Glasgow [1907], S. C. 463, 14 Scots. Law. T. 706. | Michigan. C. H. Little Co. v. Cadwell Transit Co., 197 Mich. 481, 163 N. W. 952. |
| United States. Virginia-Carolina Chemical Co. v. Ehrich, 230 Fed. 1005; American Smelting & Refining Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 248 Fed. 172. | Minnesota. Anderson v. Amidon, 114 Minn. 202, 34 L. R. A. (N.S.) 647, 130 N. W. 1002. |
| Arkansas. Leader Co. v. Little Rock Ry. & Electric Co., 120 Ark. 221, 179 S. W. 338; Morgan v. Center, 133 Ark. 247, 202 S. W. 235. | Missouri. McGinnis v. McGinnis, 274 Mo. 285, 202 S. W. 1087. |
| | Montana. Milwaukee Land Co. v. Ruesink, 50 Mont. 489, 148 Pac. 396; Standard Sewing Machine Co. v. Smith, 51 Mont. 245, 152 Pac. 38. |

against the debtor.² In some jurisdictions the action may be brought in the name of the assignor or in the name of the assignee.³ The qualifications and exceptions to the general rule that contracts may be assigned at modern law, will be discussed subsequently.⁴

This change from the original common-law rule is largely due to statute. The statutes which have this effect may be divided into two classes. One class specifically provides that the assignee may bring an action in his own name.⁵ Some of these statutes are very broad.⁶ Others are quite narrow in their scope, being limited to certain classes of contracts,⁷ or to cases in which the assignee has

Nebraska. *Vanderlip v. Barnes*, 101 Neb. 573, 163 N. W. 856.

North Carolina. *Anderson v. American Suburban Corp.*, 155 N. Car. 131, 36 L. R. A. (N.S.) 896, 71 S. E. 221.

Oklahoma. *Marker v. Gillam*, 54 Okla. 766, 154 Pac. 351; *Stringer v. Kessler*, 56 Okla. 50, 155 Pac. 867.

Oregon. *Corvallis & A. R. R. Co. v. Portland, E. & E. Ry. Co.*, 84 Or. 524, 163 Pac. 1173.

South Dakota. *Sherman v. Harris*, 36 S. D. 50, 153 N. W. 925.

Texas. *Malakoff Gin Co. v. Riddle-sperger*, 108 Tex. 273, 192 S. W. 530.

Washington. *Dickerson v. Spokane*, 26 Wash. 292, 66 Pac. 381; *Lindblom v. Johnston*, 92 Wash. 171, 158 Pac. 972.

For a discussion of the nature and effect of assignment, see *The Alienability of Choses in Action*, by Walter Wheeler Cook, 29 *Harvard Law Review*, 816; *Is the Right of an Assignee of a Chose in Action Legal or Equitable?* by Samuel Williston, 30 *Harvard Law Review*, 99; *The Alienability of Choses in Action: A Reply to Professor Williston*, by Walter Wheeler Cook, 30 *Harvard Law Review*, 449, and *The Word "Equitable" and its Application to Assignment of Choses in Action*, by Samuel Williston, 31 *Harvard Law Review*, 822.

² **United States.** *Withers v. Greene*, 50 U. S. (9 How.) 213, 13 L. ed. 109.

Arkansas. *Morgan v. Center*, 133 Ark. 247, 202 S. W. 235.

Massachusetts. *Bryne v. Dorey*, 221 Mass. 399, 109 N. E. 146.

Michigan. *Final v. Backus*, 18 Mich. 218.

Missouri. *Hill v. McPherson*, 15 Mo. 204, 55 Am. Dec. 142.

New York. *McKee v. Judd*, 12 N. Y. 622, 64 Am. Dec. 515.

³ *Dugue v. Levy*, 120 La. 369, 45 So. 280; *Rogers v. Brown*, 103 Me. 478, 70 Atl. 206.

⁴ See §§ 1259 et seq.

⁵ **Alabama.** *Wells v. Cody*, 112 Ala. 278, 20 So. 381.

Maine. *Sleeper v. Gagne*, 99 Me. 306, 59 Atl. 472.

Michigan. *Gale v. Mayhew*, 161 Mich. 96, 29 L. R. A. (N.S.) 648, 125 N. W. 781.

Mississippi. *Wright v. Hardy*, 76 Miss. 524, 24 So. 697.

Texas. *Cleveland v. Heidenheimer*, 92 Tex. 108, 46 S. W. 30.

Virginia. *Phillips v. Portsmouth*, 115 Va. 180, 78 S. E. 651.

⁶ *Outtown v. Dulin*, 72 Md. 536, 20 Atl. 134; *Sullivan v. Visconti*, 68 N. J. L. 543, 53 Atl. 598; *Phillips v. Portsmouth*, 115 Va. 180, 78 S. E. 651.

⁷ *Gale v. Mayhew*, 161 Mich. 96, 29 L. R. A. (N.S.) 648, 125 N. W. 781; *Marrigan v. Page*, 23 Tenn. (4 Humph.) 246.

filed the assignment or a copy thereof,⁸ or to cases in which the assignment is in writing,⁹ or to cases in which the assignor has died.¹⁰ The other class provides that actions must be brought in the name of the real party in interest, thus enabling the assignee to sue at law in his own name.¹¹

Statutes of this sort are usually drawn in very broad and general terms, with practically no restrictions. If the statute specifically allows the assignee to sue in his own name, this right is not taken away by a provision in the contract providing that the assignee may sue in the name of the assignor.¹² Even where such statutes are not in effect, the assignee's disabilities at common law are now limited to the necessity of his suing in his assignor's name.¹³

§ 2242. Equitable assignment at modern law. The opportunity to effect a complete fusion of law and equity upon the question of assignment has been lost in many states: in part by the fact that the statutes have been drawn in rather narrow terms, and that many kinds of assignment are not included within the terms of the statutes which permit the action to be brought in the name of the real party in interest, and in part by the narrow views taken by some of the courts, and by the persistence of certain of the courts in refusing to recognize as an assignment at law a trans-

⁸ In Maine the assignee must file a copy of the assignment with the writ in order to sue in his own name. *Sleeper v. Gagne*, 99 Me. 306, 59 Atl. 472. He may still sue in the name of the assignor without filing such copy. *Hall v. Hall*, 112 Me. 234, 91 Atl. 949.

⁹ *Bohanan v. Thomas*, 159 Ala. 410, 49 So. 308; *Lord v. Downs*, 112 Me. 396, 92 Atl. 327; *American Lithograph Co. v. Ziegler*, 216 Mass. 287, 103 N. E. 909.

¹⁰ *Andrews v. Rue*, 34 N. J. L. 402.

¹¹ *England. Fitzroy v. Cave* [1905], 2 K. B. 364.

United States. Delaware County v. Diebold Safe and Lock Co., 133 U. S. 473, 33 L. ed. 674.

California. Heisen v. Smith, 138 Cal. 216, 94 Am. St. Rep. 39, 71 Pac. 180.

Colorado. Rambo v. Armstrong, 45 Colo. 124, 100 Pac. 586.

Illinois. Congress Construction Co. v. Farson & Libbey Co., 199 Ill. 398, 65 N. E. 357.

Kansas. Stewart v. Price, 64 Kan. 191, 64 L. R. A. 581, 67 Pac. 553.

Massachusetts. Worster v. Stone, 217 Mass. 523, 105 N. E. 383.

Michigan. McKnight v. Lowitz, 176 Mich. 452, 142 N. W. 769.

Montana. Haupt v. Burton, 21 Mont. 572, 69 Am. St. Rep. 698, 55 Pac. 110.

New York. Foster v. Bank, 183 N. Y. 379, 76 N. E. 338.

Ohio. Allen v. Miller, 11 O. S. 374.

Wisconsin. Hankwitz v. Barrett, 143 Wis. 639, 128 N. W. 430.

¹² *Gilman v. Controlling Co.*, 180 Mass. 319, 62 N. E. 267.

¹³ See § 1256.

action which the same court would recognize as a sufficient assignment in equity. For these reasons in many jurisdictions equitable assignments as distinguished from legal assignments still persist.¹ An assignment of an interest to be acquired in the future may be regarded as a good assignment in equity, even though it may not be recognized at law.² An assignment of a claim may operate in equity as an assignment of a right to sue on a bond which is given for the purpose of securing such claim.³ A's payment of B's debts which C has assumed and agreed to pay, at least if made by A in good faith in order to protect his interests, may be regarded as an equitable assignment of such debts.⁴ An order may be regarded as an assignment in equity.⁵ A partial assignment, if accepted by the debtor, may be regarded in equity as a valid assignment of such part of the debt.⁶

The practical difference between the legal and the equitable assignment under modern statutes is that if the assignment is recognized as a legal assignment, the assignee may sue in his own name, while if the assignment is not recognized as a legal assignment, and it is sufficient as an equitable assignment, the assignee

¹ *United States*. In re Hawley Down-Draft Furnace Co., 233 Fed. 451 [denying rehearing, In re Hawley Down-Draft Furnace Co., 230 Fed. 471].

Delaware. New Castle County National Bank v. Taylor, 8 Del. Ch. 456, 68 Atl. 387.

Georgia. Western & A. Ry. Co. v. Union Inv. Co., 128 Ga. 74, 57 S. E. 100.

Illinois. Story v. Hull, 143 Ill. 506, 32 N. E. 265.

Indiana. Kintz v. Scully Steel & Iron Co., 184 Ind. 160, 110 N. E. 986.

Maryland. Kellas v. Slack & Slack Co., 129 Md. 535, 99 Atl. 677.

North Carolina. Godwin v. Murchison National Bank, 145 N. Car. 320, 17 L. R. A. (N.S.) 935, 59 S. E. 154.

Oregon. Wasco County v. New England Equitable Insurance Co., 88 Or. 465, 172 Pac. 126.

Tennessee. Horn v. Nicholas, 139 Tenn. 453, 201 S. W. 756.

Virginia. Rinehart & Dennis Co. v. McArthur, 123 Va. 556, 96 S. E. 829.

Washington. Paul v. Vancouver, 81 Wash. 331, 154 Pac. 453; Northwestern National Bank v. Guardian Casualty & Guaranty Co., 93 Wash. 635, 161 Pac. 473; National Market Co. v. Maryland Casualty Co., — Wash. —, 174 Pac. 479.

² *Cogan v. Conover Mfg. Co.*, 69 N. J. Eq. 809, 115 Am. St. Rep. 629, 64 Atl. 973 [reversing, 69 N. J. Eq. 358, 60 Atl. 408]; *Godwin v. Murchison National Bank*, 145 N. Car. 320, 17 L. R. A. (N.S.) 935, 59 S. E. 154.

³ *Northwestern National Bank v. Guardian Casualty & Guaranty Co.*, 93 Wash. 635, 161 Pac. 473; *National Market Co. v. Maryland Casualty Co.*, — Wash. —, 174 Pac. 479.

⁴ *Paul v. Vancouver*, 89 Wash. 331, 154 Pac. 453.

⁵ *Wasco County v. New England Equitable Insurance Co.*, 88 Or. 465, 172 Pac. 126.

⁶ *In re Macauley*, 158 Fed. 322; *Kintz v. Scully Steel & Iron Co.*, 184 Ind. 160, 110 N. E. 986. See § 2261.

may sue, but he must sue in the name of his assignor.¹ It is to be regretted that the historical distinction should survive to perplex modern law, after its true purpose should have been accomplished by the complete adoption by the common law, aided by legislation, of the equitable theory of assignments.

¹In *re Hawley Down-Draft Furnace Co.*, 233 Fed. 451 [denying rehearing, *In re Hawley Down-Draft Furnace Co.*, 230 Fed. 471].

"The counsel for the defendant contended, that a bond or other specialty could only be assigned by deed so as to pass the legal title, or make it a good and effectual assignment at law. But I do not understand what is meant by the words, at law, when used in this connection. If by a legal assignment or an assignment at law is meant such an assignment as would at common law enable the assignee to sue upon the instrument in his own name, I am ignorant of any mode by which that can be done. At common law, a bond or other specialty was not assignable in any way, so as to enable the assignee to sue upon it in his own name; and our statute, giving the assignee a right to do so, does not prescribe any form or mode of assignment.

"Some confusion has resulted from the use of the terms, legal and equitable assignments, or assignments at law and in equity. But these expressions have no reference to the form or mode of making the assignments, whether by deed or parol, but merely to the remedy or manner of enforcing the rights of an assignee. No form of assignment, either by deed or parol, is a legal assignment or an assignment at law of a judgment or specialty or a mere right of action, in such a sense as to give the assignee a remedy at law in his own name.

"All such assignments, whether by deed or parol, were called equitable assignments, because originally they could only be enforced or protected in

a court of equity, or as now, by the equitable interferences of courts of law. Whereas in the general sense of the term, every transfer or assignment of a chose in action, whether by deed, by writing not under seal or merely by delivery, if for a good or valuable consideration, is a lawful assignment, or good and valid assignment at law as well as in equity." *Allen v. Pancoast*, 20 N. J. L. 68.

"The distinction is what may be termed wholly technical. It is that between legal and equitable titles. The ancient prejudice against assigned rights of action having worn itself out, the only practical consequence left is the manner of naming the plaintiff. Unless the legal title passes by the transfer, the one in whom was originally the right of action must be named as the plaintiff in any suit brought. If the right to receive the funds has passed to another, the action is brought in the name of the legal plaintiff to the use of the assignee, who becomes the equitable plaintiff. If the legal title has passed, the assignee brings suit in his own name as the assignee of the legal plaintiff. An illustration is afforded by the Pennsylvania statute on the subject of the assignment of bonds. The act requires (among other things) two witnesses to an assignment. If such an assignment is made, the assignee may sue as such. If the assignment, although the same in all other respects, has but one witness, it does not pass the legal title, and suit is brought in the name of the obligor to the use of the obligee. Either assignment is good to all intents and purposes. One is a legal as-

§ 2243. Contracts assignable at modern law. Contracts other than personal contracts, or contracts containing a provision against assignment, or contracts forbidden to be assigned by statute, may be assigned at modern law.¹ It has been suggested that the test for assignability at modern law is whether the cause of action would have survived the assignor if he had died before he assigned

signment, the other an equitable one; but one is as good as the other. There is no other difference than this: if, for instance, one is void or voidable, because in fraud of creditors, the other is." In re Hawley Down-Draft Furnace Co., 233 Fed. 451 [denying rehearing, In re Hawley Down-Draft Furnace Co., 230 Fed. 471].

¹ England. Tolhurst v. Associated Portland Cement Mfrs. [1902], 2 K. B. 660.

United States. Delaware County Commissioners v. Diebold Safe & Lock Co., 133 U. S. 473, 33 L. ed. 674; American Smelting & Refining Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 248 Fed. 172.

Alabama. Wilkins v. Hardaway, 159 Ala. 565, 48 So. 678; Morgan v. Center, 133 Ark. 247, 202 S. W. 235.

California. La Rue v. Groezinger, 84 Cal. 281, 18 Am. St. Rep. 170, 24 Pac. 42.

Colorado. Chicago, B. & Q. R. Co. v. Provolt, 42 Colo. 103, 16 L. R. A. (N.S.) 587, 93 Pac. 1126; Wasem v. Gray, 43 Colo. 140, 95 Pac. 557.

Connecticut. Lemmon v. Strong, 59 Conn. 448, 21 Am. St. Rep. 123, 12 L. R. A. 270, 22 Atl. 293.

Florida. Hall v. O'Neil Turpentine Co., 56 Fla. 324, 16 Am. & Eng. Ann. Cas. 738, 47 So. 609.

Illinois. Savage v. Gregg, 150 Ill. 161, 37 N. E. 312; Moore v. Gariglietti, 228 Ill. 143, 81 N. E. 826.

Iowa. Dorr v. Alford, 111 Ia. 278, 82 N. W. 789; Price v. Cushing, 135 Ia. 457, 110 N. W. 1030.

Kentucky. Brackett's Administrator

v. Boreing's Administrator (Ky.), 110 S. W. 276; Enterprise Manufacturing Co. v. Taulbee, 152 Ky. 783, 154 S. W. 27.

Maine. Madunkeunk Dam Co. v. E. F. Allen Clothing Co., 102 Me. 257, 66 Atl. 537.

Michigan. Rodgers v. Torrent, 111 Mich. 680, 70 N. W. 335.

Minnesota. Harbord v. Cooper, 48 Minn. 466, 45 N. W. 860; Semper v. Coates, 93 Minn. 76, 100 N. W. 662.

Montana. Milwaukee Land Co. v. Ruesink, 50 Mont. 489, 148 Pac. 396; Standard Sewing Machine Co. v. Smith, 51 Mont. 245, 152 Pac. 38.

Nebraska. Forbes v. Omaha, 79 Neb. 6, 112 N. W. 326.

New York. Smith v. Craig, 211 N. Y. 456, Ann. Cas. 1915B, 937, 105 N. E. 798.

North Carolina. Atlantic & N. C. R. Co. v. Atlantic & N. C. R. Co., 147 N. Car. 368, 23 L. R. A. (N.S.) 223, 61 S. E. 185.

Ohio. Rodijkelt v. Andrews, 74 O. S. 104, 5 L. R. A. (N.S.) 564, 77 N. E. 747.

Oklahoma. Standard Sewing Machine Co. v. New State Shirt & Overall Mfg. Co., 42 Okla. 554, 141 Pac. 1111.

Oregon. Corvallis & A. R. R. Co. v. Portland, E. & E. Ry. Co., 84 Or. 524, 163 Pac. 1173.

South Dakota. Sherman v. Harris, 36 S. D. 50, 153 N. W. 925.

Tennessee. Bradford v. Montgomery Furniture Co., 115 Tenn. 610, 9 L. R. A. (N.S.) 979, 92 S. W. 1104.

Texas. Provident National Bank v. C. D. Hartnett Co., 100 Tex. 214, 97 S.

it.² This test does not give especial aid in determining questions of assignability, since it merely postpones a discussion of the nature of contracts which can be assigned until the nature of contracts which survive has been ascertained. It is, furthermore, not an accurate test except as to the personal character of contracts. It is true that as to the personal character of the contract, the test for assignment and for surviving the death of a party while the contract remains executory are the same. As to the effect of a covenant against assignment, and as to the effect of statutes which forbid assignment specifically, the test is not the same. Contracts of these classes can not be assigned, but they survive the death of a party.

§ 2244. Illustrations of assignable contracts. A contract of guaranty;¹ or an indemnity bond;² such as the right of a surety company under an indemnity bond;³ or a right of action on a bond given by a public contractor to protect materialmen;⁴ the beneficial interest under a contract for work and labor,⁵ as profits under a contract for grading;⁶ or wages under a logging contract;⁷ maritime wages;⁸ or an architect's commission;⁹ or the

W. 689; *Malakoff Gin Co. v. Riddle-sperger*, 108 Tex. 273, 192 S. W. 530.

Vermont. *Royce v. Carpenter*, 80 Vt. 37, 66 Atl. 888.

Washington. *Johnson v. Shuey*, 40 Wash. 22, 82 Pac. 123.

West Virginia. *Millan v. Bartlett*, 78 W. Va. 367, 89 S. E. 711.

Wisconsin. *Knowles v. Frawley*, 84 Wis. 119, 54 N. W. 107; *Porte v. Chicago & N. W. Ry. Co.*, 162 Wis. 446, 156 N. W. 469.

² *Northwestern Cooperage Co. v. Byers*, 133 Mich. 534, 95 N. W. 529; *Forbes v. Omaha*, 79 Neb. 6, 112 N. W. 326; *Devlin v. New York*, 63 N. Y. 8; *Poling v. Condon-Lane Boom Co.*, 55 W. Va. 529, 47 S. E. 279.

¹ *Lemmon v. Strong*, 59 Conn. 448, 21 Am. St. Rep. 123, 12 L. R. A. 270, 22 Atl. 293; *Crissey v. Trust Co.*, 59 Kan. 561, 53 Pac. 867; *Owen v. Potter*, 115 Mich. 556, 73 N. W. 977.

² *Hoffman v. Smith*, 94 Ia. 495, 63

N. W. 182; *Island Gun Club v. National Surety Co.*, 101 Wash. 185, 172 Pac. 209.

³ *Island Gun Club v. National Surety Co.*, 101 Wash. 185, 172 Pac. 209.

⁴ *Sepp v. McCann*, 47 Minn. 364, 50 N. W. 246; *Gilmore v. Westerman*, 13 Wash. 390, 43 Pac. 345.

⁵ *Taylor v. Hill*, 115 Cal. 143, 44 Pac. 336 [reversed on other grounds, 115 Cal. 143, 46 Pac. 922 (assignment of wages by an emancipated minor)]; *Covington v. Rosenbusch*, 148 Ga. 459, 97 S. S. 78; *Price v. Cushing*, 135 Ia. 457, 110 N. W. 1030; *Bates v. Lumber Co.*, 56 Minn. 14, 57 N. W. 218.

⁶ *Price v. Cushing*, 135 Ia. 457, 110 N. W. 1030.

⁷ *Burton v. Gage*, 85 Minn. 355, 88 N. W. 997. Maritime wages. *The New Idea*, 60 Fed. 294.

⁸ *The New Idea*, 60 Fed. 294.

⁹ *Hooker v. Bank*, 30 N. Y. 83, 86 Am. Dec. 351.

beneficial interest under a contract of sale;¹⁰ or a contract by which a mining company agrees to sell ore to a smelter;¹¹ or a contract to cut wood and to deliver it;¹² or a contract to supply materials;¹³ or damages arising out of breach of contract to sell stock in a corporation;¹⁴ or a contract by A to pay B's notes, either by the notes of a corporation or personally;¹⁵ or the benefits under a public contract;¹⁶ or good will and trade names;¹⁷ or valid and reasonable contracts restraining competition;¹⁸ a con-

¹⁰ **United States.** *American Smelting & Refining Co. v. Bunker Hill & Sullivan Mining & Concentrating Co.*, 248 Fed. 172.

Arkansas. *Bank v. Collins*, 66 Ark. 240, 50 S. W. 694.

California. *La Rue v. Groezinger*, 84 Cal. 281, 18 Am. St. Rep. 179, 24 Pac. 42.

Oregon. *Mitchell v. Taylor*, 27 Or. 377, 41 Pac. 119.

Washington. *Gilmore v. Westerman*, 13 Wash. 390, 43 Pac. 345.

¹¹ *American Smelting & Refining Co. v. Bunker Hill & Sullivan Mining & Concentrating Co.*, 248 Fed. 172.

¹² *Atlantic & N. C. R. Co. v. Atlantic & N. C. Co.*, 147 N. Car. 368, 23 L. R. A. (N.S.) 223, 61 S. E. 185.

¹³ *Tolhurst v. Associated Portland Cement Mfrs.* [1902], 2 K. B. 660, 72 Law J. K. B. 834. (For a period of thirty-five to fifty years.)

¹⁴ *Stringer v. Kessler*, 56 Okla. 50, 155 Pac. 867.

¹⁵ *Jones & Laughlin Steel Co. v. Graham*, 273 Ill. 377, 112 N. E. 967.

¹⁶ *National Bank v. Herold*, 74 Cal. 603, 5 Am. St. Rep. 476, 16 Pac. 507; *Dickerson v. Spokane*, 26 Wash. 292, 66 Pac. 381. Street paving contracts. *Brownell Improvement Co. v. Critchfield*, 107 Ill. 61, 64 N. E. 332; *Saxton National Bank v. Carswell*, 126 Mo. 436, 29 S. W. 279; *Stott v. Franey*, 20 Or. 410, 23 Am. St. Rep. 132, 26 Pac. 271. Water contract. *Carlyle v. Carlyle, etc., Co.*, 140 Ill. 445, 29 N. E. 556.

Contract to erect heater in public school building. *Anniston National Bank v. Durham School Committee*, 121 N. Car. 107, 28 S. E. 134.

¹⁷ *Bank v. Warren*, 94 Wis. 151, 68 N. W. 549. But a right to use a trade name unconnected with a business is not assignable. *Thorneloe v. Hill* [1894], 1 Ch. 560.

¹⁸ **California.** *California Steam Nav. Co. v. Wright*, 6 Cal. 259, 65 Am. Dec. 511.

Georgia. *Swanson v. Kirby*, 98 Ga. 586, 26 S. E. 71.

Iowa. *Hedge v. Lowe*, 47 Ia. 137; *Sickles v. Lauman*, — Ia. —, 169 N. W. 670.

Michigan. *Up River Ice Co. v. Denler*, 114 Mich. 296, 68 Am. St. Rep. 480, 72 N. W. 157.

Mississippi. *Klein v. Buck*, 73 Miss. 133, 18 So. 891.

New Jersey. *Fleckenstein Bros. Co. v. Fleckenstein* (N. J. Eq.), 53 Atl. 1043.

New York. *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; *Francisco v. Smith*, 143 N. Y. 488, 38 N. E. 980.

North Carolina. *Cowan v. Fairbrother*, 118 N. Car. 406, 54 Am. St. Rep. 733, 32 L. R. A. 827, 24 S. E. 212.

Contra, *Hillman v. Shannahan*, 4 Or. 163, 18 Am. Rep. 281; *Bradford v. Montgomery Furniture Co.*, 115 Tenn. 610, 9 L. R. A. (N.S.) 979, 92 S. W. 1104; *Malakoff Gin Co. v. Riddlesperger*, 108 Tex. 273, 192 S. W. 530.

tract to buy or sell realty or some interest therein;¹⁰ or a contract to sell realty and divide the profits therefrom;²⁰ a contract by which a vendor agrees with a purchaser that certain improvements should be made;²¹ or a contract creating an easement in a spring;²² railroad tickets;²³ a non-negotiable note;²⁴ a running account;²⁵ a due-bill due on demand;²⁶ outstanding debts;²⁷ a right to bring an action upon a breach of covenant;²⁸ checks given by a corporation to its employes, payable in goods at the company store;²⁹ or an insurance policy after loss;³⁰ a right of action by one partner against another for a share in the profits;³¹ or the right to enforce a partnership debt out of the individual property of a partner;³² or dues which a member of a club or voluntary association owes;³³ may all be assigned.

§ 2245. Assignment of contract rights not yet acquired. The fact that the benefits which are assigned have not yet accrued, and that the assignor has not performed the contract on his part when

¹⁰ *Illinois*. *Moore v. Gariglietti*, 228 Ill. 143, 81 N. E. 826.

Kentucky. *Baker v. Smith* (Ky.), 61 S. W. 1014.

Kansas. *Nieschburg v. Nothorn*, 101 Kan. 110, 165 Pac. 857.

Oklahoma. *Marker v. Gillam*, 54 Okla. 766, 154 Pac. 351.

Vermont. *Royce v. Carpenter*, 80 Vt. 37, 66 Atl. 888.

²⁰ *Dorr v. Alford*, 111 Ia. 278, 82 N. W. 789; *Alden v. Improvement Co.*, 57 Neb. 67, 77 N. W. 369.

²¹ *Anderson v. American Suburban Corp.*, 155 N. Car. 131, 36 L. R. A. (N.S.) 896, 71 S. E. 221.

²² *Houston, etc., Ry. v. Cluck*, 31 Tex. Civ. App. 211, 72 S. W. 83.

²³ *Spencer v. Lovejoy*, 96 Ga. 657, 51 Am. St. Rep. 152, 23 S. E. 836; *Nichols v. Pacific Co.*, 23 Or. 123, 37 Am. St. Rep. 664, 18 L. R. A. 55, 31 Pac. 296.

²⁴ *Sauter v. Leveridge*, 103 Mo. 615, 15 S. W. 981; *Barry v. Wachosky*, 57 Neb. 534, 77 N. W. 1080.

²⁵ *Virginia-Carolina Chemical Co. v. Ehrich*, 230 Fed. 1005; *Knadler v. Sharp*, 36 Ia. 232; *Smalley v. Taylor*, 33 Tex.

668; *Porter v. Young*, 85 Va. 49, 6 S. E. 803.

²⁶ *Morgan v. Center*, 133 Ark. 247, 202 S. W. 235.

²⁷ *Brackett's Administrator v. Boring's Administrator* (Ky.), 110 S. W. 276; *Provident National Bank v. C. D. Hartnett Co.*, 100 Tex. 214, 97 S. W. 689; *Johnson v. Shuey*, 40 Wash. 22, 82 Pac. 123.

²⁸ *Millan v. Bartlett*, 78 W. Va. 367, 89 S. E. 711.

²⁹ *Martin-Alexander Lumber Co. v. Johnson*, 70 Ark. 215, 66 S. W. 924; *Bewick Lumber Co. v. Hall*, 94 Ga. 539, 21 S. E. 154.

³⁰ *Star Union Lumber Co. v. Finney*, 35 Neb. 214, 52 N. W. 1113.

See also, *National Life Ins. Co. v. Beck & Gregg Hardware Co.*, 148 Ga. 757, 98 S. E. 266.

³¹ *McGinnis v. McGinnis*, 274 Mo. 285, 202 S. W. 1087.

³² *Wood v. Carter*, 67 Neb. 133, 93 N. W. 158.

³³ *Anderson v. Amidon*, 114 Minn. 202, 34 L. R. A. (N.S.) 647, 130 N. W. 1002.

he makes the assignment, does not prevent the assignment from being valid, at least in equity.¹ Thus a street contractor may assign his interest in warrants to be issued to him.² In the absence of a specific statutory provision forbidding it, an employe may assign wages not yet earned under a subsisting contract of private employment,³ even if such contract is not for any definite period

¹ **United States.** *Reece Folding Machine Co. v. Fenwick*, 140 Fed. 287, 2 L. R. A. (N.S.) 1094.

Illinois. *Warren v. Bank*, 149 Ill. 9, 25 L. R. A. 746, 38 N. E. 122.

Indiana. *Hight v. Carr*, 185 Ind. 39, 112 N. E. 881.

Maine. *Knevals v. Blauvelt*, 82 Me. 458, 19 Atl. 818.

Massachusetts. *Citizens' Loan Association v. Boston and Maine Ry.*, 196 Mass. 528, 124 Am. St. Rep. 584, 14 L. R. A. (N.S.) 1025, 13 Am. & Eng. Ann. Cas. 365, 82 N. E. 696.

Minnesota. *Riley v. Galarneault*, 103 Minn. 165, 114 N. W. 755.

Missouri. *State v. Williamson*, 118 Mo. 146, 40 Am. St. Rep. 358, 21 L. R. A. 827, 23 S. W. 1054.

Nebraska. *Perkins v. Butler County*, 44 Neb. 110, 62 N. W. 308.

New Jersey. *Lanigan v. Currier Co.*, 50 N. J. Eq. 201, 24 Atl. 505; *McFarland v. Mfg. Co.*, 53 N. J. Eq. 649, 51 Am. St. Rep. 647, 33 Atl. 962; *Cogan v. Conover Mfg. Co.*, 69 N. J. Eq. 809, 115 Am. St. Rep. 629, 64 Atl. 973.

Pennsylvania. *Caulfield v. Van Brunt*, 173 Pa. St. 428, 34 Atl. 230.

South Dakota. *Sykes v. Bank*, 2 S. D. 242, 49 N. W. 1058.

Tennessee. *Johnson v. Donohue*, 113 Tenn. 446, 83 S. W. 360.

Texas. *National Bank v. Fink*, 86 Tex. 303, 40 Am. St. Rep. 833, 24 S. W. 256.

West Virginia. *Stevenson v. Kyle*, 42 W. Va. 229, 57 Am. St. Rep. 854, 24 S. E. 886.

See also, *Monarch Discount Co. v. Chesapeake & O. Ry. Co.*, 285 Ill. 233, 120 N. E. 743.

² *Scott v. Franey*, 20 Or. 410, 23 Am. St. Rep. 132, 26 Pac. 271.

³ **Colorado.** *Chicago, B. & Q. R. Co. v. Provolt*, 42 Colo. 103, 16 L. R. A. (N.S.) 587, 93 Pac. 1126.

Illinois. *Mallin v. Wenham*, 209 Ill. 252, 101 Am. St. Rep. 233, 65 L. R. A. 602, 70 N. E. 564; *Monarch Discount Co. v. Chesapeake & O. Ry. Co.*, 285 Ill. 233, 120 N. E. 743.

Iowa. *Metcalf v. Kincaid*, 87 Ia. 443, 43 Am. St. Rep. 391, 54 N. W. 867.

Kentucky. *Manly v. Bitzer*, 91 Ky. 596, 34 Am. St. Rep. 242, 16 S. W. 464.

Massachusetts. *Ouimet v. Sirois*, 124 Mass. 162; *Citizens' Loan Association v. Boston & M. R. R.*, 196 Mass. 528, 124 Am. St. Rep. 584, 14 L. R. A. (N.S.) 1025, 13 Am. & Eng. Ann. Cas. 365, 82 N. E. 696.

Michigan. *Duluth, S. S. & A. Ry. Co. v. Wilson*, 200 Mich. 313, 167 N. W. 55.

Minnesota. *Leitch v. Northern Pac. Ry. Co.*, 95 Minn. 35, 103 N. W. 704; *Quigley v. Welter*, 95 Minn. 383, 104 N. W. 236.

Nebraska. *First National Bank v. School District*, 77 Neb. 570, 110 N. W. 349; *Hupp v. Union Pacific Railroad Co.*, 99 Neb. 654, L. R. A. 1916E, 247, 157 N. W. 343.

New Jersey. *Cogan v. Conover Mfg. Co.*, 69 N. J. Eq. 809, 115 Am. St. Rep. 629, 64 Atl. 973.

Ohio. *Rodijkeit v. Andrews*, 74 O. S. 104, 5 L. R. A. (N.S.) 564, 77 N. E. 747.

Rhode Island. *Dolan v. Hughes*, 20 R. I. 513, 40 L. R. A. 735, 40 Atl. 344.

Vermont. *Thayer v. Kelley*, 28 Vt. 19, 65 Am. Dec. 220.

and is terminable at will.⁴ Whether such assignment passes such an interest in unearned wages that the bankruptcy of the assignor does not affect the assignment as to wages not earned at the time of the bankruptcy, is a question upon which there is a conflict of authority.⁵ An assignment of future earnings at a certain employment or trade, has been treated as an assignment of wages under an existing contract of employment; and as such it has been upheld.⁶ An assignment of such future wages is not rendered invalid by a statute which makes wages exempt from execution.⁷

In some jurisdictions statutes have been enacted which specifically forbid the assignment of wages to be earned in the future. Such statutes are valid and constitutional.⁸ Such a statute does not apply to an assignment by a contractor of money which has been substantially earned on a contract.⁹ A statute which forbids an assignment of future wages, except for necessities, renders invalid an assignment of future wages for "value received."¹⁰

Wisconsin. *Porte v. Chicago & N. W. Ry. Co.*, 162 Wis. 446, 156 N. W. 469.

Special reasons control the assignment by a public officer of his unearned salary under his term of office. Such assignment is invalid. *McGowan v. New Orleans*, 118 La. 429, 8 L. R. A. (N.S.) 1120, 43 So. 40; *Granger v. French*, 152 Mich. 356, 116 N. W. 181; *Anderson v. Branstrom*, 173 Mich. 157, 43 L. R. A. (N.S.) 422, 139 N. W. 40; *Tribune Reporter Printing Co. v. Homer*, — Utah —, 169 Pac. 170; *Stevenson v. Kyle*, 42 W. Va. 229, 57 Am. St. Rep. 854, 24 S. E. 886.

His salary which has been earned may be assigned. *Oberdorfer v. Louisville School Board*, 120 Ky. 112, 85 S. W. 696, 27 Ky. Law. Rep. 508. See § 2257.

⁴**Connecticut.** *Harrop v. Landers, etc., Co.*, 45 Conn. 561.

Illinois. *Monarch Discount Co. v. Chesapeake & O. Ry. Co.*, 235 Ill. 233, 120 N. E. 743.

Iowa. *Metcalf v. Kincaid*, 87 Ia. 443, 43 Am. St. Rep. 391, 54 N. W. 867.

Massachusetts. *Lannan v. Smith*, 73 Mass. (7 Gray) 150.

Michigan. *Kane v. Clough*, 36 Mich. 436, 24 Am. Rep. 590.

Minnesota. *O'Connor v. Meehan*, 47 Minn. 247, 49 N. W. 982.

⁵That bankruptcy does not affect the assignee's right. *Mallin v. Wenham*, 209 Ill. 252, 65 L. R. A. 602, 101 Am. St. Rep. 233, 70 N. E. 564. That bankruptcy operates as a bar. *Hupp v. Union Pacific Railroad Co.*, 99 Neb. 654, L. R. A. 1916E, 247, 157 N. W. 343.

⁶*Duluth, South Shore & Atlantic Railway Co. v. Wilson*, 200 Mich. 313, L. R. A. 1916E, 763, 167 N. W. 55 [citing and purporting to follow, *Rodjkeit v. Andrews*, 74 O. S. 104, 5 L. R. A. (N.S.) 564, 6 Am. & Eng. Ann. Cas. 761, 77 N. E. 747].

⁷*Mallin v. Wenham*, 209 Ill. 252, 101 Am. St. Rep. 233, 65 L. R. A. 602, 70 N. E. 564.

⁸*Heller v. Lutz*, 254 Mo. 704, L. R. A. 1915B, 191, 164 S. W. 123.

See, *The Validity of Laws Regulating Wage Assignment*, by Guy M. Blake, 5 Illinois Law Review, 343.

⁹*Jump v. Bernier*, 221 Mass. 241, 108 N. E. 1027.

¹⁰*Brown v. Long*, 192 Ala. 72, 68 So. 324.

An assignment of wages for more than two years is forbidden in Massa-

If the assignment of wages is without limit as to time or amount,¹¹ or if made with intent to defraud the creditors of the assignor,¹² the assignment is voidable at the instance of creditors of the assignor. A statute intended to protect attaching creditors, which provides that as against attaching creditors an assignment of future earnings shall have no effect unless in writing and recorded, applies to wages and has no application to the assignment of the amount to become due under a contract.¹³ An assignment of wages to be earned under a contract of employment not yet entered into, but which employer and employe then expected to enter into in a short time, has been held valid in equity.¹⁴

An assignment of wages to be earned under a contract of employment which has not yet been entered into, is inoperative,¹⁵ even as between assignor and assignee.¹⁶ Even if a contract of employment is in existence when the assignment is made, yet if it is abandoned thereafter by the assignor,¹⁷ or if it expires by efflux of time,¹⁸ and in either case is thereafter renewed, the assignment is ineffectual as to wages earned under such renewal. An assignment of wages ends with the expiration of the contract of employment.¹⁹ It does not revive with a new employment.²⁰

chusetts. *McCallum v. Simplex Electrical Co.*, 197 Mass. 388, 83 N. E. 1108.

¹¹ *Steinbach v. Brant*, 79 Minn. 383, 79 Am. St. Rep. 494, 82 N. W. 651; *Leitch v. Northern Pac. Ry. Co.*, 95 Minn. 35, 103 N. W. 704.

¹² *O'Connor v. Meehan*, 47 Minn. 247, 49 N. W. 982; *Dow v. Taylor*, 71 Vt. 337, 76 Am. St. Rep. 775, 45 Atl. 220.

¹³ *Berlin Iron Bridge Co. v. Banking Co.*, 76 Conn. 477, 57 Atl. 275.

¹⁴ *Edwards v. Peterson*, 80 Me. 367, 6 Am. St. Rep. 207, 14 Atl. 936.

¹⁵ *Illinois. Mallin v. Wendham*, 209 Ill. 252, 70 N. E. 564.

Massachusetts. Mulhall v. Quinn, 67 Mass. (1 Gray) 105, 61 Am. Dec. 414; *Eagan v. Luby*, 133 Mass. 543.

Michigan. Neuman v. Mining Co., 57 Mich. 97, 23 N. W. 600.

Nebraska. Richards v. Chicago, etc., Ry., 100 Neb. 505, 160 N. W. 802.

New Hampshire. Runnels v. Bosquet, N. I. & S. Co., 60 N. H. 38.

Ohio. Tolman v. Steel Roofing Co., 6 Ohio N. P. 467

Pennsylvania. Lehigh Valley Ry. v. Woodring, 116 Pa. St. 513, 9 Atl. 58.

Rhode Island. O'Keefe v. Allen, 20 R. I. 414, 78 Am. St. Rep. 884, 39 Atl. 752.

Wisconsin. Porte v. Chicago & N. W. Ry. Co., 162 Wis. 446, 156 N. W. 469.

¹⁶ *Lehigh Valley R. R. v. Woodring*, 116 Pa. St. 513, 9 Atl. 58. (Hence if the debtor pays the assignee over the objection of the assignor, it is still liable to the assignor. In this case there was no time limited within which the assigned wages were to be earned. The court said: "A man may not sell himself into slavery.") *Porte v. Chicago & N. W. Ry. Co.*, 162 Wis. 446, 156 N. W. 469.

¹⁷ *O'Keefe v. Allen*, 20 R. I. 414, 78 Am. St. Rep. 884, 39 Atl. 752.

¹⁸ *Herbert v. Bronson*, 125 Mass. 475.

¹⁹ *Raulines v. Levi*, — Mass. —, 121 N. E. 500.

²⁰ *Raulines v. Levi*, — Mass. —, 121 N. E. 500.

However, an assignment made before a contract of employment is entered into is upheld in equity as to wages earned under subsequent contracts, if the assignment is on valuable consideration, not in fraud of third persons, and if the rights of third persons have not intervened.²¹ The subsequent ratification of such an assignment by the assignor, after the fund has been acquired by him, renders the original assignment operative.²² Claims for services not yet rendered,²³ for a building contract not yet performed,²⁴ or for property sold but not yet delivered,²⁵ can be assigned in equity. So the right of a mortgagee to securities to be issued thereafter can be assigned.²⁶

Whether future earnings or accounts in a business in which the assignor is engaged, but not to be acquired by any contracts which are in existence when the assignment is made, are subject to assignment or not, is a question upon which there is a conflict of authority. In some jurisdictions such interests are held to be assignable,²⁷ at least in equity.²⁸ In other jurisdictions such assignment is held to be inoperative.²⁹ If A has no contract for the sale of goods to B, A's order in favor of C upon B for all goods sold by A to B, is inoperative.³⁰ If A assigns to C A's future book accounts which are to arise out of A's established business, but not out of any existing contracts, such assignment is inoperative as against A's subsequent trustee in bankruptcy.³¹

²¹ *Jermyn v. Moffitt*, 75 Pa. St. 399.
See also, *Edwards v. Peterson*, 80 Me. 367, 6 Am. St. Rep. 207, 14 Atl. 936; *Rodijkeit v. Andrews*, 74 O. S. 104, 5 L. R. A. (N.S.) 564, 6 Am. & Eng. Ann. Cas. 761, 77 N. E. 747.

²² *Farnsworth v. Jackson*, 32 Me. 419.

²³ *Threshing wheat. Sandwich Mfg. Co. v. Robinson*, 83 Ia. 567, 14 L. R. A. 126, 49 N. W. 1031. *Hauling wood. Merchants', etc., Bank v. Barnes*, 18 Mont. 335, 56 Am. St. Rep. 586, 47 L. R. A. 737, 45 Pac. 218. *Printing. Field v. New York*, 6 N. Y. 179, 57 Am. Dec. 435.

²⁴ *Board of Education v. Pressed Brick Co.*, 13 Utah 211, 44 Pac. 709.

²⁵ *Wadhams v. Inman*, 38 Or. 143, 63 Pac. 11.

²⁶ *Central Trust Co. v. Improvement Co.*, 169 N. Y. 314, 62 N. E. 387.

²⁷ *Duluth, South Shore & Atlantic*

Railway Co. v. Wilson, 200 Mich. 313, L. R. A. 1918E, 763, 167 N. W. 55.

²⁸ *Tailby v. Official Receiver*, L. R. 13 App. Cas. 523 [overruling, *Belding v. Read*, 3 Hurl. & C. 955]; *Preston National Bank v. Middlings Purifier Co.*, 84 Mich. 364, 47 N. W. 502; *Field v. New York*, 6 N. Y. 179, 57 Am. Dec. 435.

²⁹ *Clanton Bank v. Robinson*, 195 Ala. 194, 70 So. 270; *Taylor v. Barton-Child Co.*, 228 Mass. 126, L. R. A. 1918A, 124, 117 N. E. 43; *O'Neil v. Wm. B. H. Kerr Co.*, 124 Wis. 234, 70 L. R. A. 338 [sub nomine, *O'Neil v. Helmke*, 102 N. W. 573].

³⁰ *O'Neil v. Wm. B. H. Kerr Co.*, 124 Wis. 234, 70 L. R. A. 338 [sub nomine, *O'Neil v. Helmke*, 102 N. W. 573].

³¹ *Taylor v. Barton-Child Co.*, 228 Mass. 126, L. R. A. 1918A, 124, 117 N. E. 43.

In order to perfect the assignment, however, the fund assigned must come into existence.³²

§ 2246. Assignment of quasi-contractual rights. Quasi-contractual rights are usually not personal, and such as are not personal may be assigned,¹ including quasi-contractual rights which arise out of tort where the injured party may waive the tort and sue in assumpsit.² The right to recover money paid by mistake,³ or to recover money paid at an erroneous tax sale,⁴ or to recover for taxes paid under protest,⁵ or to recover money lost at gambling,⁶ or to recover money paid for intoxicating liquor,⁷ may each be assigned. So the right of an insurance company to be subrogated to the rights of a mortgagee to whom the company has paid a loss, may be assigned.⁸ A right to recover in assumpsit against a director or officer for fraudulent mismanagement,⁹ or for incurring debts before the proper amount of stock had been subscribed,¹⁰ or for overdrawing an account,¹¹ may be assigned. A right to sue for use and occupation of lands which are held wrongfully by the possessor, is assignable.¹² The right of a surety to enforce contribution from co-sureties may be assigned to one of such sureties.¹³ The assignment of rights of action arising out of tort and treated as rights of action ex delicto, is not considered here.

³² *Nebraska Moline Plow Co. v. Fuehring*, 60 Neb. 316, 83 N. W. 69.

¹ *Colorado. United Securities Co. v. Ostenberg*, 60 Colo. 249, 152 Pac. 1163.

Michigan. Laing v. Forest Township, 139 Mich. 159, 102 N. W. 664; *Hicks v. Steel*, 142 Mich. 292, 4 L. R. A. (N.S.) 279, 105 N. W. 767.

Oklahoma. Ashton v. Noble, 46 Okla. 296, 148 Pac. 1042.

Utah. Lawler v. Jennings, 18 Utah 35, 55 Pac. 60.

Wisconsin. Weston v. Dahl, 162 Wis. 32, 155 N. W. 949.

² *Hewey v. Fouts*, 91 Kan. 680, 139 Pac. 407; *Blakeley v. Le Duc*, 22 Minn. 476.

³ *Lawler v. Jennings*, 18 Utah 35, 55 Pac. 60.

⁴ *Erickson v. Brookings County*, 3 S. D. 434, 18 L. R. A. 347, 53 N. W. 857.

⁵ *Laing v. Forest Township*, 139 Mich. 159, 102 N. W. 664.

⁶ *Allen v. Dunham*, 92 Tenn. 257, 21 S. W. 898.

⁷ *Sellers v. Arie*, 90 Ia. 515, 68 N. W. 814.

⁸ *Hare v. Headley*, 54 N. J. Eq. 545, 35 Atl. 445.

⁹ *Hicks v. Steel*, 142 Mich. 292, 4 L. R. A. (N.S.) 279, 105 N. W. 767.

¹⁰ *Weston v. Dahl*, 162 Wis. 32, 155 N. W. 949.

¹¹ *United Securities Co. v. Ostenberg*, 60 Colo. 249, 152 Pac. 1163.

¹² *Ashton v. Noble*, 46 Okla. 296, 148 Pac. 1042.

¹³ *Lindblom v. Johnston*, 92 Wash. 171, 158 Pac. 972.

§ 2247. Assignment of personal rights. Certain rights, though analogous to quasi-contractual rights, are regarded as personal in their nature and are not assignable.¹ A mere personal right can not be assigned, as a right under federal statutes to recover usury paid to a national bank,² or a statutory right to redeem after a foreclosure sale.³ Fraud is personal,⁴ and an assignment of a debt does not carry with it any right of action growing out of fraud in the transaction by which such debt was created.⁵ The right to have the transfer of certain bonds by the directors of a bank to the president thereof set aside as fraudulent, is personal to the bank and not assignable.⁶ A right of action for the rescission of a contract can not be assigned.⁷

§ 2248. Personal contracts. If A makes a contract with B, in which B's personality is material, such as a contract by which he contracts for B's personal skill or labor, or reposes special trust in B, such contract can not be assigned by either party without the consent of the other, as long as such contract is executory on the part of the party in whom such trust and confidence is reposed.¹ Whether the personality of one or both parties is material depends

¹ Gandy v. Tippet, 155 Ala. 296, 46 So. 463; Cooper v. Hillsboro Garden Tracts, 78 Or. 74, 152 Pac. 488.

² Pardoe v. Bank, 106 Ia. 345, 76 N. W. 800.

³ Terry v. Allen, 134 Ala. 259, 32 So. 664; Gandy v. Tippet, 155 Ala. 296, 46 So. 463.

⁴ Thwing v. Winkler, 13 Okla. 643, 75 Pac. 1126.

⁵ Thwing v. Winkler, 13 Okla. 643, 75 Pac. 1126.

⁶ Smith v. Bank, 137 Cal. 363, 70 Pac. 184.

⁷ Cooper v. Hillsboro Garden Tracts, 78 Or. 74, 152 Pac. 488.

¹ England. Kemp v. Baerselman [1906], 2 K. B. 604.

United States. Burck v. Taylor, 152 U. S. 634, 38 L. ed. 578; Hunt v. Springfield Fire and Marine Ins. Co., 196 U. S. 47, 49 L. ed. 381; Colton v. Raymond, 114 Fed. 803, 52 C. C. A. 382; Demarest v. Dunton Lumber Co., 161 Fed. 264; Central Brass & Stamping

Co. v. Stuber, 220 Fed. 909, 136 C. C. A. 475; Walker Electric Co. v. New York Shipbuilding Co., 241 Fed. 569, 154 C. C. A. 345; American Smelting & Refining Co. v. Bunker Hill & Sullivan Mining & Concentrating Co., 248 Fed. 172; Foster v. Callaghan, 248 Fed. 944.

Alabama. Crawford v. Chattanooga Savings Bank, — Ala. —, 78 So. 58.

California. Montgomery v. DePicot, 153 Cal. 509, 96 Pac. 305.

Delaware. Illinois Finance Co. v. Interstate Rural Credit Association, — Del. —, 101 Atl. 870.

Florida. Parker v. Evening News Publ. Co., 54 Fla. 544, 45 So. 309.

Georgia. Tifton, etc., Ry. v. Bedgood, 116 Ga. 945, 43 S. E. 257.

Illinois. Sloan v. Williams, 138 Ill. 43, 12 L. R. A. 496, 27 N. E. 531.

Iowa. Linn County Abstract Co. v. Beechley, 124 Ia. 146, 99 N. W. 702.

Kansas. Campbell v. Sumner County, 64 Kan. 376, 67 Pac. 866.

upon the intention of the parties as shown by the language which they have used and upon the nature of the contract.²

If the contract is personal in its nature it is not made assignable by the fact that it purports to be a contract with the adversary party, his heirs and assigns,³ or on behalf of the promisor, his heirs and assigns.⁴

Massachusetts. *New England Cabinet Works v. Morris*, 226 Mass. 246, 115 N. E. 315.

Minnesota. *W. H. Barber Agency Co. v. Cooperative Barrel Co.*, 133 Minn. 207, L. R. A. 1916F, 88, 158 N. W. 38.

Montana. *Standard Sewing Machine Co. v. Smith*, 51 Mont. 245, L. R. A. 1918A, 292, 152 Pac. 38.

Nebraska. *Omaha v. Oil Co.*, 55 Neb. 337, 75 N. W. 859; *Zetterlund v. Texas, etc., Co.*, 55 Neb. 355, 75 N. W. 860; *Corson v. Lewis*, 77 Neb. 446, 109 N. W. 735.

New Jersey. *People's Bank & Trust Co. v. Weidinger*, 73 N. J. L. 433, 64 Atl. 179; *Schlesinger v. Forest Products Co.*, 78 N. J. L. 637, 30 L. R. A. (N.S.) 347, 76 Atl. 1024; *Wooster v. Crane*, 73 N. J. Eq. 22, 66 Atl. 1093; *Edison v. Edison Polyform Mfg. Co.*, 73 N. J. Eq. 136, 67 Atl. 392.

New York. *New York Bank Notes Co. v. Hamilton Bank Note Engraving & Printing Co.*, 180 N. Y. 280, 73 N. E. 48.

Oregon. *Meyer v. Livesley*, 45 Or. 487, 106 Am. St. Rep. 667, 78 Pac. 670.

Rhode Island. *Swarts v. Narragansett Electric Lighting Co.*, 26 R. I. 436, 59 Atl. 111.

Texas. *Allen v. Camp*, 101 Tex. 260, 106 S. W. 315.

Utah. *Shearn's Estate*, 38 Utah 492, 114 Pac. 131.

Washington. *Deaton v. Lawson*, 40 Wash. 486, 111 Am. St. Rep. 922, 2 L. R. A. (N.S.) 392, 82 Pac. 879.

West Virginia. *Poling v. Candon-Lane Boom & Lumber Co.*, 55 W. Va. 529, 47 S. E. 279.

Wisconsin. *Johnson v. Vickers*, 139 Wis. 145, 21 L. R. A. (N.S.) 359, 120 N. W. 837. "You have a right to the benefit you contemplate from the character, credit and substance of the person with whom you contract." Lord Denman in *Humble v. Hunter*, 12 Q. B. 310, 317.

²**United States.** *Walker Electric Co. v. New York Shipbuilding Co.*, 241 Fed. 569, 154 C. C. A. 345; *American Smelting & Refining Co. v. Bunker Hill & Sullivan Mining & Concentrating Co.*, 248 Fed. 172.

California. *Montgomery v. DePicot*, 153 Cal. 509, 96 Pac. 305.

New Jersey. *Schlesinger v. Forest Products Co.*, 78 N. J. L. 637, 30 L. R. A. (N.S.) 347, 76 Atl. 1024.

Rhode Island. *Swarts v. Narragansett Electric Lighting Co.*, 26 R. I. 436, 59 Atl. 111.

³**Central Brass & Stamping Co. v. Stuber, 220 Fed. 909, 136 C. C. A. 475; *Swarts v. Narragansett Electric Lighting Co.*, 26 R. I. 388, 59 Atl. 77.**

Contra, *Alden v. George W. Frank Improvement Co.*, 57 Neb. 67, 77 N. W. 369. Such a provision seems to have been regarded as decisive in a doubtful case. *Columbia Water Power Co. v. Columbia*, 5 S. Car. 225.

⁴*Schlesinger v. Forest Products Co.*, 78 N. J. L. 637, 30 L. R. A. (N.S.) 347, 76 Atl. 1024.

"The fact that Freeman agreed for himself, his heirs and assigns, does not make the contract assignable so as to bind Gattinel. Its object was to bind Freeman's heirs to liability in case of breach, and so far as concerns assigns,

While the distinction is not always made by the adjudicated cases, contracts in which the personality of the adversary party is material should be divided into two classes: In some contracts the personality of the adversary party is material as to the performance of the contract; that is, the contract by its express terms or by its fair implication calls for performance by the adversary party, and shows that the personality of the adversary party in rendering such performance is material. In other contracts, the act which is stipulated for can be performed by one person as well as by another, but by the terms of the contract credit is to be given and the personality of the party to whom credit is given is material to the willingness of the adversary party to accept a promise in place of his performance.

A further distinction must be made in contracts in which the personality of one of the parties is material to the performance. As long as performance remains executory on his part, his right to assign the contract is governed by considerations which are very different from those which control when the materiality of the personality has been eliminated by performance, breach, and the like, and when he is seeking to assign the right to the benefits of the contract or the right to bring an action thereon for breach.

§ 2249. Personality must be element of contract. Since the intention of the parties must be deduced from the terms of the contract when considered in the light of the surrounding circumstances, and since the unexpressed intention of one party which is not made a part of the contract is inoperative,¹ the personality of the adversary party must be contracted for in express terms, or must be material from the nature of the subject-matter of the contract and the surrounding circumstances, in order to render the contract non-assignable.² The fact that one of the parties to the

is applicable only to the extent to which the contract might legally be assignable by Freeman—for example, an assignment by him of the money due for staves that might be actually sold and delivered. To hold that these words made the contract assignable in the wider sense would necessitate the conclusion that it might be performed by his heirs at law. A somewhat similar case arose in *Wooster v. Crane &*

Co., 73 N. J. Eq. 22, 66 Atl. 1093." *Schlesinger v. Forest Products Co.*, 78 N. J. L. 637, 30 L. R. A. (N.S.) 347, 76 Atl. 1024.

¹ See §§ 110 et seq.

² **England.** *British Wagon Co. v. Lea*, L. R. 5 Q. B. D. 149.

Scotland. *Cole v. Handasyde* [1910], S. C. 68, [1909], 2 Scots. L. T. 358.

United States. *Horst v. Roehm*, 84 Fed. 565.

contract believes that the adversary party will perform in person, does not render the contract non-assignable, if such method of performance is not contracted for expressly, or is not fairly implied from the nature of the subject-matter and surrounding circumstances.³ A contract to cut timber,⁴ or to deliver cordwood,⁵ or to transport certain kinds of goods,⁶ or to construct a railway switch,⁷ or a contract by which a telegraph company is to construct a line upon the right of way of a railway company,⁸ a contract to furnish electricity to certain premises,⁹ are none of them contracts of a personal character, and they can all be assigned. A contract by A to lease wagons to B and to keep them in repair, may be assigned by A to C so that C may perform over B's objection,¹⁰ while a similar contract to lease a private carriage to B, to keep it in repair and to paint it once a year, has been held not to

Arkansas. *Leader Co. v. Little Rock Ry. & Electric Co.*, 120 Ark. 221, 179 S. W. 358.

Michigan. *Detroit, T. & I. R. Co. v. Western Union Telegraph Co.*, 200 Mich. 2, 166 N. W. 494.

North Carolina. *Younce v. Broad Road Lumber Co.*, 148 N. Car. 34, 61 S. E. 624.

Oregon. *Corvallis & A. R. R. Co. v. Portland, E. & E. Ry. Co.*, 84 Or. 524, 163 Pac. 1173.

³ *Horst v. Roehm*, 84 Fed. 565; *Detroit, T. & I. R. Co. v. Western Union Telegraph Co.*, 200 Mich. 2, 166 N. W. 494; *Younce v. Broad Road Lumber Co.*, 148 N. Car. 34, 61 S. E. 624. See however, *Schlessinger v. Forest Products Co.*, 78 N. J. L. 637, 30 L. R. A. (N.S.) 347, 76 Atl. 1024.

⁴ *Younce v. Broad Road Lumber Co.*, 148 N. Car. 34, 61 S. E. 624.

⁵ *Atlantic & N. C. R. Co. v. Atlantic & N. C. Co.*, 147 N. Car. 368, 125 Am. St. Rep. 550, 23 L. R. A. (N.S.) 223, 15 Am. & Eng. Ann. Cas. 303, 61 S. E. 185.

⁶ *C. H. Little Co. v. Cadwell Transit Co.*, 197 Mich. 481, 163 N. W. 952.

⁷ *Corvallis & A. R. R. Co. v. Portland, E. & E. Ry. Co.*, 84 Or. 524, 163 Pac. 1173.

⁸ *Detroit, T. & I. R. Co. v. Western Union Telegraph Co.*, 200 Mich. 2, 166 N. W. 494.

⁹ *Leader Co. v. Little Rock Ry. & Electric Co.*, 120 Ark. 221, 179 S. W. 358.

¹⁰ *British Wagon Co. v. Lea*, L. R. 5 Q. B. D. 149.

"We entirely concur in the principle on which the decision in *Robson v. Drummond*, 2 B. & Ad. 303 rests, namely, that where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference to his individual skill, competency or other personal qualification, the inability or unwillingness of the party so employed to execute the work or perform the service is a sufficient answer to any demand by a stranger to the original contract of the performance of it by the other party, and entitles the latter to treat the contract as at an end, notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service. Personal performance is in such a case of the essence of the contract, which consequently can not in its absence be enforced against an unwilling party. But this principle

be assignable.¹¹ A contract by which A, who is not a manufacturer, agrees to furnish to B goods which answer to a certain description and which can be bought in open market, may be assigned by A to C.¹² A covenant by which B, who sells his business to A, agrees

appears to us inapplicable in the present instance, inasmuch as we can not suppose that in stipulating for the repair of these wagons by the company—a rough description of work which ordinary workmen conversant with the business would be perfectly able to execute—the defendants attached any importance to whether the repairs were done by the company or by any one with whom the company might enter into a subsidiary contract to do the work. All that the hirers, the defendants, cared for in this stipulation was that the wagons should be kept in repair; it was indifferent to them by whom the repairs should be done. Thus, if without going into liquidation or assigning these contracts, the company had entered into a contract with any competent party to do the repairs, and so had procured them to be done, we can not think that this would have been a departure from the terms of the contract to keep the wagons in repair. While fully acquiescing in the general principle just referred to, we must take care not to push it beyond reasonable limits; and we can not but think that in applying the principle, the Court of Queen's Bench in *Robson v. Drummond*, 2 B. & Ad. 303, went to the utmost length to which it can be carried, as it is difficult to see how in repairing a carriage when necessary or painting it once a year, preference would be given to one coachmaker over another. Much work is contracted for which it is known can only be executed by means of sub-contracts; much is contracted for as to which it is indifferent to the party for whom it is to be done whether it is done by the immediate party to the contract or by some-

one on his behalf. In all these cases the maxim *qui facit per alium facit per se* applies." *British Wagon Co. v. Lea*, 5 Q. B. D. 149.

¹¹ *Robson v. Drummond*, 2 B. & Ad. 303. (B was also to pay each year in advance.)

¹² *Cole v. Handasyde* [1910], S. C. 68, [1909], 2 Scots L. T. 358.

"Nobody doubts that the law as to whether a contract is assignable or not depends upon whether, as the expression goes, there is the element of *delectus personae* in it or not. Now I think by way of illustration there are three stages to be taken. The highest and easiest example of a contract in which there is *delectus personae* is where the contract is one for a personal service of a peculiar nature. Nobody supposes that in a contract with A or B to paint a picture or write a book it is possible for A or B to say, 'I will get somebody else to paint you the picture or write you the book, and that must satisfy you, and you must pay me the price.' Next you have another class where the *delectus personae* is not so clear. I mean the case of manufactured articles. It may quite well be that an article is of such a character and quality, and the reputation of the manufacturer such, that when you contract for a thing from so-and-so, you really imply that the article is to be made by so-and-so. For instance, a contract for a gun from Purdie would not be well implemented by giving you a gun bought in the ordinary market in Birmingham. There are of course, cases where it is not easy to determine on which side the matter falls, but there are cases where the difficulty lies in the application of the law to the

not to compete with A, is not personal, and may be assigned by A to C on the sale of such business to C.¹³

§ 2250. Assignment of contracts personal as to performance—General nature. If the nature of the subject-matter is such that it shows when taken in connection with the language of the contract that personal performance by the adversary party is a material element of the contract, such contract can not be assigned.¹

A contract for support can not be assigned by the person who is to furnish such support.² A son can not assign a contract whereby he has agreed to furnish his father a home and support.³ The mother of an illegitimate child can not assign a contract between herself and the child's father for the support and maintenance of the child by the mother.⁴

particular circumstances. But when we come away from manufacturers, and this is the case here, and when you come to a contract with a person who does not himself manufacture and does not profess to—a contract for goods of a certain description (it really does not matter whether at this present moment these goods have been made or not)—then it seems to me that you may go on and contract in one form or another. You may either say, 'I contract with you that you shall supply me with goods as to which you shall do something, or as to which you shall satisfy yourself in such and such a way,' and then you really incorporate into your contract for the goods a contract also for the personal services of the person with whom you contract; or on the other hand, you may contract for an article and then stipulate that the article is to be of a certain standard which is specified in the contract and say no more. It seems to me that in this latter case the whole element of the *delectus personae* is gone." *Cole v. Handasyde* [1910], S. C. 68; [1909], 2 Scots. L. T. 358.

¹³ *Sickles v. Lauman*, — Ia. —, 160 N. W. 670.

¹ *England. Griffith v. Publishing Co.* [1897], 1 Ch. 21.

United States. Foster v. Callaghan, 248 Fed. 944.

Florida. Parker v. Evening News Publ. Co., 54 Fla. 544, 45 So. 309.

Illinois. Sloan v. Williams, 138 Ill. 43, 12 L. R. A. 496, 27 N. E. 531.

Indiana. Ellis v. State, 4 Ind. 1.

Iowa. Sickles v. Lauman, — Ia. —, 160 N. W. 670.

Kansas. Campbell v. Sumner Co., 64 Kan. 376, 67 Pac. 866.

Michigan. Detroit Postage Stamp Service Co. v. Schermack, 179 Mich. 266, 146 N. W. 144.

Nebraska. Hilton v. Crooker, 30 Neb. 707, 47 N. W. 3; *Corson v. Lewis*, 77 Neb. 446, 100 N. W. 735.

New Jersey. Schlesinger v. Forest Products Co., 78 N. J. L. 637, 30 L. R. A. (N.S.) 347, 76 Atl. 1024.

Washington. Deaton v. Lawson, 40 Wash. 486, 111 Am. St. Rep. 922, 2 L. R. A. (N.S.) 392, 82 Pac. 879.

² *Shearn's Estate*, 38 Utah 492, 114 Pac. 131.

³ *Eastman v. Batchelder*, 36 N. H. 141, 72 Am. Dec. 295; *Thomas v. Thomas*, 24 Or. 251, 33 Pac. 565. (Such assignment ends the contract and forfeits the realty granted in consideration thereof.)

⁴ *People's Bank & Trust Co. v. Weidinger*, 73 N. J. L. 433, 64 Atl. 179.

A contract by which A insures B's property is personal, and A is not bound to assent to a sale of such property by B to C, so as to keep such policy in force upon such property after such sale.⁶ However, it is held that a part owner of a vessel may sell his interest in the vessel to one of the other part owners, and he may assign to such other part owner his interest in a policy of marine insurance upon such interest.⁶

A lease of a farm on shares is personal and non-assignable.⁷ A contract of agency can not be assigned.⁸ A contract by which B is to act as sales agent for A, and to guarantee sales, and to be responsible for collections, is personal.⁹ A contract whereby A agrees to allow B to use A's name in business can not be assigned by B to C.¹⁰ Permission to use the name and the picture of one who has discovered a proprietary medicine, can not be assigned.¹¹

A contract by which a corporation, B, agrees to issue its own stock to A, can not be assigned by A, since the personality of the stockholders is material.¹²

⁶ *Hunt v. Springfield Fire and Marine Ins. Co.*, 196 U. S. 47, 49 L. ed. 381; *Wyman v. Prosser*, 36 Barb. (N. Y.) 368; *Shotwell v. Jefferson Ins. Co.*, 5 Bosw. (N. Y.) 247. It is said that equity will recognize such assignment. *Bank v. Ins. Co.*, 153 Fed. 440; *Gourdon v. Ins. Co.*, 3 Yeates (Pa.) 327.

See also, *Rousset v. Ins. Co.*, 1 Binn. (Pa.) 429.

That the policy may be assigned before loss, see *Stratton v. Bankers' Life Co.*, 102 Neb. 755, 1 A. L. R. 1671, 169 N. W. 722.

⁷ *Spring v. South Carolina Ins. Co.*, 21 U. S. (8 Wheat.) 268, 5 L. ed. 614.

⁸ *Meyer v. Livesley*, 45 Or. 487, 106 Am. St. Rep. 667, 78 Pac. 670.

⁹ *Illinois Finance Co. v. Interstate Rural Credit Association*. — Del. —, 101 Atl. 870; *Globe & Rutgers Fire Ins. Co. v. Jones*, 129 Mich. 664, 89 N. W. 580; *Detroit Postage Stamp Service Co. v. Schermack*, 179 Mich. 266, 146 N. W. 144; *Barber Agency Co. v. Co-operative Barrel Co.*, 133 Minn. 207, L. R. A. 1916F, 88, 138 N. W. 38.

¹⁰ *Standard Sewing Machine Co. v.*

Smith, 51 Mont. 245, L. R. A. 1918A, 292, 152 Pac. 38.

¹¹ *Bagby, etc., Co. v. Rivers*, 87 Md. 400, 67 Am. St. Rep. 357, 40 L. R. A. 632, 40 Atl. 171.

¹² *Edison v. Edison Polyform Mfg. Co.*, 73 N. J. Eq. 136, 67 Atl. 392.

¹³ *Holyoke v. Millmann*, 151 Wis. 551, 43 L. R. A. (N.S.) 790, 139 N. W. 392.

"Primarily a corporation when it offers its stock for sale has the right to select the purchasers. It may sell to one man and refuse to sell to another. Generally it desires to interest men of means and of good reputation, and shuns crooks and cranks. Certain stockholders may be a decided advantage in a business way while others may not be. Undesirable stockholders may be and frequently are, as troublesome as undesirable partners and harder to get rid of. *Katz v. De Wolf*, 151 Wis. 337, 138 N. W. 1013. *Mapel* at best had but one executory contract for the purchase of stock to the amount of \$4,000. As a matter of fact he never purchased that amount. What he attempted to do in reality was to assign

Contracts between the state and an owner of property, exempting his property from taxation, are personal in their nature and can not be assigned with such property,¹³ unless it appears to be the legislative intention that such right should pass with the property.¹⁴

Where a promise by a vendee of realty, whereby he assumes and agrees to pay a mortgage thereon, is personal to the vendor and mortgagee, the latter can not assign the benefits thereof.¹⁵

§ 2251. Contracts for professional or expert services. A contract to render professional services is personal and non-assignable.¹ An attorney can not assign an executory contract whereby he agrees to render professional services,² nor can an abstracter assign a contract employing him to do certain abstracting.³ A contract for the employment of a teacher can not be assigned,⁴ and on the division

to the petitioner his right to purchase \$1,500 of the stock covered by the alleged agreement. It is true that in form he attempted to assign the stock itself, but he never owned it. The minds of the parties never met on accepting Holyoke as a stockholder, and he never was accepted. Unless Mapel had a right to foist an apparently obnoxious stockholder on the corporation by transferring an interest in his executory agreement to buy stock, no rights were acquired by Holyoke. *Holyoke v. Millmann*, 151 Wis. 551, 43 L. R. A. (N.S.) 790, 139 N. W. 392.

¹³ *Armstrong v. Athens County*, 41 U. S. (16 Pet.) 281, 10 L. ed. 965 [affirming, 10 Ohio 235]; *Mercantile Bank v. Tennessee*, 161 U. S. 161, 40 L. ed. 656; *Gulf, etc., Ry. v. Hewes*, 183 U. S. 66, 46 L. ed. 86; *Rochester Railway Co. v. Rochester*, 205 U. S. 236, 51 L. ed. 784; *Yale University v. New Haven*, 71 Conn. 316, 43 L. R. A. 490, 42 Atl. 87; *Lake Shore, etc., Ry. v. Grand Rapids*, 102 Mich. 374, 29 L. R. A. 195, 60 N. W. 767.

¹⁴ *Louisville, etc., Ry. v. Palmes*, 109 U. S. 244, 27 L. ed. 922 [affirming, 19 Fla. 231]; *Detroit, etc., Ry. v. Common Council*, 125 Mich. 673, 84 Am. St. Rep.

589, 85 N. W. 96, 86 N. W. 809; *State Board v. Ry.*, 49 N. J. L. 193, 7 Atl. 826.

¹⁵ *Woodcock v. Bostic*, 118 N. Car. 822, 24 S. E. 362.

¹ *Chapin v. Longworth*, 31 O. S. 421; *Deaton v. Lawson*, 40 Wash. 486, 111 Am. St. Rep. 922, 2 L. R. A. (N.S.) 392, 82 Pac. 879.

² *Sloan v. Williams*, 138 Ill. 43, 12 L. R. A. 496, 27 N. E. 531; *Hilton v. Crooker*, 30 Neb. 707, 47 N. W. 3. The client may treat such attempted assignment as a renunciation of the entire contract. *Hilton v. Crooker*, 30 Neb. 707, 47 N. W. 3; *Corson v. Lewis*, 77 Neb. 446, 109 N. W. 735.

³ *Linn County Abstract Co. v. Beechley*, 124 Ia. 146, 99 N. W. 702.

A promise by A who sells his abstracting business to B, to turn over to B all orders which A may receive, does not bind A to turn over such orders to a corporation to whom B has sold such business. *Linn County Abstract Co. v. Beechley*, 124 Ia. 146, 99 N. W. 702.

⁴ *Board of Education v. State Board of Education*, 81 N. J. L. 211, 81 Atl. 163 [affirmed, *Glazer v. Flemington*, 85 N. J. L. 384, 91 Atl. 1068].

of the school district, the new district is not bound by such contract.⁵ A publisher can not assign a contract with an author for publishing a book;⁶ nor can a printer assign a contract to do public printing;⁷ nor can a newspaper assign a contract to print a delinquent tax list;⁸ nor can a nurseryman assign a contract whereby he is to prune and care for certain trees.⁹

§ 2252. Contracts for manufacture or production of articles.

A contract by which A agrees to manufacture articles for B, can not be assigned by A to C so that C may perform against B's objection, if B had relied upon A's personal control of the performance of the contract.¹ A hemp grower can not assign a contract for the sale of hemp "of his own raising."²

§ 2253. Building and construction contracts. A contract for the construction of a building has been held to be personal in character so that it can not be assigned to one who is to perform such contract.¹ As a matter of fact the personality of the building con-

⁵ Board of Education v. State Board of Education, 81 N. J. L. 211, 81 Atl. 163 [affirmed, Glazer v. Flemington, 85 N. J. L. 384, 91 Atl. 1068].

⁶ Griffith v. Publishing Co. [1897], 1 Ch. 21; Foster v. Callaghan, 248 Fed. 944; Wooster v. Crane, 73 N. J. Eq. 22, 66 Atl. 1093. (Even if the promisee is a corporation and the assignee is a corporation formed by the stockholders of the first corporation under the laws of another state.)

⁷ Ellis v. State, 4 Ind. 1; Campbell v. Sumner Co., 64 Kan. 376, 67 Pac. 866.

⁸ Parker v. Evening News Publ. Co., 54 Fla. 544, 45 So. 309.

⁹ Edison v. Babka, 111 Mich. 235, 60 N. W. 499.

¹ Schlesinger v. Forest Products Co., 78 N. J. L. 637, 30 L. R. A. (N.S.) 347, 76 Atl. 1024.

"The injustice of permitting an assignment of a contract for personal services, for the painting of a picture for a partnership, is obvious. A contract for the sale of goods to be manu-

factured stands on similar grounds where the vendee relies upon the skill and experience of the manufacturer, as well as upon the implied warranty of quality. No man who has employed a tailor to make a suit of clothes ought to be compelled to accept a suit made by the tailor's assignee * * *. In the present case, Gaffinel relied in fact upon Freeman's personal performance of the contract, and was careful to stipulate that the staves should be hand-finished by European workmen. We think he was not compelled to accept performance from a corporation to whom it had been assigned." Schlesinger v. Forest Products Co., 78 N. J. L. 637, 30 L. R. A. (N.S.) 347, 76 Atl. 1024.

² Schultz v. Johnson, 44 Ky. (5 B. Mon.) 497. A contract by A to grow trees and to deliver them to B may be assigned. Parsons v. Woodward, 22 N. J. L. 196.

¹ Johnson v. Vickers, 130 Wis. 145, 21 L. R. A. (N.S.) 359, 120 N. W. 837.

tractor is generally regarded as material. The contract is not always given to the lowest bidder, even by private property owners. The skill and integrity of a contractor who has not put in the lowest bid are often thought to be worth more than the difference in bids. The theory that such a contract is so personal that it can not be assigned as to performance conforms to the actual understanding of persons who let such contracts.² At the same time, in the absence of a specific covenant to the contrary, the contractor may perform through subcontractors,³ and he may employ another person to supervise the construction.⁴ There is, however, no inconsistency in these different views. It is not ordinarily intended, in the absence of specific covenants, that the contractor must do the work himself. It is his ability and honesty as the general contractor and not his personal skill in physical performance of the contract that the property owner is seeking to obtain.

A contract to install an electric system under the personal supervision of the contractor,⁵ or to furnish an electric system, including switchboards for a battleship,⁶ or to design, manufacture and install

² "This contract obligated the Industrial Construction Company to build and equip a canning factory according to specifications attached to the contract that seem to be complete as to details. The performance of the work undoubtedly required skill and experience, and upon its proper execution, the success of the enterprise might well depend. The assignees were wholly inexperienced in constructing plants of this character, while the assignor apparently followed the business of so doing. This contract manifestly imposed a liability upon the assignor of the plaintiffs, and involved a relation of personal confidence which the subscribers must have intended would be exercised by the party in whom they confided. In the construction of a complex plant, subscribers, having no knowledge themselves as to how such a plant should be constructed, would naturally prefer to make their contract with a party having the requisite knowledge and experience rather than with

persons having neither. Good business judgment would dictate that such a course should be pursued. They had the right to select the party with whom they would deal, and when the selection was made and the contract was executed, there could be no substitution of contractors in the case before us without the assent of the subscribers. The authorities are quite uniform in holding that such a contract is not assignable by the contractor without the consent of the other party thereto." *Johnson v. Vickers*, 139 Wis. 145, 21 L. R. A. (N.S.) 359, 120 N. W. 837.

³ *Neeley v. Searight*, 113 Ind. 316, 15 N. E. 598; *Drumheller v. American Surety Co.*, 30 Wash. 530, 71 Pac. 25.

⁴ *Council v. Teal*, 122 Ga. 61, 49 S. E. 806.

⁵ *Swarts v. Narragansett Electric Lighting Co.*, 26 R. I. 388, 59 Atl. 77.

⁶ *Walker Electric Co. v. New York Shipbuilding Co.*, 241 Fed. 569, 154 C. A. 345.

fixtures in a store,⁷ can not be assigned. In accordance with these general principles a public contract has been held to be assignable, where by statute it must be let to the lowest bidder, without conferring any discretion upon the public corporation to reject the lowest bid in favor of a higher bid of a more reliable bidder.⁸ If the recognition of the assignment will operate as a discharge of a surety on the bond of the original contractor, the contract is non-assignable.⁹

§ 2254. Contracts for supplying needs or requirements of business. B may enter into a contract with A, by which he agrees to furnish A with such amount of goods as A may need or may require in his business. Such contracts are sufficiently definite,¹ and A's promise to take what may be necessary for his business is generally regarded as a sufficient consideration for B's promise.² Whether such contract may be assigned by A to C, so that C can compel B to deliver such quantity of goods as C may need in his business, is a question upon which it would appear that there was little opportunity for difference of opinion, since B in all probability was influenced by his knowledge of the public requirements of A's business, and since he may be unable to furnish as small a quantity as C may require, or he may not be able to furnish as large a quantity as C may require. It has, accordingly, been held that such a contract can not be assigned by A.³ In a case in which A agreed to

⁷ *New England Cabinet Works v. Morris*, 226 Mass. 246, 115 N. E. 315.

⁸ *Taylor v. Palmer*, 31 Cal. 241; *Anderson v. De Urioste*, 96 Cal. 404, 31 Pac. 266.

⁹ *Pike v. Waltham*, 168 Mass. 581, 47 N. E. 437.

¹ See § 90.

² See § 581.

³ *Kemp v. Baerselman* [1906], 2 K. B. 604 [distinguishing, *Tolhurst v. Associated Portland Cement Manufacturers Association* (1903), A. C. 414].

"In my opinion this agreement contains two considerations moving to the defendant, one being the payment of the price and the other being Kemp's undertaking not to purchase eggs from any other merchant. It is obvious that the value of the latter consideration

must in a large measure depend upon the person who gives the undertaking and the business carried on by him, and to that extent the personal element enters into the question; and as regards payment, it is conceded that novation can not be compulsory so as to make the person supplying the goods accept against his will the liability of another person to pay for them in substitution for the liability of the original purchaser, so that in that respect also the contract is personal; and thirdly, the contract contains a personal element in that the quantity to be supplied is measured by the requirements of Kemp himself. When he assigned his three businesses to the new company, one of them was given up and a much larger business taken in its place. That

furnish to B at least seven hundred and fifty tons of chalk a week, and as much more as A might require for the whole of his manufacture of Portland cement upon his land for a period of fifty years, or for a less period if the supply of chalk failed, but in any event for a period of thirty-five years, it was held that A might assign such contract to C, and that B could be compelled to furnish the amount which C might need for the manufacture of Portland cement upon the same land,⁴ on the theory that B was bound to furnish as much chalk as A might need for manufacturing Portland cement upon such land and that the maximum quantity was the amount which could be manufactured upon such land and that this quantity was not increased by A's assignment to C.⁵ In a case in which B agrees to furnish to A all the meat of certain kinds which might be required by A for his hotel, it was held that A could not assign such contract to C; but such result was based entirely upon the fact that B had agreed to give credit to A, since A was to pay for such meat at the end of each month. No attention was given to the fact that on the one hand A still remained liable under his original contract, and on the other hand, to the fact that C's requirements

fact brings into prominence the importance of the provision in clause 1 that the defendant shall supply to Kemp as many fresh eggs as 'he shall require for manufacturing purposes.' The requirements of Kemp for manufacturing purposes are one thing, and the requirements of any one to whom Kemp may assign his business are another." *Kemp v. Baerselman* [1906], 2 K. B. 604 [distinguishing, *Tolhurst v. Associated Portland Cement Manufacturers Association* (1903), A. C. 414].

⁴*Tolhurst v. Associated Portland Cement Manufacturers Association* [1903], A. C. 414 [affirming, *Tolhurst v. Associated Portland Cement Manufacturers Association* (1902), 2 K. B. 660, which reversed, *Tolhurst v. Associated Portland Cement Manufacturers* (1901), 2 K. B. 811].

⁵"The Imperial Company were not entitled to an unlimited supply of chalk, but only to so much as they might want for making cement on their own piece of land. I do not think their

right to have chalk from Tolhurst's quarries could be assigned apart from their own land and cement works. The Imperial Company could not by alienation or otherwise increase the burdens which Mr. Tolhurst undertook to bear. But this is the only limit which I can find in the present case. Mathew, J., thought that the mere fact that the Imperial Company was a comparatively small company and that the Associated Company was much larger, and would or might want more chalk than the other, involved a material increase in the burden thrown on Mr. Tolhurst. But the learned judge apparently overlooked the fact that the Imperial Company could have increased its capital to any extent, and could have increased its cement works to any extent which the land they had bought from Mr. Tolhurst could carry. The limit of the burden thrown on Mr. Tolhurst is in any case measured by this consideration, and this limit can no more be passed by the Associated

might be very different from A's.⁶ A contract by which B agreed to deliver to A its entire cut of lumber of a certain kind, except such as B might need for his retail trade, and such lumber was to be of certain lengths, but A would agree that he would accept an indefinite amount shorter than minimum length, or longer than the maximum length, was held to be non-assignable on the ground that B might be willing to allow A to exercise his discretion in determining the quantity of lumber which he would accept above or below such prescribed length, but that he would not allow C to exercise such discretion.⁷

A contract by a carrier to transport goods for a certain person as he might require has been held to be assignable,⁸ at least to the purchaser of such shipper's business,⁹ and it has also been held non-assignable.¹⁰

§ 2255. Assignment of performance by person for whose benefit personal element required. While most of the questions of assignment of personal contracts arise in cases in which the party who was to render the personal service has attempted to assign the contract,¹ the principle which underlies the doctrine of the non-assignability of these contracts prevents the adversary party also from

Company than by the Imperial Company.

"But then Mr. Pickford, in his very able argument, relied on the words 'as the company shall require for the whole of their manufacture of Portland cement upon their said land.' By throwing a strong emphasis on the words 'the company' and 'their,' the impression may be produced that these words, which plainly refer to the Imperial Company, were purposely used to exclude all other persons. But I cannot think that these expressions indicate any such intention. There is no question here of any personal confidence or personal skill. There is no reason whatever for supposing that any personal element entered into the mind of either of the parties to the agreement, and I cannot find anything in it to prevent the Imperial Company

from assigning the benefit of it to any other company or to any individual."

Tolhurst v. Associated Portland Cement Manufacturers Association [1903] A. C. 414 [affirming, Tolhurst v. Associated Portland Cement Manufacturers Association (1902), 2 K. B. 660, which reversed Tolhurst v. Associated Portland Cement Manufacturers (1901), 2 K. B. 811.]

⁶ Lansden v. McCarthy, 45 Mo. 106.

⁷ Demarest v. Dunton Lumber Co., 161 Fed. 264. (In this case credit was extended to the original purchaser.)

⁸ Himrod Furnace Co. v. Railroad Co., 22 O. S. 451.

⁹ Himrod Furnace Co. v. Railroad Co., 22 O. S. 451.

¹⁰ Ry. v. Jackson, 153 Ky. 534.

¹ Barber Agency Co. v. Co-operative Barrel Co., 133 Minn. 207, L. R. A. 1916F, 88, 158 N. W. 38.

assigning it.² The principal can not assign his interest in a personal executory contract of agency.³

Since a corporation is a legal entity distinct from its stockholders, subject to different duties and liabilities, and endowed with different capacities, a transfer of a personal contract by one party to a corporation which he has formed is inoperative,⁴ and the same rule applies where one corporation transfers a personal contract to another corporation, made up of the same stockholders but under the laws of a different state.⁵

§ 2256. Assignment of contracts personal as to credit. If the subject-matter of the contract is such that performance might be rendered by any one, but by the terms of the contract credit is to be given by one party to the other, it is ordinarily said that since the personality of the party to whom credit is given is material, such contract can not be assigned by such party.¹ A contract by which B agrees to furnish meat to A for A's hotel at a certain price per pound, payable at the end of each month, can not be assigned by A to C so that C can compel B to accept C as a debtor or to give credit to C.² A contract by which A may buy certain property from B at a certain price within a certain period of time on credit, can not be assigned by A to C.³

This rule has been laid down by the courts in a number of cases without any discussion of the effect of the assignment upon the liability of the assignor. If the nature of the contract does not make it necessary to extend credit to the assignee, and if the assignor

² *Standard Sewing Machine Co. v. Smith*, 51 Mont. 245, L. R. A., 1918A, 292, 152 Pac. 38; *Chapin v. Longworth*, 31 O. S. 421.

³ *Globe & Rutgers Fire Ins. Co. v. Jones*, 129 Mich. 664, 89 N. W. 580 (explained on the theory that the personality of the employer was material); *Standard Sewing Machine Co. v. Smith*, 51 Mont. 245, L. R. A. 1918A, 292, 152 Pac. 38.

⁴ *W. H. Barber Agency Co. v. Co-operative Barrel Co.*, 133 Minn. 207, L. R. A. 1916F, 88, 158 N. W. 38.

⁵ *Wooster v. Crane*, 73 N. J. Eq. 22, 66 Atl. 1093.

¹ *United States v. Mining Co.*, 127 U. S. 379, 32 L. ed.

246; *Demarest v. Dunton Lumber Co.*, 161 Fed. 264.

Georgia. *Sims v. Cordele Ice Co.*, 119 Ga. 597, 46 S. E. 841; *Macon Auto Co. v. Heard*, 142 Ga. 264, 82 S. E. 658.

Iowa. *Rappleve v. Seeder Co.*, 79 Ia. 220, 7 L. R. A. 139, 44 N. W. 363.

Missouri. *Lansden v. McCarthy*, 45 Mo. 106.

Texas. *Menger v. Ward*, 87 Tex. 622, 30 S. W. 853.

² *Lansden v. McCarthy*, 45 Mo. 106.

³ *Sims v. Cordele Ice Co.*, 119 Ga. 597, 46 S. E. 841. (It is said to lapse on A's death since it is non-assignable.) *Macon Auto Co. v. Heard*, 142 Ga. 264, 82 S. E. 658.

remains liable upon the contract, it is difficult to see why the assignor may not assign the benefits of such contract to a third person, while he himself remains liable upon the original contract. The adversary party still retains his right to compel performance against the assignor, and from the nature of the case it is immaterial to the adversary party to whom he delivers the benefits of the contract, unless we are ready to say that no executory contracts can be assigned as to performance. At the same time the courts have ordinarily held that contracts by which credit was to be extended, could not be assigned without considering whether the adversary party was giving any greater credit in delivering the benefits of the contract to the assignee than he had agreed to give by the original terms of the contract.

If the theory is correct that a personal contract is absolutely non-assignable, and that even if the adversary party assents to an attempted assignment, his assent is the acceptance of an offer made by the assignee, thus making a new contract and not an assignment of the original contract,⁴ it may be said that on accepting such offer from the assignee, the adversary party gives up his original contract with the assignor; and that he is thus given his choice between refusing to perform for the benefit of the assignee and releasing the assignor. If this is the correct theory of the effect of assent to the assignment of a personal contract,⁵ the party who has agreed to extend credit should not be compelled to release the adversary party to the contract and accept the credit of the assignee.

If the assignee has assumed and agreed to pay the obligation incurred by his assignor, in a jurisdiction in which it is held that the election of the beneficiary to enforce performance against the assignee, operates as a discharge of the assignor,⁶ or reduces the assignor to the position of a surety,⁷ such adversary party should not be compelled to perform for the benefit of the assignee and thus to give up his claim against the assignor.

In a jurisdiction in which the original primary debtor by an arrangement with a third person and notice to the adversary party may alter his position to that of a surety, the adversary party may give up his original contractual right as against the assignor

⁴ American Colortype Co. v. Continental Colortype Co., 188 U. S. 104, 47 L. ed. 404.

⁵ See § 2252.

⁶ See § 2411.

⁷ See § 2411.

upon agreeing to perform for the benefit of the assignee.⁸ Except where these theories are recognized and applied by the courts, no reason appears for denying the right of the assignor who remains personally liable upon the original contract to assign the benefits thereof to a third person.

A different question arises where from the nature of the contract it is necessary to give credit to the assignee.⁹ If A has entered into a contract with B, by which he agrees to collect money for B and to pay it over to him, A can not assign such contract to C.¹⁰ Cases of this sort are, however, merely apparent exceptions to the general principle, since in a case of this sort the personality of A is a material element of the contract.

§ 2257. Assignment on elimination of personal element by performance or breach. B may assign to C the right to receive compensation from A on performance of the contract between A and B, even if under such contract B's personality is material,¹ if such compensation does not itself involve any personal element.² An attorney who has performed all services to be performed under his contract may assign his compensation thereunder.³ The publisher of a magazine may, on performance of a contract to publish advertisements, assign the benefits thereof.⁴ A building contract or a construction contract which has been performed by the original contractor, may be assigned so that the assignee may recover the benefits due thereunder, whether such contract is a private contract,⁵ or a public contract.⁶

⁸ *Rouse v. Bradford Banking Co.* [1894], A. C. 586.

⁹ *New York Bank Notes Co. v. Hamilton Bank Note, Engraving & Printing Co.*, 180 N. Y. 280, 73 N. E. 48.

¹⁰ *New York Bank Notes Co. v. Hamilton Bank Note, Engraving & Printing Co.*, 180 N. Y. 280, 73 N. E. 48.

¹ *England. Lett v. Morris*, 4 Sim. 607.

United States. In re Wright, 157 Fed. 544, 18 L. R. A. (N.S.) 193, 85 C. A. 206.

Massachusetts. American Lithograph Co. v. Ziegler, 216 Mass. 287, 103 N. E. 909.

Minnesota. Dickson v. St. Paul, 97 Minn. 258, 106 N. W. 1053.

Missouri. Houssels v. Jacobs, 178 Mo. 579, 77 S. W. 857.

Nebraska. Daugherty v. Gouff, 23 Neb. 105, 36 N. W. 351.

Oregon. Stott v. Franey, 20 Or. 410, 26 Pac. 271.

Tennessee. Smith v. Hubbard, 85 Tenn. 306, 2 S. W. 569.

Wisconsin. Rockwell v. Daniels, 4 Wis. 432.

² *In re Wright*, 157 Fed. 544, 18 L. R. A. (N.S.) 193, 85 C. C. A. 206.

³ *Taylor v. Mining Co.*, 86 Cal. 589, 25 Pac. 51.

⁴ *American Lithograph Co. v. Ziegler*, 216 Mass. 287, 103 N. E. 909.

⁵ *Iaeger v. Bossieux*, 56 Va. (15 Gratt) 83.

⁶ *Daugherty v. Gouff*, 23 Neb. 105, 36 N. W. 351; *Stott v. Franey*, 20 Or. 410, 26 Pac. 271; *Smith v. Hubbard*, 85 Tenn. 306, 2 S. W. 569.

If the contract has been broken by one party the other party may assign his right of action for such breach in some cases,¹ such as in case of a contract to furnish support,² although the contract is personal. After a loss has occurred, the insured may assign the right to the proceeds of an insurance policy.³

§ 2258. Assent to assignment of personal contract. If the person who contracts for the skill, personal labor or credit of another consents to the attempted assignment of such contract by such other, he can not subsequently object that the contract could not be assigned.¹ Such a transaction is said, however, not to be an assignment, but a new contract between one of the parties to the original contract and the assignee of the other.² If this theory is correct, a contract in which the personality of one of the parties is material for any reason, is non-assignable as a matter of law,

¹ *Bryne v. Dorey*, 221 Mass. 399, 109 N. E. 146.

² *Bryne v. Dorey*, 221 Mass. 399, 109 N. E. 146.

³ *Illinois. Glover v. Lee*, 140 Ill. 102, 29 N. E. 680.

Iowa. Bartling v. German Mutual Ins. Co., 154 Ia. 335, 134 N. W. 864.

Maine. Warner v. Mutual Fire Ins. Co., 111 Me. 590 [memorandum opinion], 90 Atl. 706.

Massachusetts. Boardman v. Holmes, 124 Mass. 438.

New York. Greene v. Republic Fire Ins. Co., 84 N. Y. 572.

¹ *American Colortype Co. v. Continental Colortype Co.*, 188 U. S. 104, 47 L. ed. 404; *Cleveland, etc., Ry. v. Wood*, 189 Ill. 352, 59 N. E. 619; *Weatherhogg v. Board of Commissioners*, 158 Ind. 14, 62 N. E. 477.

² *American Colortype Co. v. Continental Colortype Co.*, 188 U. S. 104, 47 L. ed. 404.

"It is true that the starting point for the relations between the plaintiff and its employees was what purported to be an assignment. It is true that the bill emphasizes this aspect of the case and states the evidence more ac-

curately than the result. But those circumstances do not change the legal conclusion from the facts set forth. The allegations show that, having the old contract before them, the parties came together under a new agreement, which was determined by reference to the terms of that contract, but which none the less was personal and immediate. *Maas, Fierlein and Freese*, who were under contract with the National Colortype Company, agreed to work for the plaintiff instead. The plaintiff accepted their promises and gave a consideration for them by undertaking personally to pay. It does not matter that the bill calls this becoming substituted as the employer and as a party to the old contracts. The plaintiff could not become substituted to a strictly personal relation. All that it could do was to enter into a new one which was exactly like that which had existed before. Service is like marriage, which, in the old law, was a species of it. It may be repeated, but substitution is unknown." *American Colortype Co. v. Continental Colortype Co.*, 188 U. S. 104, 47 L. ed. 404.

without regard to the agreement of the parties or to their subsequent assent.

It seems to be assumed in some cases that such contract is assignable with the assent of the original parties thereto.³ If the parties to a personal contract consent to its assignment, a third person, such as the assignee, can not object thereafter.⁴ If A assigns B's contract for personal services to C, and B acquiesces in such assignment, C can not refuse to pay to A the amount agreed upon as consideration for such assignment, on the ground that the contract was a personal one.⁵

If no objection is made to the performance of the contract by the assignee, no objection can be made to the validity of the assignment on which he seeks to recover the benefits of the contract.⁶

§ 2259. Specific provision against assignment. In the absence of statutory provisions to the contrary, a contract which would otherwise be assignable may be non-assignable without the consent of the adversary party by inserting a clause providing that it shall not be assigned.¹ Such provisions against assignment have been upheld in building and construction contracts,² lighting contracts,³

³ *Augusta Baseball Association v. Thomasville Baseball Club*, 147 Ga. 201, L. R. A. 1917F, 841, 93 S. E. 208.

The use of the word "assigns" tends to show assent in advance to assignment. *National Life Ins. Co. v. Beck & Gregg Hardware Co.*, 148 Ga. 757, 98 S. E. 266.

⁴ *Augusta Baseball Association v. Thomasville Baseball Club*, 147 Ga. 201, L. R. A. 1917F, 841, 93 S. E. 208.

⁵ *Augusta Baseball Association v. Thomasville Baseball Club*, 147 Ga. 201, L. R. A. 1917F, 841, 93 S. E. 208 (sale of a baseball player).

⁶ *Stitt v. Horton*, 165 Ind. 555, 76 N. E. 241 (sole question one as to discharge of assessment against one property owner); *Ernst v. Kunkle*, 5 O. S. 520.

¹ *United States. Delaware County v. Lock Co.*, 133 U. S. 473, 32 L. ed. 674; *Burck v. Taylor*, 152 U. S. 634, 38 L.

ed. 578; *Bitterman v. R. R.*, 207 U. S. 205, 52 L. ed. 171.

Maine. *International Wood Co. v. National Assurance Co.*, 99 Me. 415, 105 Am. St. Rep. 288, 59 Atl. 544.

Nebraska. *Zetterlund v. Texas, etc., Co.*, 55 Neb. 355, 75 N. W. 860.

New York. *Collister v. Hayman*, 183 N. Y. 250, 111 Am. St. Rep. 740, 1 L. R. A. (N.S.) 1188, 76 N. E. 20.

Ohio. *Kinner v. Lake Shore & M. S. Ry.*, 69 O. S., 339, 69 N. E. 614.

Oklahoma. *Barringer v. Bes Line Construction Co.*, 23 Okla. 131, 21 L. R. A. (N.S.) 597, 99 Pac. 775.

Washington. *Lockerby v. Amon*, 64 Wash. 24, 35 L. R. A. (N.S.) 1064, 116 Pac. 463.

² *Burck v. Taylor*, 152 U. S. 634, 38 L. ed. 578; *Mueller v. University*, 195 Ill. 236, 88 Am. St. Rep. 194, 63 N. E. 110.

³ *Omaha v. Oil Co.*, 55 Neb. 337, 75 N. W. 859.

insurance contracts,⁴ provisions making claims for wages non-assignable,⁵ theater tickets,⁶ and railway tickets.⁷ Such a clause seems to be inoperative in most jurisdictions, in contracts for the sale of realty, although various reasons for such result are assigned.⁸

Under a statute specifically authorizing the assignment of contract rights, however, the words "not transferable" do not prevent assignment.⁹ By express statutory provision a contract, which by its terms is non-assignable, may be assignable in spite of such provision.¹⁰ Merchandise coupon books, which by their terms are not transferable, may be assigned by special statutory provision.¹¹ On the other hand, a general statutory provision to the effect that things in action which arise out of obligations may be transferred by the owner, does not render inoperative a covenant to the effect

⁴ **Maine.** *International Wood Co. v. National Assurance Co.*, 99 Me. 415, 105 Am. St. Rep. 288, 59 Atl. 544.

Massachusetts. *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245; *Merrill v. Ins. Co.*, 169 Mass. 10, 61 Am. St. Rep. 268, 47 N. E. 430.

New Hampshire. *Dube v. Ins. Co.*, 64 N. H. 527, 1 L. R. A. 57, 15 Atl. 141.

Ohio. *Charch v. Charch*, 57 O. S. 561, 49 N. E. 408.

Wisconsin. *McQuillan v. Life Association*, 112 Wis. 665, 88 Am. St. Rep. 986, 56 L. R. A. 233, 88 N. W. 925, 87 N. W. 1069.

⁵ **Barringer v. Bes Line Construction Co.**, 23 Okla. 131, 21 L. R. A. (N.S.) 597, 99 Pac. 775.

⁶ **Collister v. Hayman**, 183 N. Y. 250, 111 Am. St. Rep. 740, 1 L. R. A. (N.S.) 1188, 76 N. E. 20.

⁷ **Bitterman v. R. R.**, 207 U. S. 205, 52 L. ed. 171; *Kinner v. Lake Shore, etc., Ry.*, 69 O. S. 339, 69 N. E. 614.

⁸ **United States.** *Cheney v. Bilby*, 74 Fed. 52.

Georgia. *Corvart v. Singletary*, 140 Ga. 435, 47 L. R. A. (N.S.) 621, Ann. Cas. 1915A, 1116, 79 S. E. 196.

Iowa. *Thomassen v. De Goey*, 133 Ia. 278, 119 Am. St. Rep. 605, 110 N. W. 581.

Minnesota. *Johnson v. Eklund*, 72 Minn. 195, 75 N. W. 14.

Nebraska. *Wagner v. Cheney*, 16 Neb. 202, 20 N. W. 222.

New Jersey. *Grigg v. Landis*, 21 N. J. Eq. 494.

In Washington full effect is given to such provision. *Lockerby v. Amon*, 64 Wash. 24, 35 L. R. A. (N.S.) 1064, 116 Pac. 463.

⁹ **Leader Co. v. Little Rock Ry. & Electric Co.**, 120 Ark. 221, 179 S. W. 358; *Bewick Lumber Co. v. Hall*, 94 Ga. 539, 21 S. E. 154; *Thomassen v. De Goey*, 133 Ia. 278, 119 Am. St. Rep. 605, 110 N. W. 581 (under Iowa code § 3046); *Pond Creek Coal Co. v. Lester*, 171 Ky. 811, 188 S. W. 907 (under Kentucky constitution § 244 and Kentucky statutes §§ 1350 and 2738r).

¹⁰ *Thomassen v. De Goey*, 133 Ia. 278, 119 Am. St. Rep. 605, 110 N. W. 581 (under Iowa code § 3046).

¹¹ Assignable under Kentucky constitution § 244 and Kentucky statutes §§ 1350 and 2738r. *Pond Creek Coal Co. v. Lester*, 171 Ky. 811, 188 S. W. 907.

that a claim for wages could not be transferred and that it must be receipted for personally.¹²

A provision which forbids assignment is intended solely for the benefit of the creditor whose interests may be affected by assignment. If he assents to the assignment, no one can object.¹³ The original debtor may consent to such assignment, although he has by contract with another relieved himself from liability. Thus an insurance company which has reinsured its risks may consent to the assignment of a policy.¹⁴ The receipt of rent by the lessor from an assignee of the lessee operates as a waiver of a covenant against assignment.¹⁵ If the debtor receives notice of the assignment without objecting thereto, it is said that he thereby consents.¹⁶

While such provision prevents the assignment of a contract while executory, it does not prevent a party who has performed, from assigning his right to receive compensation,¹⁷ nor does it prevent an assignment of the right, on breach of such contract, to recover money paid thereunder.¹⁸ Such provision does not prevent assignment as collateral security.¹⁹ So a provision in an

¹² *Barringer v. Bes Line Construction Co.*, 23 Okla. 131, 21 L. R. A. (N.S.) 597, 99 Pac. 775 (under Wilson's statutes [Oklahoma] § 4163).

¹³ *California*. *Norton v. Whitehead*, 84 Cal. 263, 18 Am. St. Rep. 172, 24 Pac. 154.

Iowa. *Wilson v. Reuter*, 29 Ia. 176.

Kentucky. *Meyer Brothers v. Gaertner*, 106 Ky. 481 [sub nomine, *Louisville Trust Co. v. Gaertner*, 45 L. R. A. 513, 50 S. W. 971].

Massachusetts. *Brierly v. Equitable Aid Union*, 170 Mass. 218, 64 Am. St. Rep. 297, 48 N. E. 1090; *Staples v. Somerville*, 176 Mass. 237, 57 N. E. 380.

Minnesota. *Cohen v. Todd*, 130 Minn. 227 L. R. A. 1915E, 846, 153 N. W. 531.

New York. *Fortunato v. Patten*, 147 N. Y. 277, 41 N. E. 572; *Spencer v. Myers*, 150 N. Y. 260, 55 Am. St. Rep. 675, 34 L. R. A. 175, 44 N. E. 942.

¹⁴ *Faneuil Hall Ins. Co. v. Ins. Co.*, 153 Mass. 63, 10 L. R. A. 423, 26 N. E. 244.

¹⁵ *California*. *Randal v. Tatum*, 98 Cal. 390, 33 Pac. 433.

Iowa. *Colton v. Gorham*, 72 Ia. 324, 33 N. W. 76.

Massachusetts. *Porter v. Merrill*, 124 Mass. 534.

Minnesota. *Cohen v. Todd*, 130 Minn. 227, L. R. A. 1915E, 846, 153 N. W. 531.

New York. *Murray v. Harway*, 56 N. Y. 337.

Washington. *Field v. Copping*, 65 Wash. 359, 36 L. R. A. (N.S.) 488, 118 Pac. 329.

¹⁶ *Staples v. Somerville*, 176 Mass. 237, 57 N. E. 380; *Burnett v. Jersey City*, 31 N. J. Eq. 341; *Turner v. Wells*, 64 N. J. L. 269, 45 Atl. 641.

¹⁷ *Bank of Harlem v. Bayonne*, 48 N. J. Eq. 246, 21 Atl. 478.

Contra, *Omaha v. Standard Oil Co.*, 55 Neb. 337, 75 N. W. 859.

¹⁸ *Shivley v. Water Co.*, 99 Cal. 259, 33 Pac. 848.

¹⁹ *Butler v. Rockwell*, 14 Colo. 125, 23 Pac. 462; *Crouse v. Mitchell*, 130 Mich. 347, 97 Am. St. Rep. 479, 90 N. W. 32; *Aetna Insurance Co. v. Smith*, 117 Miss. 327 L. R. A. 1918D, 1158, 78 So. 289.

insurance policy forbidding assignment without proof of insurable interest, does not forbid assignment to a creditor not absolutely but merely as collateral security.²⁰ If an insurance company issues a policy to the owners of the property insured, loss payable to the mortgagee as his interest may appear, a clause forbidding assignment does not prevent the mortgagee from assigning the debt and his interest under the policy to another.²¹ A contract for perpetual insurance, notice of assignment of interest to be given to the company in thirty days after the assignment, "to be entered and allowed," does not give the insurance company the right to forfeit the policy for assignment of which due notice is given, unless the character of the assignee is such as to increase the risk, or some other good cause for objecting to the transfer exists.²²

A provision to the effect that a gratuity fund, set aside for the families of the deceased members of a stock exchange, or a produce exchange, was a gift and not a property right which could be pledged, prevents an assignment of an interest in such fund to secure debts not related thereto; but it does not prevent an assignment for the purpose of raising money to keep such interest in force.²³

A provision restricting a right of action to promisee does not prevent garnishment of such claim.²⁴

§ 2260. Statutory prohibition of assignment. In some jurisdictions certain contracts are specifically forbidden to be assigned either at all, or for certain specified purposes. A federal statute provides that contracts with the United States can not be assigned, and that claims against the United States can not be assigned until a warrant has been given for the claim.¹ While this statute was at first held to make assignments of such contracts invalid, as between the assignor and assignee,² it is now held that the legislative intent was merely to protect the United States and its officers from being compelled to recognize assignments. Accordingly, if the proper

²⁰ *Curtiss v. Ins. Co.*, 90 Cal. 245, 25 Am. St. Rep. 114, 27 Pac. 211; *Aetna Insurance Co. v. Smith*, 117 Miss. 327, L. R. A. 1918D, 1158, 78 So. 289.

²¹ *Whiting v. Burkhardt* 178 Mass. 535, 86 Am. St. Rep. 503, 52 L. R. A. 788, 60 N. E. 1.

²² *Marshall v. Insurance Co.*, 176 Pa. St. 628, 34 L. R. A. 159, 35 Atl. 204.

²³ *Holmes v. Seaman*, 184 N. Y. 486, 77 N. E. 724.

²⁴ *Elliott v. Aetna Life Ins. Co.*, 100 Neb. 833, L. R. A. 1917C, 1061, 161 N. W. 579.

¹ R. S. U. S. §§ 3477, 3737.

² *Spofford v. Kirk*, 97 U. S. 484, 24 L. ed. 1032.

federal officials acquiesce in the assignment no one else has any right to complain.³ Such assignment is valid as between the assignor and the assignee.⁴ Claims against the United States can not be assigned if the United States does not assent thereto.⁵ If the United States does not assent, claims due from it can not be reached by attachment, or by the appointment of a receiver of the particular claim.⁶ A disbursing officer has no power to bind the United States by recognizing an assignment, and his recognition gives it no validity.⁷ An attorney can not enforce a lien upon a claim which he has recovered for his client.⁸

Such statute does not apply to a subcontract made by a government contractor with a third person to enable the former to perform his contract with the government,⁹ nor to an assignment by a deputy marshal of his claims against the marshal.¹⁰ This prohibition does not apply to claims against officers, as to a claim against a postoffice inspector for money seized by him but not then

³ *United States v. Goodman v. Niblack*, 102 U. S. 556, 26 L. ed. 229; *Hobbs v. McLean*, 117 U. S. 567, 29 L. ed. 940; *Freedman's, etc., Co. v. Shepherd*, 127 U. S. 494, 32 L. ed. 163; *Lay v. Lay*, 248 U. S. 24, 63 L. ed. 23; *Dulaney v. Scudder*, 94 Fed. 6, 36 C. C. A. 52; *Hegness v. Chilberg*, 224 Fed. 28, 139 C. C. A. 492; *Lopey v. United States*, 24 Ct. Cl. 84, 2 L. R. A. 571.

Massachusetts. Jernegan v. Osborn, 155 Mass. 207, 29 N. E. 520; *Thayer v. Pressey*, 175 Mass. 225, 56 N. E. 5.

Mississippi. Fewell v. Surety Co., 80 Miss. 782, 92 Am. St. Rep. 625, 28 So. 755.

New York. York v. Conde, 147 N. Y. 486, 42 N. E. 193.

Virginia. Hawes v. Wm. R. Trigg Co., 110 Va. 165, 65 S. E. 538.

⁴ *Nutt v. Knut*, 200 U. S. 12, 50 L. ed. 348 [affirming, *Knut v. Nutt*, 83 Miss. 365, 102 Am. St. Rep. 452, 35 So. 686]; *Lay v. Lay*, 248 U. S. 24, 63 L. ed. 23; *Dexter v. Meigs*, 47 N. J. Eq. 488, 21 Atl. 114; *In re Hone*, 153 N. Y. 522, 47 N. E. 798.

The statute does not apply where the work was finished by the creditors of

the contractor, and one of the creditors secured all the money and applied it to his claim; other creditors garnished. *Fewell v. Surety Co.*, 80 Miss. 782, 28 So. 755.

⁵ *Nutt v. Knut*, 200 U. S. 12, 50 L. ed. 348 [affirming, *Knut v. Nutt*, 83 Miss. 365, 102 Am. St. Rep. 452, 35 So. 686]; *United States v. Illinois Surety Co.*, 226 Fed. 653, 141 C. C. A. 409; *John Shillito Co. v. McClung*, 51 Fed. 868, 2 C. C. A. 526 (claim for duties).

⁶ *Howes v. United States*, 24 Ct. Cl. 170, 5 L. R. A. 66.

⁷ *Greenville Savings Bank v. Lawrence*, 76 Fed. 545, 22 C. C. A. 646, U. S. Rev. St., § 3477; *Harris v. United States*, 27 Ct. Cl. 177; *Hitchcock v. United States*, 27 Ct. Cl. 185.

⁸ *Nutt v. Knut*, 200 U. S. 12, 50 L. ed. 348 [affirming, *Knut v. Nutt*, 83 Miss. 365, 102 Am. St. Rep. 452, 35 So. 686].

⁹ *United States v. Farley*, 91 Fed. 474.

¹⁰ *Wallace v. Douglas*, 116 N. Car. 659, 21 S. E. 387 (this not being a claim against the United States).

turned over to the postmaster-general,¹¹ or drafts of deputies accepted by a marshal;¹² nor does it apply to a pledge of a crop of sugar including the bounty;¹³ nor to a transfer by one partner to another of all the partnership property including such claim;¹⁴ nor to an assignment of a claim against the United States to a receiver ordered by a court of chancery;¹⁵ nor to the purchase of a claim sold in bankruptcy.¹⁶ Where specified forms of assignment are required, informality in assignment, though "absolutely void" by statute, does not invalidate such assignment as between the parties, but the assignee may enforce his lien after payment by the government to the assignor.¹⁷

Some statutes forbid assigning a claim to a non-resident to enable him to sue in another state and thus avoid local exemption laws. In the absence of statute this can be done and the debtor has no right of action against the assignor.¹⁸ An attachment suit already begun in another state may be assigned to a resident of such state on the debtor's making an assignment in insolvency, and thus an injunction against the prosecution of the attachment suit may be prevented.¹⁹ Statutes forbidding assignment of claims to residents of other states to evade exemption laws are valid.²⁰ They apply to a claim assigned in good faith before the act is passed, but assigned by the assignee to a third person to evade the act.²¹ They apply to a foreign corporation doing business and extending credit within the state, which sues in another state to enforce its claim.²² In the absence of statute in the state in which suit is brought, such statutes forbidding assignment have no extra

¹¹ *United States v. Ferguson*, 78 Fed. 103.

¹² *Douglas v. Wallace*, 161 U. S. 346, 40 L. ed. 727.

¹³ *Barrow v. Milliken*, 74 Fed. 612, 20 C. C. A. 559.

¹⁴ *Jernegan v. Osborn*, 155 Mass. 207, 39 N. E. 520.

¹⁵ *Price v. Forrest*, 173 U. S. 410, 43 L. ed. 749; *Redfield v. United States*, 27 Ct. Cl. 393; *Forrest v. Price*, 52 N. J. Eq. 16, 29 Atl. 215; *Price v. Forrest*, 54 N. J. Eq. 669, 35 Atl. 1075.

¹⁶ *McKay v. United States*, 27 Ct. Cl. 422.

¹⁷ *York v. Conde*, 147 N. Y. 486, 42 N. E. 193, U. S. R. S. § 3477.

¹⁸ *Horwell v. Sharp*, 85 Ga. 124, 21 Am. St. Rep. 149, 8 L. R. A. 514, 11 S. E. 561.

¹⁹ *Proctor v. Bank*, 152 Mass. 223, 9 L. R. A. 122, 25 N. E. 81.

²⁰ *Gordon v. Wageman*, 77 Neb. 185, 108 N. W. 1067; *St. Louis & S. F. R. Co. v. Crews*, 51 Okla. 144, 151 Pac. 879; *Sweeny v. Hunter*, 145 Pa. St. 363, 14 L. R. A. 594, 22 Atl. 653.

²¹ *Bishop v. Middleton*, 43 Neb. 10, 26 L. R. A. 445, 61 N. W. 129.

²² *Singer Mfg. Co. v. Fleming*, 39 Neb. 679, 42 Am. St. Rep. 613, 58 N. W. 226.

territorial operation. The efficient remedy is either to make such conduct criminal,²³ or to provide that in such cases the debtor may recover from the assignor the amount collected from the debtor by the action in the state to which the debt has been sent for collection.²⁴

Under some statutes an assignment of future wages is invalid.²⁵ Such statute does not prevent the assignment, by a contractor, of money due under a contract which he has performed substantially in full.²⁶ Under some statutes an assignment of future wages is void except for necessities.²⁷ Under other statutes an assignment of future wages or salary by a married man is void, unless such assignment is in writing and signed by his wife as well as by himself.²⁸ An assignment of future wages may be required to be in writing and may be limited to a fixed period of time.²⁹

An attorney may be forbidden to buy a right of action.³⁰

§ 2261. Partial assignment. A creditor can not at law assign a part of his claim against his debtor to a third person so as to subject such debtor to two or more actions instead of one, without the consent of such debtor.¹ The custom of merchants can not

²³ *State v. Dittmar*, 120 Ind. 54, 388, 22 N. E. 88, 22 N. E. 299.

²⁴ *O'Connor v. Walter*, 37 Neb. 267, 40 Am. St. Rep. 486, 23 L. R. A. 650, 55 N. W. 867; *Bishop v. Middleton*, 43 Neb. 10, 26 L. R. A. 445, 61 N. W. 129; *Gordon v. Wageman*, 77 Neb. 185, 108 N. W. 1067.

²⁵ *Heller v. Lutz*, 254 Mo. 704, L. R. A. 1915B, 191, 164 S. W. 123.

A statute which renders invalid notes secured by assignment of wages which does not show such security on its face, does not apply to an assignment of wages without the transfer of a note. *Monarch Discount Co. v. Chesapeake & O. Ry. Co.*, 285 Ill. 233, 120 N. E. 743.

It may be invalid for more than a certain period prescribed by statute. *McCallum v. Simplex Electrical Co.*, 197 Mass. 388, 83 N. E. 1108.

²⁶ *Jump v. Bernier*, 221 Mass. 241, 108 N. E. 1027.

²⁷ *Brown v. Long*, 192 Ala. 72, 68 So.

324. (Under such a statute, an assignment "for value received" is inoperative.)

²⁸ *Porte v. Chicago & N. W. Ry. Co.*, 162 Wis. 446, 156 N. W. 469.

²⁹ *McCallum v. Simplex Electrical Co.*, 197 Mass. 388, 83 N. E. 1108.

³⁰ *State v. Nix*, 135 La. 811, 66 So. 230 (see, however, *Bluefields S. S. Co. v. Lala Ferreras Cangelosi S. S. Co.*, 133 La. 424, 63 So. 96).

¹ *United States. Mandeville v. Welch*, 18 U. S. (5 Wheat.) 277, 5 L. ed. 87; *Sheatz v. Markley*, 249 Fed. 315; *John A. Schmitt's Sons v. Shadrach*, 251 Fed. 874.

Alabama. *Kansas City, etc., Ry. v. Robertson*, 109 Ala. 296, 19 So. 432.

California. *Clancy v. Plover*, 107 Cal. 272, 40 Pac. 394; *Home Ins. Co. v. Ry.*, 19 Colo. 46, 34 Pac. 281.

Colorado. *Chicago, B. & Q. R. Co. v. Provolt*, 42 Colo. 103, 16 L. R. A. (N.S.) 587, 93 Pac. 1126; *Welch v. Mayer*, 4 Colo. App. 440, 36 Pac. 613;

authorize partial assignment of a bill of exchange,² and such custom was said to be void.³ A partial assignment, though champertous, can not defeat the right of the original creditor or claimant.⁴ The rule which forbids partial assignment at law prevents the use of a partial assignment as a set-off as well as a cause of action.⁵

The rule against partial assignment is solely for the benefit of the debtor, and is intended to prevent him from being exposed to two separate suits on one contract. Accordingly, a partial assignment is valid if it makes assignor and assignee co-owners in the claim assigned, and they both join in one action to enforce the entire claim.⁶ So if the debtor assents to a partial assignment it is as valid as a total assignment would have been. No one can thereafter object to the assignment as partial,⁷ neither the debtor,⁸ nor the assignor,⁹ nor the attaching creditors of the assignor.¹⁰

Snedden v. Harmes, 5 Colo. App. 477, 39 Pac. 68.

Georgia. *Rivers v. Wright*, 117 Ga. 81, 43 S. E. 499.

Illinois. *Chicago Ry. v. Nichols*, 57 Ill. 464.

Kansas. *German Fire Ins. Co. v. Bulene*, 51 Kan. 764, 33 Pac. 467.

Louisiana. *Red River Valley Bank & Trust Co. v. Louisiana Petrolithic Construction Co.*, 142 La. 838, 77 So. 763.

Maine. *Getchell v. Maney*, 69 Me. 442.

Massachusetts. *Gibson v. Cooke*, 37 Mass. (20 Pick.) 15, 32 Am. Dec. 194.

Missouri. *Burnett v. Crandall*, 63 Mo. 410.

Nebraska. *Hopkins v. Washington County*, 56 Neb. 596, 77 N. W. 53.

Ohio. *Stanbery v. Smythe*, 13 O. S. 495; *P. C. C. & St. L. Ry. Co. v. Volkert*, 58 O. S. 362, 50 N. E. 924; *Pennsylvania Co. v. Thatcher*, 78 O. S. 175, 85 N. E. 55.

Tennessee. *Peters v. Goetz*, 136 Tenn. 257, 188 S. W. 1144.

Wisconsin. *Skobis v. Ferge*, 102 Wis. 122, 78 N. W. 426; *Cook v. Menasha*, 103 Wis. 6, 79 N. W. 26; *Dugan v. Knapp*, 105 Wis. 320, 81 N. W. 412.

²*Hawkins v. Cardee*, 1 Salk. 65, Carth. 466, 1 Ld. Raym. 360.

³*Hawkins v. Cardee*, 1 Salk. 65, Carth. 466, 1 Ld. Raym. 360.

In the report 1 Lord Raymond, it is said that this is not the custom of merchants and that the court will take judicial notice that the custom is not as pleaded.

⁴*Prosky v. Clark*, 32 Nev. 441, 35 L. R. A. (N.S.) 512, 109 Pac. 793.

⁵*Wamsley v. Ward*, 61 W. Va. 65, 55 S. E. 998.

⁶*Evans v. Land & Coal Co.*, 80 Fed. 433, 25 C. C. A. 531; *Schilling v. Mullen*, 55 Minn. 122, 43 Am. St. Rep. 475, 56 N. W. 586; *Whittemore v. Oil Co.*, 124 N. Y. 565, 21 Am. St. Rep. 708, 27 N. F. 244; *Ramsey v. Johnson*, 8 Wyo. 476, 80 Am. St. Rep. 948, 58 Pac. 755.

⁷*United States. Methven v. Power Co.*, 66 Fed. 113, 13 C. C. A. 362.

Indiana. *Manchester Ins. Co. v. Glenn*, 13 Ind. App. 365, 55 Am. St. Rep. 225, 40 N. E. 926, 41 N. E. 847.

Iowa. *Des Moines County v. Hinkley*, 62 Ia. 637, 17 N. W. 915.

Massachusetts. *Lannan v. Smith*, 73 Mass. (7 Gray) 150.

Washington. *Grippin v. Benham*, 5 Wash. 589, 32 Pac. 555.

⁸*Manufacturing Co. v. Price*, 49 W. Va. 432, 38 S. E. 526.

⁹*Potter v. Banking Co.*, 59 Kan. 455, 53 Pac. 520.

¹⁰*Burditt v. Porter*, 63 Vt. 296, 25 Am. St. Rep. 763, 21 Atl. 955.

In equity, however, it is always possible to make all the parties in interest parties to the action and have their rights determined thereby. Accordingly, the reason which the common law had for prohibiting partial assignments does not exist in equity, and partial assignments are enforced, even if the debtor does not consent thereto.¹¹ Neither the debtor,¹² subsequent assignees,¹³ nor attaching creditors,¹⁴ can object in equity to an assignment as partial. Even if separate actions are brought by the several partial assignees, the court may consolidate them and the defendant debtor has no ground of complaint except as to costs made before consolidation.¹⁵ An assignment of a note carries a proportionate interest in a mortgage given to secure notes of which this is one.¹⁶ If the debtor has paid the amount of the debt to the assignor before notice, and the fund is in the hands of the receiver of the assignor, equity will permit the partial assignee to file a bill to enforce such assignment.¹⁷

Equitable relief is not given, however, if the sole ground therefor is that a partial assignment of a legal claim has been made.¹⁸ This view is sometimes entertained on the theory that the legal

¹¹ *United States*. *Addison v. Cox*, L. R. 8 Ch. 76; *Trist v. Child*, 88 U. S. (21 Wall.) 441, 22 L. ed. 623; *The Emnbank*, 72 Fed. 610; *Dulles v. H. D. Crippen Mfg. Co.*, 156 Fed. 706; *In re Macauley*, 158 Fed. 322.

California. *Grain v. Aldrich*, 38 Cal. 514, 99 Am. Dec. 423.

Georgia. *Rivers v. Wright*, 117 Ga. 81, 43 S. E. 499.

Illinois. *Warren v. Bank*, 149 Ill. 9, 25 L. R. A. 746, 38 N. E. 122.

Minnesota. *Dean v. Ry.*, 53 Minn. 504, 55 N. W. 628.

Nebraska. *Guthrie v. Treat*, 66 Neb. 415, 103 Am. St. Rep. 718, 92 N. W. 595.

New Jersey. *Lanigan v. Bradley, etc.*, Co., 50 N. J. Eq. 201, 24 Atl. 505; *Cogan v. Conover Mfg. Co.*, 69 N. J. Eq. 809, 115 Am. St. Rep. 629, 64 Atl. 973.

New York. *Fairbanks v. Sargent*, 117 N. Y. 320, 6 L. R. A. 475, 22 N. E. 1039; *Chambers v. Lancaster*, 160 N. Y. 342, 54 N. E. 707.

Ohio. *Pittsburg, etc., Ry. v. Volkert*,

58 O. S. 362, 50 N. E. 924; *Robbins v. Klein*, 60 O. S. 199, 54 N. E. 94.

Oregon. *McDaniel v. Maxwell*, 21 Or. 202, 28 Am. St. Rep. 740, 27 Pac. 952.

Texas. *Harris County v. Campbell*, 68 Tex. 22, 2 Am. St. Rep. 467, 3 S. W. 243.

West Virginia. *Wamsley v. Ward*, 61 W. Va. 65, 55 S. E. 998.

¹² *Pittsburg, etc., Ry. v. Volkert*, 58 O. S. 362, 50 N. E. 924.

¹³ *Fairbanks v. Sargent*, 117 N. Y. 320, 6 L. R. A. 475, 22 N. E. 1039.

¹⁴ *Warren v. Bank*, 149 Ill. 9, 25 L. R. A. 746, 38 N. E. 122; *Robbins v. Klein*, 60 O. S. 199, 54 N. E. 94; *McDaniel v. Maxwell*, 21 Or. 202, 28 Am. St. Rep. 740, 27 Pac. 952.

¹⁵ *Avery v. Popper*, 92 Tex. 337, 71 Am. St. Rep. 849, 48 S. W. 572.

¹⁶ *Guthrie v. Treat*, 66 Neb. 415, 103 Am. St. Rep. 718, 92 N. W. 595.

¹⁷ *Fourth Street Bank v. Yardley*, 165 U. S. 634, 41 L. ed. 855.

¹⁸ *Gaugler v. Chicago, Milwaukee & St. Paul Ry.*, 197 Fed. 79; *Home Ins.*

remedy of an action in the name of the assignor is adequate;¹⁹ and sometimes on the theory that partial assignment is not recognized in equity.²⁰ The right of the partial assignee to sue in equity may depend, in part, on whether the debtor denies the existence or amount of the debt; whether he does not deny the debt, but does not seek relief in equity, or whether he admits the debt and seeks relief in equity. If the debtor denies the existence or amount of the obligation, the enforcement of the right of the partial assignee in equity will deprive the debtor of a trial by a jury at law.²¹ If the debtor does not deny the existence or amount of the debt on the one hand, or assent to relief in equity on the other,²² as where he has paid the entire debt to the assignor with knowledge of the partial assignment,²³ equity will grant relief. If the debtor does not deny the existence or extent of his liability, and is not a party to the dispute over the division of the funds, equity may give relief.²⁴ If the debtor assents to the proceeding in equity and asks the court to determine the rights of the claimants, no objection can be made to the enforcement of partial assignment in equity.²⁵ Under some codes of procedure the partial assignee may be heard in a proceeding in which the debtor and the assignor are parties. Under such procedure the objections which existed to partial assignment at common law, no longer exist; and such a proceeding affords complete relief.²⁶ There has been some difference of opinion as to whether such a proceeding was to be treated as an action at law or a suit in equity.²⁷ If the necessary parties are brought

Co. v. Ry., 19 Colo. 46, 34 Pac. 281 (failure to allege any special grounds for relief in equity); *Burnett v. Crandall*, 63 Mo. 410; *Hopkins v. Washington County*, 56 Neb. 596; 77 N. W. 53; (failure to allege special facts requiring equitable relief; action though under the code, treated as an action at law by the partial assignee).

¹⁹ *Gaugler v. Chicago, Milwaukee & St. Paul Ry.*, 197 Fed. 79.

²⁰ *Burnett v. Crandall*, 63 Mo. 410. This rule is applied to contracts of municipal corporations. *Philadelphia's Appeal*, 86 Pa. St. 179.

²¹ *Gaugler v. Chicago, Milwaukee & St. Paul Ry.*, 197 Fed. 79.

²² *Moody v. Kyle*, 34 Miss. 506.

²³ *Hutchinson v. Simon*, 57 Miss. 628; *Field v. New York*, 6 N. Y. 179, 57 Am. Dec. 435; *Dickerson v. Spokane*, 26 Wash. 292, 66 Pac. 381.

²⁴ *Clark v. Gillespie*, 70 Tex. 513, 8 S. W. 121.

²⁵ *James v. Newton*, 142 Mass. 366, 56 Am. Rep. 692, 8 N. E. 122.

²⁶ *Delaware County v. Diebold Safe and Lock Co.*, 133 U. S. 473, 33 L. ed. 674 (under Indiana code); *Western, etc., Ry. v. Union Investment Co.*, 128 Ga. 74, 57 S. E. 100; *Schilling v. Mullen*, 55 Minn. 122, 43 Am. St. Rep. 475, 56 N. W. 586.

²⁷ In *Risley v. Phenix Bank*, 83 N. Y. 318, 38 Am. Rep. 421, which was affirmed in *Phoenix Bank v. Risley*,

in, and the debtor is given a jury trial on the question of his original liability, further discussion as to the name to be given to such a proceeding, or as to the class of remedies formerly given under an obsolete classification, which it most nearly resembles, may be interesting but not profitable.

According to the weight of authority, if due notice of a partial assignment has been given to the debtor, the assignment is complete; and the debtor can not discharge his liability to the assignee by paying the entire amount of the debt to the original creditor.²⁸ The debtor can not, however, as against the creditor, withhold the amount named in a partial assignment which the debtor has not paid and which he has not accepted in writing.²⁹ In some jurisdictions it seems to be held that an order does not operate as an assignment until it has been accepted by the debtor.³⁰

§ 2262. Assignment does not discharge assignor. The assignor can not, by assigning the benefits of his contract, relieve himself

111 U. S. 125, 28 L. ed. 374, a jury trial was had. No objection to the procedure was made. The case is explained as "a suit on the equity side of the court," in *Chambers v. Lancaster*, 160 N. Y. 342, 54 N. E. 707. In *Crouch v. Miller*, 141 N. Y. 495, 36 N. E. 394, there was no dispute as to the existence or amount of the debt. The chief question was as to notice to the debtor. The case was tried to a jury, and a verdict was directed on the theory that all material facts were conceded or undisputed. No question was raised as to whether the case was at law or in equity..

In *Chambers v. Lancaster*, 160 N. Y. 342, 54 N. E. 707, the debtor denied all liability on the original contract. The evidence established waiver by him of the breach by the assignor, and an express assent on his part to the partial assignment. The case seems to have been treated as a suit in equity. No exception to the procedure appears to have been taken.

In *National Fire Ins. Co. v. Denver & Rio Grande Ry.*, 44 Utah 26, 137 Pac. 653, an action at law was brought by

the partial assignee in his own name. No specific objection was made to such procedure. It was held that such objection was not made by a general demurrer, and that accordingly it was waived.

²⁸ *England*. *Brice v. Bannister*, 3 Q. B. D. 569.

Georgia. *Brown v. Southern Ry. Co.*, 140 Ga. 539, 79 S. E. 152.

Mississippi. *A. K. McInnis Lumber Co. v. Rather*, 111 Miss. 55, 71 So. 264.

New Jersey. *Germania Building & Loan Association v. Realty Co.*, 82 N. J. Eq. 49, 88 Atl. 305.

Ohio. *P. C. C. & St. L. Ry. Co. v. Volkert*, 58 O. S. 362, 50 N. E. 924.

Tennessee. *Peters v. Goetz*, 136 Tenn. 257, 188 S. W. 1144. (The real question here was as to priority of notice.)

²⁹ *Usher v. Seaboard Air Line Ry.*, 125 Ga. 809, 54 S. E. 704.

³⁰ *Emerson-Brantingham Co. v. Lyons*, 102 Kan. 733, 172 Pac. 513; *Smith v. Plate Glass Co.*, 111 Md. 696 [memorandum opinion], 77 Atl. 264; *Burditt v. Porter*, 63 Vt. 296, 25 Am. St. Rep. 763, 21 Atl. 955.

from his liability thereon.¹ Hence, the mere fact of assignment can not be treated as a breach by the assignor.² Thus if an assignee of a lease expressly assumes the obligations and liabilities arising under such lease in consideration of such assignment, and thereby makes himself personally liable, his subsequent assignment to another does not discharge such liability.³ The assent of the lessor to the assignment and his receipt of rent from the assignee do not operate as a discharge of the lessee from liability.⁴ If, on the other hand, there has been no assumption of personal liability, assignment of the lease relieves from liability for rent.⁵ Only a novation can operate as a discharge of the original party to the contract who has assigned his interest.⁶

In some jurisdictions, however, this rule must be qualified by the statement that the assignor becomes the surety for the assignee and ceases to be liable to the adversary party in the first instance.⁷

§ 2263. Assignment may impose personal liability on assignee.

The assignee may incur a personal liability to the adversary party to the contract by expressly agreeing in the contract of assignment to perform terms of the contract for which his assignor was originally liable.¹ This is simply a particular example of the broader question whether one for whose benefit a contract is made but who

¹ **United States.** *Illinois Cudahy Packing Co. v. Kansas City Soap Co.*, 247 Fed. 556.

California. *Cutting Packing Co. v. Packers' Exchange*, 86 Cal. 574, 21 Am. St. Rep. 63, 10 L. R. A. 369, 25 Pac. 52; *Ferguson v. McBean*, 91 Cal. 63, 14 L. R. A. 65, 27 Pac. 518.

Illinois. *Springer v. De Wolf*, 194 Ill. 218, 88 Am. St. Rep. 155, 56 L. R. A. 465, 62 N. E. 542.

Maryland. *Tarr v. Veasey*, 125 Md. 190, 93 Atl. 423.

Oregon. *Corvallis & A. R. R. Co. v. Portland, E. & E. Ry. Co.*, 84 Or. 524, 163 Pac. 1173.

Rhode Island. *Granite Building Corporation v. Rubin*, 40 R. I. 208, L. R. A. 1917D, 845, 100 Atl. 310.

² *Alden v. Improvement Co.*, 57 Neb. 67, 77 N. W. 369.

³ *Springer v. De Wolf*, 194 Ill. 218.

88 Am. St. Rep. 155, 56 L. R. A. 465, 62 N. E. 542; *Granite Building Corporation v. Rubin*, 40 R. I. 208, L. R. A. 1917D, 845, 100 Atl. 310.

⁴ *Granite Building Corporation v. Rubin*, 40 R. I. 208, L. R. A. 1917D, 845, 100 Atl. 310.

⁵ *Consolidated Coal Co. v. Peers*, 166 Ill. 361, 38 L. R. A. 624, 46 N. E. 1105; *Cohen v. Todd*, 130 Minn. 227, L. R. A. 1915E, 846, 153 N. W. 531.

⁶ *Illinois Cudahy Packing Co. v. Kansas City Soap Co.*, 247 Fed. 556.

See ch. LXXV.

⁷ See reasoning in *Cutting Packing Co. v. Packers' Exchange*, 86 Cal. 574, 21 Am. St. Rep. 63, 10 L. R. A. 369, 25 Pac. 52. See § 2411.

¹ **Arkansas.** *National Trust & Credit Co. v. Polk*, 123 Ark. 24, 183 S. W. 195.

California. *McKenzie v. Hodgkin*, 126 Cal. 591, 59 Pac. 36.

is not a party thereto can enforce it.² Thus an assignee of a lease may become personally liable on its covenants,³ and the assignee of a bid at an execution sale may make himself personally liable thereon.⁴ A contract by which A agrees to pay B for goods when delivered may be assigned under an agreement by which the assignee incurs a personal liability to C when such goods are delivered.⁵ If the assignee fails to perform, the adversary party may enforce the original contract against the assignor, and the assignor may then compel the assignee to reimburse him for such loss.⁶ If the original contract imposed no liability on the assignor, the assignee incurs no personal liability by his express assumption thereof.⁷

The assignment of an interest under a contract does not of itself impose any liability upon the assignee.⁸ The assignment of a lease does not, in the absence of a special agreement for assuming liability thereunder, impose any liability upon the assignee, which

Minnesota. P. M. Hennessy Construction Co. v. Hart, 141 Minn. 449, 170 N. W. 597.

Montana. Bach v. Mining Co., 16 Mont. 467, 41 Pac. 75.

North Carolina. Atlantic & N. C. R. Co. v. Atlantic & N. C. Co., 147 N. Car. 368, 23 L. R. A. (N.S.) 223, 61 S. E. 185.

² See ch LX.

³ Bonetti v. Treat, 91 Cal. 223, 14 L. R. A. 151, 27 Pac. 612; Woodland Oil Co. v. Crawford, 55 O. S. 161, 34 L. R. A. 62, 44 N. E. 1003.

⁴ Archer v. Archer, 155 N. Y. 415, 63 Am. St. Rep. 688, 50 N. E. 55.

⁵ Atlantic & N. C. R. Co. v. Atlantic & N. C. Co., 147 N. Car. 368, 23 L. R. A. (N.S.) 223, 61 S. E. 185.

⁶ Atlantic & N. C. R. Co. v. Atlantic & N. C. Co., 147 N. Car. 368, 23 L. R. A. (N.S.) 223, 61 S. E. 185; Corvallis & Alsea River Ry. v. Portland, E. & E. Ry., 84 Or. 524, 163 Pac. 1173.

⁷ Rockwell v. Edgcomb, 72 Wash. 694, 45 L. R. A. (N.S.) 661, 131 Pac. 191.

⁸ Illinois. Springer v. DeWolf, 194 Ill. 218, 88 Am. St. Rep. 155, 56 L. R. A. 465, 62 N. E. 542; Lunt v. Lorscheider, 285 Ill. 589, 121 N. E. 237.

Iowa. Tolerton v. Anglo-Californian Bank, 112 Ia. 706, 50 L. R. A. 777, 84 N. W. 930.

Minnesota. Pioneer Loan & Land Co. v. Cowden, 128 Minn. 307, 150 N. W. 903.

Nebraska. Gammel Book Co. v. Paine, 75 Neb. 683, 106 N. W. 777.

Pennsylvania. Brown v. German-American Title & Trust Co., 174 Pa. St. 443, 34 Atl. 335.

Vermont. Smith v. Kellogg, 46 Vt. 560.

"An assignee does not become liable on an executory contract of the assignor unless by his contract he assumes such liability, and the mere assignment of an interest under a contract will not render the assignee personally liable for moneys thereafter to become due. An assignment of money due or to become due under an executory contract is not an assignment of the contract, and the assignee is not bound to perform it." Lunt v. Lorscheider, 285 Ill. 589, 121 N. E. 237.

Language is used in Corvallis & Alsea River Ry. v. Portland, E. & E. Ry., 84 Or. 524, 163 Pac. 1173, which implies that the assignment of

lasts beyond his assignment of such lease to a third person.⁹ The mere assignment of a contract for the sale of certain realty made by a vendee in possession who transfers possession to the assignee, does not impose any personal liability upon the assignee which the original vendor can enforce.¹⁰ It is therefore held that, conversely, the assignee can not have specific performance against the vendor, since the assignee is not bound.¹¹ If the contract which is assigned is executory on the part of the assignor, and the assignee undertakes performance with the assent of the adversary party, such findings justify a finding that the assignee has incurred a personal liability,¹² even though the assignment would not, of itself, have imposed such liability.¹³ It has been held that the sale of a railway and an assignment of its contracts impose on the purchaser the duty of performing a contract whereby the assignor had agreed to construct an extension of its tracks.¹⁴

§ 2264. Assignment passes all assignor's rights—General principles. If the assignment purports to pass all of the rights of the assignor, the assignee acquires all the rights of his assignor under the contract assigned to him.¹ After a total assignment, the assignor has no interest in the contract or property right which he

an executory contract imposes a personal liability upon the assignee without any agreement on his part to assume such liability.

⁹ *Cohen v. Todd*, 130 Minn. 227, L. R. A. 1915E, 846, 153 N. W. 531.

¹⁰ *Lisenby v. Newton*, 120 Cal. 571, 65 Am. St. Rep. 203, 52 Pac. 813.

¹¹ *Lunt v. Lorscheider*, 285 Ill. 589, 121 N. E. 237. (The right of the vendor against the original vendee was ignored. Specific performance was apparently denied for other reasons.)

¹² *Atlantic & N. C. R. Co. v. Atlantic N. C. Co.*, 147 N. Car. 368, 125 Am. St. Rep. 550, 23 L. R. A. (N.S.) 223, 15 Am. & Eng. Ann. Cas. 363, 61 S. E. 185.

¹³ *Union Pacific Co. v. Douglas Bank*, 42 Neb. 469, 60 N. W. 886.

¹⁴ *Corvallis & Alsea River Ry. v. Portland E. & F. Ry.*, 84 Or. 524, 163 Pac. 1173. (This was quite likely the actual intention of the parties in this

case. The court seems to assume that such liability is necessarily imposed by such assignment.)

¹ *United States*. *Judson v. Corcoran*, 58 U. S. (17 How.) 612, 15 L. ed. 331; *Fidelity & Deposit Co. v. Fidelity Trust Co.*, 143 Fed. 152.

Colorado. *Doyle v. Nesting*, 37 Colo. 522, 88 Pac. 862; *Good v. Lipp*, 41 Colo. 209 [sub nomine, *Lipp v. Good*, 91 Pac. 1104].

Georgia. *Walker v. Maddox*, 105 Ga. 253, 31 S. E. 165.

Idaho. *Ercanbrack v. Faris*, 10 Ida. 584, 79 Pac. 817.

Illinois. *Moore v. Gariglietti*, 228 Ill. 143, 10 Am. & Eng. Ann. Cas. 560, 81 N. E. 826.

Iowa. *Hipwell v. National Surety Co.*, 130 Ia. 656, 105 N. W. 318.

Kansas. *Hall v. Kansas City Terra Cotta Co.*, 97 Kan. 103, L. R. A. 1916D, 361, 154 Pac. 210.

has assigned.² The assignor can not maintain an action upon such contract or property right in his own name under a statute which requires the action to be brought in the name of the real party in interest.³ If B has given an option to A, and A assigns an interest therein to C, A can not exercise such option after such assignment.⁴ The assignor and the original debtor can not enter into any contract after the assignment which will affect the rights of the assignee.⁵ If the assignor induces the original debtor to make a payment to him by representing that he has not assigned such debt, he is guilty of obtaining money under false pretenses.⁶

If an assignment is evidently intended to transfer all of the interest of the assignor, the fact that it names the amount of the indebtedness does not restrict the assignee's rights to recover such amount named, if by reason of the accrual of interest pending litigation the total amount of such fund exceeds the amount thus named.⁷ An assignment of all compensation "thereafter accruing," assigns an amount which had been earned when the assignment was made, but which by the terms of the original contract was to be retained to insure complete performance.⁸

Massachusetts. *Sawyer v. Cook*, 188 Mass. 163, 74 N. E. 356; *Usher v. A. S. Tucker Co.*, 217 Mass. 441, L. R. A. 1916F, 826, 105 N. E. 360; *Bennett v. Tighe*, 224 Mass. 159, 112 N. E. 629.

Michigan. *United States Casualty Co. v. Bagley*, 129 Mich. 70, 55 L. R. A. 616, 87 N. W. 1044.

New Jersey. *Cogan v. Conover Mfg. Co.*, 69 N. J. Eq. 358, 115 Am. St. Rep. 629, 60 Atl. 408.

New York. *Whiting v. Glass*, 217 N. Y. 333, 111 N. E. 1082.

Pennsylvania. *Beaver Trust Co. v. Morgan*, 259 Pa. St. 567, 103 Atl. 367.

South Carolina. *Loan & Savings Bank Co. v. Farmers' & Merchants' Bank*, 74 S. Car. 210, 114 Am. St. Rep. 991, 54 S. E. 364.

Texas. *Solinsky v. Bank*, 82 Tex. 244, 17 S. W. 1050.

Utah. *Wilson v. Sullivan*, 17 Utah 341, 53 Pac. 994.

Washington. *Parkhurst v. Dickinson*, 41 Wash. 420, 83 Pac. 895; *Berg v. Yakima Valley Canal Co.*, 83 Wash.

451, L. R. A. 1915D, 292, 145 Pac. 619; *State Bank v. Johnson*, 104 Wash. 550, 3 A. L. R. 235, 177 Pac. 340.

Wisconsin. *Roach v. Sanborn Land Co.*, 135 Wis. 354, 115 N. W. 1102.

² *Hall v. Kansas City Terra Cotta Co.*, 97 Kan. 103, L. R. A. 1916D, 361, 154 Pac. 210; *Solomon v. Shewitz*, 185 Mich. 620, 152 N. W. 196; *Foster v. Central National Bank*, 183 N. Y. 379, 76 N. E. 338; *Whiting v. Glass*, 217 N. Y. 333, 111 N. E. 1082; *Parkhurst v. Dickinson*, 41 Wash. 420, 83 Pac. 895.

³ *Foster v. Central National Bank*, 183 N. Y. 379, 76 N. E. 338; *Phoenix Ins. Co. v. Carnahan*, 63 O. S. 253, 58 N. E. 805.

⁴ *Solomon v. Shewitz*, 185 Mich. 620, 152 N. W. 196.

⁵ *Parkhurst v. Dickinson*, 41 Wash. 420, 83 Pac. 895.

⁶ *Commonwealth v. Johnson*, 167 Ky. 727, L. R. A. 1916D, 267, 181 S. W. 368.

⁷ *Bennett v. Tighe*, 224 Mass. 159, 112 N. E. 629.

⁸ *Ercanbrack v. Faris*, 10 Ida. 584, 79 Pac. 817.

The assignee acquires the rights of his assignor even when the assignee would not have acquired the rights which his assignor has acquired, had the assignee instead of the assignor been a party to the original transaction. Thus where B takes a lease from A, and B's lease is prior to X's mechanic's lien because B has no notice thereof, B may assign to C with the same priority even if C has notice.⁹ If, however, the assignee is the person who is primarily liable, he can not by assignment acquire a right of action against one who is secondarily liable.¹⁰

The assignee has the same right as his assignor to recover for breach of the contract.¹¹ He can recover from agents of his assignor,¹² or from public officers,¹³ for misconduct, causing loss of the money due under such contract. So in case of breach the assignee has the same right to recover whatever has been paid in under such contract that his assignor would have had.¹⁴ If the assignor refuses performance of the contract with the adversary party, the assignee may perform and thereby protect his own rights.¹⁵

As between the assignor and the assignee, the assignor may make a partial assignment of his interest in the contract which is assigned.¹⁶ Whether the debtor is bound to recognize such partial assignment or not, the rights of the assignee can not exceed those which are conferred upon him by the terms of the assignment.¹⁷

§ 2265. Assignment as passing incidents and remedies. An assignment of a laborer's wages due from a corporation gives the

⁹ Floete v. Brown, 104 Ia. 154, 65 Am. St. Rep. 434, 73 N. W. 483.

¹⁰ Greer v. Equity Co-operative Exchange, 137 Minn. 300, L. R. A. 1917F, 440, 163 N. W. 527.

¹¹ Abrahamson v. Lamberson, 72 Minn. 308; 75 N. W. 226 (where recovery was had against a vendor of realty for wrongful taking of possession and removal of buildings).

See also, Berg v. Yakima Valley Canal Co., 83 Wash. 451, L. R. A. 1915D, 292, 145 Pac. 619.

¹² Munson v. Bank, 19 Wash. 125, 52 Pac. 1011 (negligence of a collecting bank to notify indorsers of non-payment).

¹³ Citizens' National Bank v. Loomis, 100 Ia. 266, 62 Am. St. Rep. 571, 60 N. W. 443 (negligence of officer in levying attachment).

¹⁴ Malloy v. Malloy, 35 Neb. 224, 52 N. W. 1097.

¹⁵ Southern Paving Co. v. Chattanooga (Tenn. Ch. App.), 48 S. W. 92. (Assignee of benefits of a street paving contract may make repairs during the five-year period and collect the fund reserved to enforce such repairs, the assignor having given bond to the assignee to make required repairs.)

¹⁶ See § 2261.

¹⁷ Wheelock v. Hull, 124 Ia. 752, 100 N. W. 863; Dickerson v. Spokane, 35 Wash. 414, 77 Pac. 730.

assignee the same right as the assignor to recover from the stockholders.¹ So an assignee of a note may avail himself of a power of attorney to confess judgment in favor of the holder.² An assignee may use the debt assigned as a set-off.³ He may interpose the same defenses against a set-off sought to be made against the debt assigned to him as his assignor could have done.⁴ So the assignment of a claim carries with it the right to sue in rescission for fraud,⁵ or the right to sue to set aside a fraudulent conveyance,⁶ though such right of action could not be assigned apart from such claim. So an assignee has the same right as his assignor to rescind for the fraud of the adversary party and recover on quantum meruit.⁷ The assignment of a property interest or a contract does not of itself carry with it a right of action for fraud in the transaction by which the assignor acquired such contract or property interest from the adversary party thereto.⁸ If A assigns stock to C, such assignment does not of itself transfer A's right of action against B for fraud in the sale of such stock by B to A.⁹ If A assigns to C his claim against B for a commission, such assignment does not transfer A's right of action against B for fraudulently representing his authority to employ A as a broker.¹⁰ So an assignment of a warehouse receipt for wheat carries a right of action for a prior conversion of the wheat.¹¹ An assignment of the purchase money due on the sale of a chattel sold conditionally on acceptance by the purchaser, carries the right to the chattel if the purchaser refuses to accept it.¹²

¹ Day v. Vinson, 78 Wis. 198, 10 L. R. A. 205, 47 N. W. 269.

² Snyder v. Critchfield, 44 Neb. 66, 62 N. W. 306 (under Pennsylvania law).

³ Nix v. Ellis, 118 Ga. 345, 98 Am. St. Rep. 111, 45 S. E. 404; Jack v. Klepson, 196 Pa. St. 187, 79 Am. St. Rep. 699, 46 Atl. 479.

⁴ Defense of limitations. Walker v. Burgess, 44 W. Va. 399, 67 Am. St. Rep. 775, 30 S. E. 99.

• Defense that debt was for personal services (painting a picture) and by statute not subject to set-off. Millington v. Laurer, 89 Ia. 322, 48 Am. St. Rep. 385, 56 N. W. 533.

⁵ Metropolitan Life Ins. Co. v. Fuller, 61 Conn. 252, 29 Am. St. Rep. 196, 23 Atl. 193; National Valley Bank v. Hancock, 100 Va. 101, 40 S. E. 611.

⁶ Howd v. Breckenridge, 97 Mich. 65, 56 N. W. 221; Billingsley v. Clelland, 41 W. Va. 234, 23 S. E. 812.

⁷ Hicks v. Steel, 126 Mich. 408, 85 N. W. 1121.

⁸ Huston v. Ohio & Colorado Smelting & Refining Co., — Colo. —, 165 Pac. 251; Lee v. Fisk, 222 Mass. 418, 109 N. E. 833; Sorenson v. Kribs, 82 Or. 130, 161 Pac. 405.

⁹ Huston v. Ohio & Colorado Smelting & Refining Co., — Colo. —, 165 Pac. 251.

¹⁰ Sorenson v. Kribs, 82 Or. 130, 161 Pac. 405.

¹¹ Dolliff v. Robbins, 83 Minn. 498, 85 Am. St. Rep. 466, 86 N. W. 772.

¹² Caulfield v. Van Brunt, 173 Pa. St. 428, 34 Atl. 230.

§ 2266. Assignment as passing securities. The assignment of a debt carries with it every security held by the assignor for the protection of such debt.¹ Assignment of a note carries the security of a mortgage on realty,² and the security of a pledge of personalty.³ Assignment of a security without assigning the debt passes nothing.⁴ So the assignment of a debt passes a note given therefor, held by the assignor at the time of the assignment,⁵ and assignment of a note carries the debt for which it is given.⁶ Thus assignment of a debt carries with it a guaranty of such debt.⁷ A personal guaranty can not be assigned in some jurisdictions.⁸ An unaccepted offer of guaranty can not be assigned.⁹ If a vendor of realty,¹⁰ or personalty,¹¹ reserves the legal title until payment in full as security, such security passes to an assignee of the vendor.

¹ United States. *Church v. Swetland*, 243 Fed. 289.

Georgia. *Townsend v. Southern Product Co.*, 127 Ga. 342, 119 Am. St. Rep. 340, 56 S. E. 436.

Nebraska. *Guthrie v. Treat*, 66 Neb. 415, 103 Am. St. Rep. 718, 92 N. W. 595.

Pennsylvania. *Beaver Trust Co. v. Morgan*, 259 Pa. St. 567, 103 Atl. 367.

Wisconsin. *Roach v. Sanborn Land Co.*, 135 Wis. 354, 115 N. W. 1102.

² United States. *Batesville Institute v. Kauffman*, 85 U. S. (18 Wall.) 151, 21 L. ed. 775.

California. *Hurt v. Wilson*, 38 Cal. 263.

Illinois. *Miller v. Larned*, 103 Ill. 562.

Indiana. *Connecticut Ins. Co. v. Talbot*, 113 Ind. 373, 3 Am. St. Rep. 655, 14 N. E. 586.

Massachusetts. *Morris v. Bacon*, 123 Mass. 58, 25 Am. Rep. 17.

Nebraska. *Guthrie v. Treat*, 66 Neb. 415, 103 Am. St. Rep. 718, 92 N. W. 595.

³ *Church v. Swetland*, 243 Fed. 289.

⁴ *Johnson v. Clarke* (N. J. Eq.), 28 Atl. 558.

⁵ *Van Pelt v. Hurt*, 97 Ga. 660, 25 S. E. 489.

⁶ *Chestnut Hill Reservoir Co. v. Chase*, 14 Conn. 123.

⁷ Connecticut. *Lemmon v. Strong*, 59 Conn. 448, 21 Am. St. Rep. 123, 12 L. R. A. 270, 22 Atl. 293.

Minnesota. *Sepp v. McCann*, 47 Minn. 364, 50 N. W. 246; *Anchor Investment Co. v. Kirkpatrick*, 59 Minn. 378, 50 Am. St. Rep. 417, 61 N. W. 29.

New Jersey. *Hayden v. Weldon*, 43 N. J. L. 128, 39 Am. Rep. 551; *Woolley v. Moore*, 61 N. J. L. 16, 38 Atl. 758.

New York. *Craig v. Parkis*, 40 N. Y. 181, 100 Am. Dec. 469; *Claffin v. Ostrom*, 54 N. Y. 581; *Stillman v. Northrup*, 109 N. Y. 473, 17 N. E. 379.

Wisconsin. *Tidioute Savings Bank v. Libbey*, 101 Wis. 193, 70 Am. St. Rep. 907, 77 N. W. 182.

⁸ An indorsement, "We hereby guarantee the payment of within note," properly signed, was held personal. *Edgerly v. Lawson*, 176 Mass. 551, 51 L. R. A. 432, 57 N. E. 1020.

⁹ *Schoonover v. Osborne*, 108 Ia. 453, 79 N. W. 263.

¹⁰ *Douglass v. Blount*, 95 Tex. 369, 58 L. R. A. 699, 67 S. W. 484.

¹¹ *Townsend v. Southern Product Co.*, 127 Ga. 342, 119 Am. St. Rep. 340, 56 S. E. 436; *Ross-Meehan Foundry Co. v. Ice Co.*, 72 Miss. 608, 18 So. 364; *Landigan v. Mayer*, 32 Or. 245, 67 Am. St. Rep. 521, 51 Pac. 649.

But an assignment by a mortgagee of a claim for damages for selling mortgaged property on a lien subsequent to the mortgage has been held not to pass a right of action on an indemnity bond, unless the debt and mortgage have been assigned.¹² Assignment of a policy of life insurance as collateral implies an obligation on the part of the assignor to pay future premiums.¹³

§ 2267. Assignment as passing lien. Since a common-law lien is a right to keep possession of personal property until a claim due from the owner to a person so keeping possession is satisfied, some authorities hold that such a lien is a personal right, and therefore non-assignable.¹ Equitable liens which consist in the right of the holder thereof to priority of payment have been held to be assignable by some authorities,² but other courts have held that such liens can not be assigned.³ Maritime liens are generally held to be assignable,⁴ as a lien of mariners for wages,⁵ or a lien for wharfage.⁶ Statutory liens analogous to common-law liens which consist in the right to retain possession of personalty are held by some authorities to be non-assignable.⁷ Other authorities have held such liens to be assignable.⁸ Statutory liens which consist in the right of the holder thereof to priority of payment out of the proceeds of prop-

¹² *Garretson v. Ferrall*, 78 Ia. 166, 6 L. R. A. 377, 42 N. W. 637.

¹³ *Stratton v. Bankers' Life Co.*, 102 Neb. 755, 1 A. L. R. 1671, 169 N. W. 722.

¹ *Roberts v. Jacks*, 31 Ark. 597, 25 Am. Rep. 584; *Lovett v. Brown*, 40 N. H. 511; *Dewing v. Hutton*, 40 W. Va. 521, 21 S. E. 780.

Contra, *Coit v. Waples*, 1 Minn. 134; *Woodland Co. v. Mendenhall*, 82 Minn. 483, 85 N. W. 164.

² *Lamm v. Armstrong*, 95 Minn. 434, 111 Am. St. Rep. 479, 104 N. W. 304.

Vendor's lien. *Gessner v. Palmateer*, 89 Cal. 89, 13 L. R. A. 187, 24 Pac. 608, 26 Pac. 789; *Lagow v. Badollet*, 1 Blackf. (Ind.) 416, 12 Am. Dec. 258; *Lamm v. Armstrong*, 95 Minn. 434, 111 Am. St. Rep. 479, 104 N. W. 304; *Douglass v. Blount*, 95 Tex. 369, 58 L. R. A. 699, 67 S. W. 484; *Schmertz*

v. Hammond, 47 W. Va. 527, 35 S. E. 945.

Contra, that a vendor's lien is personal, and therefore, being non-assignable, does not pass by assignment of the purchase money. *Elder v. Jones*, 85 Ill. 384; *Law v. Butler*, 44 Minn. 482, 9 L. R. A. 856, 47 N. W. 53; *Hammond v. Peyton*, 34 Minn. 529, 27 N. W. 72.

³ *Carlton v. Buckner*, 28 Ark. 66.

⁴ *The Sarah J. Weed*, 2 Lowell (U. S.) 555.

⁵ *The William M. Hoag*, 69 Fed. 742.

⁶ *The Shrewsbury*, 69 Fed. 1017.

⁷ Lien of livery stable keeper. *Glaascock v. Lemp*, 26 Ind. App. 175, 59 N. E. 342.

Contra, *McPherson First National Bank v. Commission Co.*, 61 Mo. App. 143.

⁸ Lien of attorney. *Sibley v. Pine County*, 31 Minn. 201, 17 N. W. 337.

erty subject to the lien, and which do not involve merely the right to retain possession of property, may be assigned.⁹ Liens created by express contract as distinguished from those created by the operation of the law are generally held assignable.¹⁰ The mere right to obtain a lien does not pass by assignment.¹¹ This rule has been changed in some states by statute, and the right to obtain a lien passes by assignment of the debt.¹² The assignee is also entitled to such rights of priority as his assignor enjoyed. Thus where wages of laborers are entitled to preference the assignee of such wages has the same preference.¹³ So the assignee may avail himself of a decree in favor of his assignor, though rendered after the assignment and in a suit to which the assignee was not a party.¹⁴ Personal remedies for enforcing the contract do not pass by assignment of the contract.¹⁵

⁹ **United States.** *Davis v. Bilsland*, 85 U. S. (18 Wall.) 659, 21 L. ed. 969.

Mechanic's lien. *Davis v. Bilsland*, 85 U. S. (18 Wall.) 659, 21 L. ed. 969.

California. *Duncan v. Hawn*, 104 Cal. 10, 37 Pac. 626.

Florida. *Clarkson v. Louderback*, 36 Fla. 660, 19 So. 887.

Maine. *Murphy v. Adams*, 71 Me. 113, 36 Am. Rep. 209.

Minnesota. *Sibley v. Pine County*, 31 Minn. 201, 17 N. W. 337.

Nebraska. *Henry, etc., Co. v. Fisherdick*, 37 Neb. 207, 55 N. W. 643.

Virginia. *Iaege v. Bossieux*, 56 Va. (15 Gratt.) 83, 76 Am. Dec. 189.

Washington. *Logging lien. Casey v. Ault*, 4 Wash. 167, 29 Pac. 1048.

Contra, that mechanics' liens cannot be assigned. *Lovett v. Brown*, 40 N. H. 511. So by statute. *O'Connor v. Ry.*, 111 Mo. 185, 20 S. W. 16. So before statute. *First National Bank of Decorah v. Day*, 52 Ia. 680, 3 N. W. 728. Statutory lien for materials furnished for a boat. *The Victorian No. 2*, 26 Or. 194, 46 Am. St. Rep. 616, 41 Pac. 1103. Tax lien. *Hart v. Tiernan*, 59 Conn. 521, 21 Atl. 1007. Lien for assessments. *Gill v. Dunham (Cal.)*

34 Pac. 68. Lien on threshing machine to secure laborers' wages. *Duncan v. Hawn*, 104 Cal. 10, 37 Pac. 626.

¹⁰ *Ober v. Gallagher*, 93 U. S. 199, 23 L. ed. 829. *Law. Paramore v. Nabers*, 42 Ia. 659; *Macomber v. Parker*, 31 Mass. (14 Pick.) 497. *Equity. Payne v. Wilson*, 74 N. Y. 348.

¹¹ Lien for street paving. *Rauer v. Fay*, 110 Cal. 361, 42 Pac. 902.

¹² *Mechanics' lien. Leftwich Lumber Co. v. Savings Association*, 104 Ala. 584, 18 So. 48; *Kinney v. Ore Co.*, 58 Minn. 455, 49 Am. St. Rep. 528, 60 N. W. 23; *Bank v. School Directors*, 91 Wis. 596, 65 N. W. 368. *Landlord's lien on crops. Ballard v. Mayfield*, 107 Ala. 396, 18 So. 29.

¹³ *In re Campbell*, 102 Fed. 686; *Drennen v. Deposit Co.*, 115 Ala. 592, 66 Am. St. Rep. 72, 39 L. R. A. 623, 23 So. 164; *Falconio v. Larsen*, 31 Or. 137, 37 L. R. A. 254, 48 Pac. 703; *McIlhenny v. Binz*, 80 Tex. 1, 26 Am. St. Rep. 705, 13 S. W. 655.

¹⁴ *Kramer v. Wood (Tenn. Ch. App.)*, 52 S. W. 1113.

¹⁵ *Right to distrain goods of tenant. Hutsell v. Bank*, 102 Ky. 410, 39 L. R. A. 403, 43 S. W. 469.

§ 2268. Assignment of judgment as passing cause of action. An assignment of a judgment does not carry with it the cause of action on which it is rendered. Hence, if it is vacated by appeal,¹ or if the claim is settled before judgment is rendered,² the assignee takes nothing. So an assignment by a judgment debtor to the judgment creditor of all claim against the debtor's agent on account of damages sustained by them "by reason of said above judgment," does not pass a cause of action against the agent, the judgment being for injuries to the creditor's horse by the negligence of the debtor's agent.³ So the assignment of a judgment has been held not to carry a right of action on an appeal bond unless specially assigned,⁴ nor a right of action against the clerk of the court for failure to index the judgment so as to make it a lien on the land of the debtor.⁵

§ 2269. Assignment passes only assignor's rights against debtor—General principles. The assignee of a contract takes no interest under the assigned contract greater than that which the original party whose interest he takes had therein, at the time when the adversary party to the contract received notice of the assignment,¹

¹ *Bennett v. Lathrop*, 71 Conn. 613, 71 Am. St. Rep. 222, 42 Atl. 634.

² *De Graffenreid v. Ry.*, 66 Ark. 260, 50 S. W. 272.

³ *Crook v. Gruell*, 82 Ia. 736, 47 N. W. 1081.

⁴ *Chilstrom v. Eppinger*, 127 Cal. 326, 78 Am. St. Rep. 46, 59 Pac. 696.

⁵ *Redmond v. Staton*, 116 N. Car. 140, 21 S. E. 186.

¹ *United States*. *Judson v. Corcoran*, 58 U. S. (17 How.) 612, 15 L. ed. 231; *Deming v. Ins. Co.*, 78 Fed. 1; *Williams v. Neely*, 134 Fed. 1, 67 C. C. A. 171, 69 L. R. A. 232; *Michigan Yacht & Power Co. v. Busch*, 143 Fed. 929, 75 C. C. A. 109; *Wagner v. Central Banking & Security Co.*, 249 Fed. 145, C. C. A.

Alabama. *Jefferson County Savings Bank v. Carland*, Ala., 77 So. 704.

Arizona. *Ives v. Sanguinetti*, 10 Ariz. 83, 85 Pac. 480.

Colorado. *Doherty v. Doe*, 18 Colo.

456, 33 Pac. 165; *Watrous v. Hilliard*, 38 Colo. 255, 88 Pac. 185.

Connecticut. *Mereness v. DeLemos*, 91 Conn. 651, 101 Atl. 8.

Georgia. *Third National Bank v. Ry.*, 114 Ga. 890, 40 S. E. 1016; *Fulton National Bank v. Fulton County*, 144 Ga. 691, 87 S. E. 1023; *Fourth National Bank v. Odom*, 147 Ga. 170, 93 S. E. 91.

Idaho. *Green v. Consolidated Wagon & Machine Co.*, 30 Ida. 359, 164 Pac. 1016.

Illinois. *Roberts v. Clelland*, 82 Ill. 538; *Commercial Nat. Bank v. Burch*, 141 Ill. 519, 33 Am. St. Rep. 331, 31 N. E. 420; *Ostertag v. Evans*, 176 Ill. 215, 52 N. E. 255.

Iowa. *Wing v. Page*, 62 Iowa 87, 11 N. W. 639, 17 N. W. 181; *Shambaugh v. Current*, 111 Ia. 121, 82 N. W. 497; *State Trust Co. v. Turner*, 111 Ia. 664, 53 L. R. A. 136, 82 N. W. 1029; *Peterson v. Ball*, 121 Ia. 544, 97 N. W. 79;

even if the assignee takes for value and without notice.² The assignor can not impose a greater obligation upon the assignee than that to which he would have been liable if the assignment had not been made.³ A partial assignment by the principal contractor can not impose upon the property owner a liability in excess of

Hipwell v. National Surety Co., 130 Ia. 556, 105 N. W. 318; **Steltzer v. Chicago, Milwaukee & St. Paul Ry. Co.**, 156 Ia. 1, L. R. A. 1915E, 1017, 134 N. W. 573; **Rice v. Friend Bros. Co.**, 170 Ia. 355, 161 N. W. 310 [reversing judgment on rehearing, **Rice v. Friend Bros. Co. (Ia.)**, 146 N. W. 748].

Kansas. **Fuller v. Horner**, 69 Kan. 467, 77 Pac. 88.

Kentucky. **Gossom v. Sharp**, 37 Ky. (7 Dana) 140.

Maryland. **National Bank v. Baltimore, etc.**, R. R., 90 Md. 661, 105 Am. St. Rep. 321, 50 Atl. 134.

Massachusetts. **Willis v. Twambly**, 13 Mass. 204; **Sawyer v. Cook**, 188 Mass. 163, 74 N. E. 356; **Earnshaw v. Whittemore**, 194 Mass. 187, 80 N. E. 520; **Boston Safe Deposit & Trust Co. v. Adams**, 224 Mass. 442, 113 N. E. 277.

Michigan. **Warner v. Whittaker**, 6 Mich. 133, 72 Am. Dec. 65; **Hooper v. Van Huse**, 105 Mich. 592, 63 N. W. 522; **Allen v. Detroit**, 167 Mich. 464, 36 L. R. A. (N.S.) 890, 133 N. W. 317.

Missouri. **United Shoe Machinery Co. v. Ramlose**, 210 Mo. 631, 109 S. W. 567.

Montana. **Farrell v. Gold Flint Min. Co.**, 32 Mont. 416, 80 Pac. 1027.

Nebraska. **Lewis v. Holdredge**, 56 Neb. 379, 76 N. W. 890 [reversing on other grounds on rehearing, 55 Neb. 173, 75 N. W. 549; modified, 57 Neb. 219, 77 N. W. 656].

New York. **Callanan v. Edwards**, 32 N. Y. 483; **Littlefield v. Albany County Bank**, 97 N. Y. 581.

North Dakota. **Crane & Ordway Co. v. Sykeston School District**, 36 N. D. 254, 162 N. W. 413.

Oklahoma. **Jack v. National Bank**, 17 Okla. 430, 89 Pac. 219; **Pittsburg Mortgage Investment Co. v. Robins**, 59 Okla. 217, 158 Pac. 929.

Oregon. **Rayburn v. Hurd**, 20 Or. 229, 25 Pac. 635; **Columbia Realty Investment Co. v. Alameda Land Co.**, 87 Or. 277, 168 Pac. 64, 440.

South Carolina. **Patterson v. Rabb**, 38 S. Car. 138, 19 L. R. A. 831, 17 S. E. 463; **Pittman v. Raysor**, 49 S. Car. 469, 27 S. E. 475.

South Dakota. **Dewey v. Komar**, 21 S. D. 117, 110 N. W. 90.

Utah. **South High School District v. McMillan Paper & Supply Co.**, 49 Utah 477, 164 Pac. 1041.

Washington. **Paul v. Vancouver**, 89 Wash. 331, 154 Pac. 453.

West Virginia. **Prim v. McIntosh**, 43 W. Va. 700, 28 S. E. 742; **Whan v. Hope Natural Gas Co.**, 81 W. Va. 338, 94 S. E. 365.

See also, **Greer v. Equity Co-operative Exchange**, 137 Minn. 300, L. R. A. 1917F, 440, 163 N. W. 527.

For the effect of sale as passing better title than the seller had, see **Market Overt in the City of London**, by J. G. Pease, 31 Law Quarterly Review, 270.

² **Fourth National Bank v. Odom**, 147 Ga. 170, 93 S. E. 91; **Bruschke v. Wright**, 166 Ill. 183, 57 Am. St. Rep. 125, 46 N. E. 813; **Pittsburg Mortgage Investment Co. v. Robins**, — Okla. —, 158 Pac. 929.

³ **Wheelock v. Hull**, 124 Ia. 752, 100 N. W. 863.

that fixed by the mechanics' lien law.⁴ Whether the assignee of a foreign corporation or of a partnership which has not complied with statutory requirements can maintain an action or not depends upon whether as the consequence of the violation of statutory requirements the party in default was not permitted to bring an action until he had complied with such requirements or whether the contract was void. If such contract was void the assignee could not enforce such contract.⁵ If the contract was not void the assignee might enforce such contract, although his assignor could not have maintained such action without complying with the statutory requirements.⁶ If the adversary party could have avoided a transaction for fraud, the assignee of the party who is guilty of such fraud is subject to the same defense or to the same proceeding to rescind as his assignor would have been.⁷ If the assignor, by his contract with the adversary parties, has dealt with them as members of a limited partnership with himself, his assignee can not hold them as partners.⁸ All defenses which could be made against the original party to the contract, such as illegality,⁹ can be made against the assignee. If the assignor has no right to a vendor's lien, the assignee has no right thereto.¹⁰

Considerations of public policy may, however, give to the assignee a right which the assignor could not have enforced.¹¹ The assignee of a public contract for which payment is to be made by assessments upon the property owners, is not bound by a contract made by the assignor for crediting one of the property owners with the payment upon his assessment.¹²

The debtor may, by his representations to the assignee prior to assignment, estop himself from denying the validity of the claim

⁴ *Wheelock v. Hull*, 124 Ia. 752, 100 N. W. 863.

⁵ *United Shoe Machinery Co. v. Ramlose*, 210 Mo. 631, 109 S. W. 567.

⁶ *Partnership. Good v. Lipp*, 41 Colo. 209 [sub nomine, *Lipp v. Good*, 91 Pac. 1104]. Foreign corporation. *Dewey v. Komar*, 21 S. D. 117, 110 N. W. 90.

⁷ *Rice v. Friend Bros. Co.*, 179 Ia. 355, 161 N. W. 310 [reversing judgment on rehearing, *Rice v. Friend Bros. Co. (Ia.)*, 146 N. W. 748]; *Crane & Ordway Co. v. Sykeston School District*, 39 N. D. 254, 162 N. W. 413.

⁸ *Egbert v. Kimberly*, 146 Pa. St. 96, 23 Atl. 437.

⁹ *Commercial National Bank v. Burch*, 141 Ill. 519, 33 Am. St. Rep. 331, 31 N. E. 420; *Nester v. Brewing Co.*, 161 Pa. St. 473, 41 Am. St. Rep. 894, 24 L. R. A. 247, 29 Atl. 102.

¹⁰ *Bell v. Pelt*, 51 Ark. 433, 14 Am. St. Rep. 57, 4 L. R. A. 247, 11 S. W. 684.

¹¹ *Stitt v. Horton*, 165 Ind. 555, 76 N. E. 241.

¹² *Stitt v. Horton*, 165 Ind. 555, 76 N. E. 241.

assigned.¹³ Thus where A had rendered services for B, trustee, and A assigned his claim to X, B stating that the only question as to A's fee was as to the amount to be fixed by the court, B can not afterwards claim that A's services were rendered under a contract that he should make no charge therefor.¹⁴ The debtor's promise to pay the assignee in full, if made before the assignment, may estop him from denying the validity of the claim.¹⁵

§ 2270. Discharge, etc. If before assignment the assignor has waived or modified his contract rights, his assignee is bound thereby.¹ An assignee is bound by a contract of compromise and settlement made between the assignor and the original debtor.² If the assignor has surrendered his contract to the adversary party conditionally, the assignee can not enforce such contract as against the adversary party except on failure of such condition.³ If the insolvency of the assignor has made impossible of performance a contract to secure a loan for him, his assignee takes no rights.⁴ If the rights of the assignor cease because of his death, the assignee has no greater right. Thus where A took out an insurance policy in favor of his wife, B, and if she died before him, to his children, and A and B assign the policy to X, and B dies before A, X takes nothing by the assignment.⁵

Defenses on the ground of non-performance of the contract may be interposed against the assignee.⁶ If the proceeds of the contract were to be applied in accordance with the manner specified in the original contract, the assignee can not claim a right to such pro-

¹³ *Cowdrey v. Vandeburgh*, 101 U. S. 572, 25 L. ed. 923; *Stone v. Hart* (Ky.), 66 S. W. 191; *Follett v. Reese*, 20 Ohio 546, 55 Am. Dec. 472.

¹⁴ *Stone v. Hart* (Ky.), 66 S. W. 191. B's representations here were made after the assignment, but while A was alive and solvent, and he sought to defeat X's claim after A had died and his estate had become insolvent.

¹⁵ *Morrison v. Beckwith*, 20 Ky. (4 T. B. Mon.) 73, 16 Am. Dec. 136.

¹ *Iowa*. *Soukup v. Investment Co.*, 84 Ia. 448, 35 Am. St. Rep. 317, 51 N. W. 167.

Kentucky. *Shuttleworth v. Development Co.* (Ky.), 60 S. W. 534.

Louisiana. *Dannenmann v. Charlton*, 113 La. 276, 36 So. 965.

Nebraska. *Hoover v. Bank*, 58 Neb 420, 78 N. W. 717.

Massachusetts. *Homer v. Shaw*, 177 Mass. 1, 58 N. E. 160.

² *Dannenmann v. Charlton*, 113 La. 276, 36 So. 965.

³ *Allen v. Detroit*, 167 Mich. 464, 36 L. R. A. (N.S.) 890, 133 N. W. 317.

⁴ *National Bank v. Security Co.*, 50 Kan. 313, 31 Pac. 1080.

⁵ *Brown's Appeal*, 125 Pa. St. 303, 11 Am. St. Rep. 900, 17 Atl. 419.

⁶ *California*. *Pacific Rolling Mill Co. v. English*, 118 Cal. 123, 50 Pac. 383.

ceeds, ignoring such provision as to the application thereof.⁷ If the assignor is to be reimbursed only out of a certain fund, his assignee can not enforce his claim unless such fund has been created.⁸ If the assignor has broken the contract and the damages due to his breach exceed the amount due thereon from the adversary party, the assignee can not recover the amount thus due and insist that the adversary party shall look to the assignor for damages.⁹ If the assignor has abandoned the contract and the adversary party has been obliged to expend an amount equal to or greater than the contract price in completing the contract, the assignee can recover nothing.¹⁰ If the assignor holds the non-negotiable claim solely to secure a debt, his assignee takes it subject to the right of the adversary party to redeem.¹¹

§ 2271. Set-off. Any right of set-off or counter-claim growing out of that transaction existing in favor of the adversary party when he receives notice of the assignment can be made against the assignee.¹ Thus where selling agents had made advances to their vendor in excess of the amount realized by them from the sales after deducting their expenses and compensation, and assign such

District of Columbia. *Barber v. Johnson*, 5 D. C. App. 305.

Georgia. *Fulton National Bank v. Fulton County*, 144 Ga. 691, 87 S. E. 1023.

Iowa. *Hipwell v. National Surety Co.*, 130 Ia. 656, 105 N. W. 318.

Kansas. *Sargent v. Kansas Midland Ry.*, 48 Kan. 672, 29 Pac. 1063.

New York. *Chambers v. Lancaster*, 160 N. Y. 342, 54 N. E. 707.

Pennsylvania. *Hazelton Mercantile Co. v. Improvement Co.*, 143 Pa. St. 573, 22 Atl. 906; *Paul v. City of Vancouver*, 89 Wash. 331, 154 Pac. 453.

West Virginia. *Whan v. Hope Natural Gas Co.*, 81 W. Va. 338, 94 S. E. 365.

⁷*Jefferson County Savings Bank v. Carland (Ala.)*, 77 So. 704; *Green v. Consolidated Wagon & Machine Co.*, 30 Ida. 359, 164 Pac. 1016; *Steltzer v. Chicago, Milwaukee & St. Paul Ry. Co.*, 156 Ia. 1, L. R. A. 1915E, 1017, 134 N. W. 573.

⁸*Farrell v. Gold Flint Min. Co.*, 32 Mont. 416, 80 Pac. 1027; *Columbia Realty Investment Co. v. Alameda Land Co.*, 87 Or. 277, 168 Pac. 64, 440.

⁹*Earnshaw v. Whittemore*, 194 Mass. 187, 80 N. E. 520.

¹⁰*Fisken v. Iron Works*, 86 Mich. 199, 49 N. W. 133 [re-hearing denied, 87 Mich. 591, 49 N. W. 873]; *Jenks v. Wells*, 90 Mich. 515, 51 N. W. 636; *Union Pacific Ry. v. Bank*, 42 Neb. 469, 60 N. W. 886; *Beardsley v. Cook*, 143 N. Y. 143, 38 N. E. 109; *People v. Bank*, 159 N. Y. 382, 54 N. E. 35; *Greene v. Duncan*, 37 S. Car. 239, 15 S. E. 956.

¹¹*Drake v. Cloonan*, 99 Mich. 121, 41 Am. St. Rep. 586, 57 N. W. 1098.

¹*United States. Brashear v. West*, 32 U. S. (7 Pet.), 608, 8 L. ed. 802; *Wagner v. Central Banking & Security Co.*, 249 Fed. 145.

California. *Jennings v. Bank*, 79 Cal. 323, 12 Am. St. Rep. 145, 5 L. R. A. 233, 21 Pac. 852.

excess, the vendor may set up the fact that the agents are indebted to him for failure to sell at the highest market price.² So the assignee of a non-negotiable note given for sheep is liable to counter-claim for breach of warranty.³ There is, however, a divergence of authority on the question whether the adversary party must show affirmatively that the amount expended by him exceeds the contract price to defeat the right of the assignee, some authorities holding that it is for such adversary party to show that there is nothing due under the contract;⁴ others holding that it is for the assignee to show in case of breach by the assignor that there is anything due under the contract.⁵ If A has assigned to C a judgment which A has against B, B can not set off, as against such judgment, a judgment against A, which B has purchased after A has made such assignment.⁶ Under statutes allowing assignment and permitting set-off existing at the time of the assignment, a set-off arising after assignment and before notice can not be made.⁷ Under some statutes a set-off may be made if it is acquired at any time before action by the assignee.⁸ If, by statute, set-off due at the time of the transfer can be made against the assignee's claim when mature, a claim mature at the time of the assignment can not be set off against an assignee who takes before performance.⁹ If the debtor is induced to enter into a contract by fraud,

Delaware. *Burton v. Willin*, 6 Houst. (Del.) 552, 22 Am. St. Rep. 363.

Idaho. *Northwestern, etc., Bank v. Rauch*, 8 Ida. 50, 66 Pac. 807.

Illinois. *McCarthy v. Crawford*, 238 Ill. 38, 128 Am. St. Rep. 95, 29 L. R. A. (N.S.) 252, 86 N. E. 750.

Iowa. *Benson v. Haywood*, 86 Ia. 107, 23 L. R. A. 335, 53 N. W. 85; *Cress v. Ivens*, 163 Ia. 659, 145 N. W. 325; *Rice v. Friend Bros. Co.*, 179 Ia. 355, 161 N. W. 310 [reversing judgment on rehearing, 146 N. W. 748].

Massachusetts. *Homer v. Shaw*, 212 Mass. 113, 98 N. E. 697.

Michigan. *Benson v. Bauden*, 149 Mich. 584, 13 L. R. A. (N.S.) 721, 113 N. W. 20.

Minnesota. *Quigley v. Welter*, 95 Minn. 383, 104 N. W. 236.

Nebraska. *First National Bank v. Bank*, 34 Neb. 71, 33 Am. St. Rep. 1618, 15 L. R. A. 386, 51 N. W. 305.

Ohio. *King v. Armstrong*, 50 O. S. 222, 34 N. E. 163.

Tennessee. *Nugent v. Allen*, 95 Tenn. 97, 32 S. W. 9.

² *Mackenzie v. Hodgkin*, 126 Cal. 591, 77 Am. St. Rep. 209, 59 Pac. 36.

³ *National Bank v. Feeney*, 12 S. D. 156, 76 Am. St. Rep. 594, 80 N. W. 186.

⁴ *Layton v. Davidson*, 144 Pa. St. 145, 22 Atl. 909.

⁵ *Beardsley v. Cook*, 143 N. Y. 143, 38 N. E. 109.

⁶ *Alexander v. Clarkson*, 100 Kan. 294, L. R. A. 1917F. 1006, 164 Pac. 294.

⁷ *Stadler v. Bank*, 22 Mont. 190, 74 Am. St. Rep. 582, 59 Pac. 111.

⁸ *Wing v. Page*, 62 Ia. 87, 11 N. W. 639, 17 N. W. 181.

⁹ *Bradley v. Smith*, 98 Mich. 449, 39 Am. St. Rep. 565, 23 L. R. A. 305, 57 N. W. 576.

and he elects to affirm the contract and to bring an action for the fraud, it is said that if the assignment passes the legal title, he can not set off such claim for fraud as against a bona fide assignee.¹⁰

§ 2272. Assignment of property rights. It may be here briefly noted that a different rule obtains if the contract under which have arisen rights which are sought to be assigned has been so far performed as to pass property rights. Thus if property is obtained by fraud in the inducement, and such contract is so far performed as to pass a title which is at least voidable, a bona fide purchaser for value from such fraudulent vendee can hold such property as against the original vendor.¹ The term "bona fide" purchaser is used to include a trustee without notice for bona fide creditors.² So land transferred by vendee to his father in payment of an actual debt can not be charged with the amount due from the vendee to co-vendee by reason of false representations as to the price of the land.³ If the property is transferred to one not a bona fide purchaser, as to one with notice of the fraud,⁴ or one who aids in such fraud,⁵ or one who does not pay value therefor, as a devisee,⁶ or a judgment creditor,⁷ or an officer who levies on the property, sells it and has the proceeds in his hands,⁸ such per-

¹⁰ *Stoddart v. Union Trust Co.* [1912], 1 K. B. 181.

¹ *Illinois.* *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60; *Moore v. Recek*, 163 Ill. 17, 44 N. E. 868; *Bunn v. Schnellbacher*, 163 Ill. 328, 45 N. E. 227.

Indiana. *Moore v. Moore*, 112 Ind. 149, 2 Am. St. Rep. 170, 13 N. E. 673.

New York. *Bank v. Bank*, 150 N. Y. 456, 54 N. E. 66; *Phelps v. McQuade*, 220 N. Y. 232, 115 N. E. 441.

North Dakota. *Ditton v. Purcell*, 21 N. D. 648, 132 N. W. 347.

Ohio. *Baltimore & Ohio Southwestern Ry. v. Good*, 82 O. S. 278, 20 L. R. A. (N.S.) 713, 92 N. E. 435.

Pennsylvania. *Dettra v. Kestner*, 147 Pa. St. 566, 23 Atl. 889; *Schwartz v. McCloskey*, 156 Pa. St. 258, 27 Atl. 300.

Virginia. *Oberdorfer v. Meyer*, 88 Va. 384, 13 S. E. 756.

² *Oberdorfer v. Meyer*, 88 Va. 384, 13 S. E. 756.

³ *Bunn v. Schnellbacher*, 163 Ill. 328, 45 N. E. 227.

⁴ *Lewis v. Mortgage Co.*, 94 Ga. 572, 21 S. E. 224; *Lillibridge v. Walsh*, 97 Mich. 459, 56 N. W. 854; the *Arnaud v. Peet*, 40 N. J. Eq. 346, 25 Atl. 964; *Stone v. Oil Co.*, 188 Pa. St. 602, 41 Atl. 748, 1119; *Stone v. Oil Co.*, 188 Pa. St. 614, 41 Atl. 748, 41 Atl. 1119; *Hofecker v. Pfeil*, 193 Pa. St. 288, 44 Atl. 421; *Knox v. Earbee* (Tex. Civ. App.), 35 S. W. 186. Even if the statutory notice necessary to give notice to bona fide purchasers is not filed. *Lillibridge v. Walsh*, 97 Mich. 459, 56 N. W. 854.

⁵ *Horter v. Herndon*, 12 Tex. Civ. App. 637, 35 S. W. 80.

⁶ *Rhino v. Emery*, 72 Fed. 382.

⁷ *Hofecker v. Pfeil*, 193 Pa. St. 288, 44 Atl. 421.

⁸ *Converse v. Sickles*, 146 N. Y. 200, 48 Am. St. Rep. 790, 40 N. E. 777.

son is liable to the defrauded vendor to the extent of the property in his hands. One who is aware of facts which are enough to put him on inquiry whereby he would have discovered the true state of affairs, is not a bona fide purchaser of property,⁹ as where he knows that the mortgagor is old and infirm, that the mortgage covers his entire property and that the mortgagee is insolvent.¹⁰ If conveyed to one who has notice of the fraud, he is liable, even if he has sold the property as agent of the vendee and transmitted the proceeds to vendee.¹¹

If possession passed, but not title, the owner may recover the property even from a bona fide holder.¹² The transfer of the possession of personalty for payment in cash,¹³ as a condition precedent to passing title, does not pass even a voidable title until such condition is complied with,¹⁴ or for security.¹⁵

⁹ Reddin v. Dunn, 2 Colo. App. 518, 31 Pac. 947.

¹⁰ Galbraith v. McLaughlin, 91 Ia. 399, 59 N. W. 338.

¹¹ Morrow Shoe Mfg. Co. v. Shoe Co., 57 Fed. 685, 24 L. R. A. 417 [affirmed in 60 Fed. 341].

¹² Johnson v. Iankovetz, 57 Or. 24, 29 L. R. A. (N.S.) 709, 110 Pac. 398.

¹³ Alabama. Drake v. Scott, 136 Ala. 261, 96 Am. St. Rep. 25, 33 So. 873.

Arkansas. Jones v. Southern Coöperage Co., 94 Ark. 621, 127 S. W. 704.

Indiana. Evansville & Terre Haute Ry. v. Erwin, 84 Ind. 457.

Iowa. Amundson v. Standard Printing & Mfg. Co., 140 Ia. 464, 118 N. W. 789.

Maine. Merrill Furniture Co. v. Hill, 87 Me. 17, 32 Atl. 712.

Massachusetts. Commonwealth v. Devlin, 141 Mass. 423, 6 N. E. 64.

Minnesota. National Bank v. Chicago, Burlington & Northern Ry., 44 Minn. 224, 20 Am. St. Rep. 566, 9 L. R. A. 263, 46 N. W. 342.

Missouri. Johnson-Brinkman Commission Co. v. Central Bank, 116 Mo. 558, 38 Am. St. Rep. 615, 22 S. W. 813.

Ohio. Bonham v. Hamilton, 66 O. S. 82, 63 N. E. 597.

South Dakota. Baskerville v. Johnson, 20 S. D. 88, 104 N. W. 913.

Vermont. Allen Lumber Co. v. Higuera, 86 Vt. 453, 85 Atl. 979.

¹⁴ Alabama. Drake v. Scott, 136 Ala. 261, 96 Am. St. Rep. 25, 33 So. 873.

Indiana. Evansville & Terre Haute Ry. v. Erwin, 84 Ind. 457.

Maine. Merrill Furniture Co. v. Hill, 87 Me. 17, 32 Atl. 712.

Massachusetts. Commonwealth v. Devlin, 141 Mass. 423, 6 N. E. 64.

Minnesota. National Bank v. Chicago, Burlington & Northern Ry., 44 Minn. 224, 20 Am. St. Rep. 566, 9 L. R. A. 263, 46 N. W. 342.

Missouri. Johnson-Brinkman Commission Co. v. Central Bank, 116 Mo. 558, 38 Am. St. Rep. 615, 22 S. W. 813.

Oregon. Johnson v. Iankovetz, 57 Or. 24, 29 L. R. A. (N.S.) 709, 110 Pac. 398.

Vermont. Allen Lumber Co. v. Higuera, 86 Vt. 453, 85 Atl. 979.

¹⁵ Jones v. Southern Coöperage Co., 94 Ark. 621, 127 S. W. 704; Amundson v. Standard Printing & Mfg. Co., 140 Ia. 464, 118 N. W. 789; Bonham v. Hamilton, 66 O. S. 82, 63 N. E. 597; Baskerville v. Johnson, 20 S. D. 88, 104 N. W. 913.

§ 2273. Equities of third persons. Whether in case of successive assignments, each by a prior assignee to his assignee, the last assignee takes subject to equities existing between some prior assignor and his assignee, is a question upon which there is a conflict of authority. Some authorities hold that the last assignee takes subject to equities existing between a prior assignor and his assignee.¹ Thus where an insurance policy payable to A was assigned by A to B as collateral to secure A's debt to B, and then by B to C as collateral to secure B's debt to C, it was held that C took no greater right in the policy than B had had; and hence, if on A's death C collects the policy, he must refund to A's estate all in excess of A's debt to B.² An assignee of a contractor has no priority as against one who performed the contract when the contractor abandoned it.³ If an assignment is, by its express terms, subordinate to another assignment, full effect must be given to such provision.⁴

Other authorities hold that the last assignee takes free from equities between a prior assignor and his assignee.⁵ So if overdue notes which have ceased to be negotiable are assigned apparently

¹ **United States.** *Hardaway v. National Surety Co.*, 150 Fed. 465, 80 C. C. A. 283.

Colorado. *German American Trust Co. v. White*, — Colo. —, 165 Pac. 761.

District of Columbia. *Metropolitan Loan & Trust Co. v. Schafer*, 44 D. C. App. 356.

Illinois. *Sutherland v. Reeve*, 151 Ill. 384, 38 N. E. 130.

Maryland. *Werntz v. Wells*, 130 Md. 53, 99 Atl. 956.

New Jersey. *Dixon v. Bentley*, 68 N. J. Eq. 108, 59 Atl. 1036.

Oklahoma. *Gillette v. Murphy*, 7 Okla. 91, 54 Pac. 413.

South Carolina. *Westbury v. Simmons*, 57 S. Car. 467, 35 S. E. 764.

Vermont. *Downer v. Bank*, 39 Vt. 25.

Tennessee. *Horn v. Nicholas*, 139 Tenn. 453, 201 S. W. 756 (equitable assignment).

² *Westbury v. Simmons*, 57 S. Car. 467, 35 S. E. 764.

³ *Finkelstein v. Morse*, 226 Mass. 368, 115 N. E. 667; *Aberdeen v. Equitable Surety Co.*, 92 Wash. 440, 159 Pac. 683.

See also *Hardaway v. National Surety Co.*, 150 Fed. 465, 80 C. C. A. 283. He has priority as to amounts due under the contract which has been performed by the assignor. *Aberdeen v. Equitable Surety Co.*, 92 Wash. 440, 159 Pac. 683.

⁴ *German-American Trust Co. v. White*, — Colo. —, 165 Pac. 761.

⁵ **Canada.** *Quebec Bank v. Taggart*, 27 Ont. 162.

United States. *Baker v. Wood*, 157 U. S. 212, 39 L. ed. 677.

California. *First National Bank of Bridgeport v. Irrigation District*, 107 Cal. 55, 40 Pac. 45.

Illinois. *Y. M. C. A. Gymnasium Co. v. Bank*, 179 Ill. 599, 70 Am. St. Rep. 135, 46 L. R. A. 753, 54 N. E. 297.

Indiana. *Moore v. Moore*, 112 Ind. 149, 2 Am. St. Rep. 170, 13 N. E. 673.

absolutely, but really as collateral, an assignment by such assignee to a bona fide assignee for value passes absolute title.⁶ So a prior assignor can not recover non-negotiable notes from the last assignee on the ground that such prior assignor was induced to assign such notes to an intermediate assignee through fraud.⁷

An assignee for value takes free from latent equities of third persons of which he had no notice.⁸ Thus an assignee of a judgment which is a lien on certain realty does not take subject to the interest of a mortgage on the same land, if the mortgage being defective, and therefore not constructive notice, although the assignor having actual notice thereof,⁹ nor does he take subject to the interest of a third person in the notes secured by the mortgage on which the judgment assigned had been rendered, where some of such notes had been assigned to such third person, but on foreclosure he had returned said notes to his assignor for the purpose of the suit and had allowed him to take judgment in his favor on all the notes.¹⁰

§ 2274. Theories as to necessity of notice to debtor. Whether notice of the assignment must be given to the debtor in order to protect the rights of the assignee, is a question the answer to which is determined largely by the theory of the purpose for which notice is requisite. According to one theory, the only purpose of such notice is to protect the debtor. Under this theory notice of an assignment is necessary only in cases in which the debtor has paid the debt to the original creditor or to one who claims under him, without notice of the assignment in question.¹ According to the

Nebraska. *Williams v. Donnelly*, 54 Neb. 193, 74 N. W. 601.

New York. *Moore v. Bank*, 55 N. Y. 41, 41 Am. Rep. 173 [overruling, *Bush v. Lathrop*, 22 N. Y. 535].

⁶ *Y. M. C. A. Gymnasium Co. v. Bank*, 179 Ill. 599, 70 Am. St. Rep. 135, 46 L. R. A. 753, 54 N. E. 297.

⁷ *Moore v. Moore*, 112 Ind. 149, 2 Am. St. Rep. 170, 13 N. E. 673.

⁸ *Western Bank v. Bank*, 90 Ga. 339, 35 Am. St. Rep. 210, 16 S. E. 942; *Yarnell v. Brown*, 170 Ill. 362, 62 Am. St. Rep. 380, 48 N. E. 909.

⁹ *Yarnell v. Brown*, 170 Ill. 362, 62 Am. St. Rep. 380, 48 N. E. 909.

¹⁰ *Western Bank v. Bank*, 90 Ga. 339, 35 Am. St. Rep. 210, 16 S. E. 942.

¹ **England.** *Unwin v. Grosvenor*, West Ch. 647.

United States. *Knickerbocker Trust Co. v. Coyle*, 139 Fed. 792.

Massachusetts. *Hellen v. Boston*, 194 Mass. 579, 80 N. E. 603.

North Carolina. *Virginia-Carolina Chemical Co. v. McNair*, 139 N. Car. 326, 51 S. E. 949.

Washington. *Dial v. Inland Logging Co.*, 52 Wash. 81, 100 Pac. 157.

On the subject of notice, see *Notice of Assignments in Equity*, by Edward Q. Keasbey, 19 Yale Law Journal, 258.

other theory, the purpose of notice is to make the assignee who gives the notice the master of the chose in action, and to divest the title of the assignor in favor of the assignee.² The practical difficulty in applying these two theories and distinguishing between them is due to the fact that while as a rule the courts which have adopted the first theory have applied it logically, the courts which have adopted the second theory have frequently shrunk from applying it, except for the purpose of protecting another bona fide assignee who takes for value and without notice. For this reason the courts which have apparently accepted the second theory, frequently reach results which apparently can be justified only by the first theory.

§ 2275. Origin of doctrine of necessity of notice in England.

The leading case in England, in which it was held that as between two successive assignees each claiming under a total assignment and each taking for value and without notice, priority should be given to the first who gave the notice, although he might be a subsequent assignee in point of time,¹ was a case which was not decided in accordance with the principles of equity, but under a provision of the bankrupt act of James I.² The only question which was involved in this case was whether the phrase, "any goods or chattels whereof they shall be reputed owners," included

² Lee v. Howlett, 2 Kay & J. 531; Bernard v. Whitney National Bank, 43 La. Ann. 50, 12 L. R. A. 302, 8 So. 702; Dillingham v. Traders' Ins. Co., 120 Tenn. 302, 16 L. R. A. (N.S.) 220, 108 S. W. 1148; Peters v. Goetz, 136 Tenn. 257, 188 S. W. 1144.

¹ Ryall v. Rowles, 1 Ves. Sr. 348, 9 Bligh (N.S.) 377 [sub nomine, Ryall v. Rolle, 1 Atk. 165].

² 21 Jac. Ic. 19, §§ X and XI, provided: "And for that it often falls out, that many persons before they become bankrupts, do convey their goods to other men upon good consideration, yet still do keep the same, and are reputed the owners thereof, and dispose the same as their own:

"Be it enacted, That if at any time

hereafter any person or persons shall become bankrupt, and at such time as they shall so become bankrupt shall by the consent and permission of the true owner and proprietary have in their possession, order and disposition, any goods or chattels, whereof they shall be reputed owners, and take upon them the sale, alteration or disposition as owners; that in every such case the said commissioners or the greater part of them shall have power to sell and dispose the same, to and for the benefit of the creditors which shall seek relief by the said commission, as fully as any other part of the estate of the bankrupt; and for the better payment of debts and discouraging men to become bankrupts."

choses in action which the bankrupt had assigned prior to his bankruptcy. It was held that these words were broad enough to include choses in action,³ and that as against the assignee in bankruptcy of an individual partner his assignment of his interest in the partnership to his co-partner was invalid as to specific existing chattels,⁴ and also as to choses in action of which the assignee had not taken possession as fully as the nature of the thing would permit. In the case of a bond, it was said that the assignor must deliver the bond to the assignee; and apparently in cases of all choses in action, notice must be given by the assignee to the debtor, in order to vest the assignee with such an interest that he could retain the benefits of the chose in action as against a subsequent assignee in bankruptcy.⁵ In deciding the case the court did not purport to be acting upon general principles of equity. The only question discussed was the construction of the bankrupt act, and of the acts which must be done in order that the assignor of a chose in action could be said not to have such chose in action in his "possession, order and disposition" after such assignment, within the meaning of the bankrupt act.

In a later case in which the question of necessity of notice to the debtor in order to protect an assignee as against a subsequent bona fide assignee was considered, the first assignee of an equitable interest in personalty had omitted to give notice to the trustees for four years and had permitted the assignor to hold himself out to the world as the owner of such equitable interest. The second assignee made actual inquiry of the trustees and was informed by them that they still held in trust for the assignor. For these reasons priority was given to the second assignee;⁶ a result which would probably be reached in jurisdictions in which priority would be given to the first assignee in point of time unless he had been guilty of laches or negligence.⁷ In deciding this case, however, language was used which seemed to indicate that priority of notice, and not priority of assignment, was the sole test for determining

³ Citing on this point, under another statute, *Ford and Sheldon's case*, 12 Coke 1.

⁴ Distinguishing and criticising the reasoning in *Copeland v. Gallant*, 1 P. Wms. 314.

⁵ *Ryall v. Rowles*, 1 Ves. Sr. 348, 9 Bligh (N.S.) 377 [sub nomine, *Ryall v. Rolle*, 1 Atk. 165].

⁶ *Dearle v. Hall*, 3 Russ. 1 (for opinion on appeal see 3 Russ. 55).

⁷ See § 2280.

the rights of the parties.⁸ In discussing the earlier case,⁹ the court, furthermore, said that while it was a case in bankruptcy, the chancellor had called to his assistance some eminent common-law

⁸ "Where a contract, respecting property in the hands of other persons who have a legal right to the possession, is made behind the back of those in whom the legal interest is thus vested, it is necessary, if the security is intended to attach on the thing itself, to lay hold of that thing in the manner in which its nature permits it to be laid hold of—that is, by giving notice of the contract to those in whom the legal interest is. By such notice, the legal holders are converted into trustees for the new purchaser, and are charged with responsibility towards him; and the cestui que trust is deprived of the power of carrying the same security repeatedly into the market, and of inducing third persons to advance money upon it, under the erroneous belief that it continues to belong to him absolutely, free from incumbrance, and that the trustees are still trustees for him, and for no one else. That precaution is always taken by diligent purchasers and incumbrancers: if it is not taken, there is neglect; and it is fit that it should be understood that the solicitor, who conducts the business for the party advancing the money, is responsible for that neglect. The consequence of such neglect is, that the trustee of the fund remains ignorant of any alteration having taken place in the equitable rights affecting it: he considers himself to be a trustee for the same individual as before, and no other person is known to him as his cestui que trust. The original cestui que trust, though he has in fact parted with his interest, appears to the world to be the complete equitable owner, and remains in the order, management, and disposition of the property as absolutely as ever; so

that he has it in his power to obtain, by means of it, a false and delusive credit. He may come into the market to dispose of that which he has previously sold; and how can those, who may chance to deal with him, protect themselves from his fraud? Whatever diligence may be used by a puerile incumbrancer or purchaser—whatever inquiries he may make in order to investigate the title, and to ascertain the exact state of the original right of the vendor, and his continuing right—the trustees, who are the persons to whom application for information would naturally be made, will truly and unhesitatingly represent to all who put questions to them, that the fund remains the sole absolute property of the proposed vendor. These inconveniences and mischiefs are the natural consequences of omitting to give notice to trustees; and they must be considered as foreseen by those who, in transactions of that kind, omit to give notice, for they are the consequences which, in the experience of mankind, usually follow such omissions. To give notice is a matter of no difficulty, and whenever persons, treating for a chose in action, do not give notice to the trustee or executor, who is the legal holder of the fund, they do not perfect their title; they do not do all that is necessary in order to make the thing belong to them in preference to all other persons; and they become responsible, in some respects, for the easily foreseen consequences of their negligence." *Dearle v. Hall*, 3 Russ. 1 (for opinion on appeal, see 3 Russ. 55).

⁹ *Ryall v. Rowles*, 1 Ves. Sr. 348, 9 Bligh (N.S.) 377 [sub nomine, *Ryall v. Rolle*, 1 Atk. 165].

judges, and that the grounds upon which this case was decided were not limited to cases of bankruptcy, but were of general application.¹⁰

These two cases were regarded as determining the law in England; and in the following cases it was assumed that priority of notice, and not priority of time, fixed the rights of the bona fide assignees, whether or not the cases were cases of bankruptcy and whether or not elements of negligence or laches on the part of the first assignee were present.¹¹ The principle was applied to cases in which it appeared affirmatively that the second assignee had made no inquiry of the trustee, and was not misled by the failure of the

¹⁰ *Dearle v. Hall*; *Lovridge v. Cooper*, 3 Russ. 1 (58).

¹¹ *Ex parte Arkwright*, 3 Mont. D. & D. G. 129; *Addison v. Cox*, L. R. 8 ch. 76.

"This was a question of priority between two equitable incumbrancers—a question whether the subsequent incumbrancer of the equity, having given notice to the trustees of the fund, was entitled to priority over the former incumbrancer. Now, that question has been settled, after much deliberate discussion, in the cases of *Dearle v. Hall*, 3 Russ. 1, 27 R. R. 1 and *Lovridge v. Cooper*, 3 Russ. 30, 27 R. R. 1. Those two cases were argued before Sir Thomas Plumer as Master of the Rolls with great learning and attention to the subject. The Master of the Rolls, after considering the question, pronounced a very elaborate judgment, deciding that in cases of this description the party who gave notice to the trustees was entitled to the priority; and, without adverting to the particular facts of those cases, the principle upon which the decision was founded was this: that if a contrary doctrine were to prevail, it would enable a cestui que trust to commit a fraud; he might assign his interest first to one and then to a second incumbrancer, and that second incumbrancer would have no opportunity by any communication with the trustees of as-

certaining whether or not there had been a prior assignment of the interest. There was also another principle upon which he decided that case, which was this, that a party till he gives notice to the trustees has not done everything necessary to complete his title. In such cases it is necessary for the parties to do everything in their power. Further than that he assigns, as an additional reason, that until notice was given to the trustees, they did not in fact become trustees for the assignee. It was upon these distinct grounds that he laid down as a general rule, that in case of an equitable assignment, the party giving notice to the trustees, although he was the second incumbrancer, was entitled to priority, if the former incumbrancer had given no such notice. * * * The principle of those authorities applies directly to the present case.' [Quoted from *Foster v. Cockerell*, 9 Bligh (N.S.) 332, 375.] According to that authority, the rule which prefers that assignee who has given prior notice does not depend solely on the imputation of laches to those who have not given notice; and even in the absence of laches the other grounds for the rule exist. Nor, I think, has the question ever been treated as one merely of laches. The courts seem to me to have in modern times asked only which assignee was the first to perfect his security by notice." In

first assignee to give notice.¹² The principle was not limited to assignments of contracts, but it applied to assignments of equitable interests in personalty,¹³ although it did not apply to assignments of interests in realty,¹⁴ or to an assignment of an equitable interest in a chattel real.¹⁵ It applied to an assignment of an interest in property which was in fact realty, but which was treated in equity as personalty under the doctrine of conversion, by reason of a direction to sell.¹⁶

In some cases actual knowledge on the part of the debtor seems to be sufficient, although the assignee has not given notice.¹⁷ In other cases the actual knowledge of the creditor was regarded as insufficient. A definite notice had to be given by the assignee.¹⁸

In reaching the result that priority depended on notice, and not on the time of the assignment, the courts overlooked or ignored the cases in which it was held that, apart from statute or apart from negligence or laches, priority of notice was not of itself sufficient to prefer the later assignee to the earlier assignee.¹⁹ Notice was

re Lake [1903], 1 K. B. 151. In some of the bankruptcy cases the real question decided is whether a chose in action is included in the term "goods in possession." Williams v. Thorpe, 2 Sim. 257, ex parte Tennyson, Mont. & B. 67.

¹² Foster v. Cockerell, 9 Bligh (N.S.) 376 [affirming, Foster v. Blackstone, 1 Mylne & K. 297; In re Lake [1903], 1 K. B. 147.

¹³ Timson v. Ramsbottom, 2 Keen 35; Martin v. Sedgwick, 9 Beav. 333; Foster v. Cockerell, 3 Cl. & Fin. 456; Eddy v. Bridges, 2 Y. & Coll. 486.

¹⁴ Lee v. Howlett, 2 Kay & J. 531.

¹⁵ Wiltshire v. Rabbits, 14 Sims. 76.

¹⁶ Lee v. Howlett, 2 Kay & J. 531.

¹⁷ Meux v. Bell, 1 Hare 73; In re Tichener, 35 Beav. 317.

¹⁸ Lloyd v. Banks, L. R. 4 Eq. 222; In re Brown L. R. 5 Eq. 88; Arden v. Arden, 29 Ch. D. 702.

¹⁹ Univen v. Grosvenor, West. Ch. 647 (a bankruptcy case); Evans v. Bicknell, 6 Ves. 174; Cooper v. Fynmore, 3 Russ. 60. "If the question were concerning a bond, or any other chose in

action, in the possession of the bankrupt, it would be within the statute. 21 Jac. from the case of Ryall v. Rowles, 1 Vesey, 348. There is no difference as to pawns, whether the goods have been in the possession of the pawner, or come into the possession of the pawnee. So, where there is a lien, there is no difference whether the special property be by the act of the pawner or any other way. Then, suppose there was no such statute. In this case, there is no doubt the plaintiff [testator] obtained the property. When Case made the assignment, Crowder acquired the property, and had a right to come here for the specific performance. Whatever binds the property in the hands of the bankrupt, binds it also in the hands of the assignee. Therefore, if it stands clear of the statute, Crowder is in the case of the bankrupt whilst solvent." Falkner v. Case, 1 Brown, Ch. 125, 2 T. R. 491 (holding that the bankrupt act did not apply to the facts of the case at bar).

held to be unnecessary where the assignor had only an equitable interest in an insurance policy of which the broker retained custody as a lien for the premium,²⁰ on the theory that in the case at bar the chose was not in the possession of the assignor. Notice was said to be necessary only for the protection of the debtor.²¹

The rule requiring notice was subsequently enacted in statutory form in the Judicature Act.²² The cases which have been decided since the enactment of this statute construe it and apply it; but since the enactment of the Judicature Act, the English rule is purely statutory. In cases which do not fall within the operation of the statute, the rule requiring notice is recognized as still in effect.²³

²⁰ *Falkner v. Case*, 1 Brown, Ch. 125, 2 T. R. 491 (a case of bankruptcy, distinguishing *Ryall v. Rowles*, 1 Ves. Sr. 348, 9 Bligh (N.S.) 377 [sub nomine, *Ryall v. Rolle*, 1 Atk. 165]).

²¹ "It is again objected that this is fraudulent, because no notice is given to the debtors whose debts are assigned. It would be a defense, indeed, for them if they had paid it to the assignor, and were afterwards sued by the assignee, but it is no defense on the part of the present defendants; and it is objected that this assignment, according to the doctrine of *Tywne's case*, 3 Co. 81, is fraudulent, because the property remained still in the assignor. But that doctrine extends not to such an assignment as this, but only to an assignment or sale of chattels which lie in livery. Choses in action will always remain in some measure in the power of the assignor." *Univen v. Grosvenor*, West. Ch. 647 (holding that a chose in action is not in the 'possession' of the bankrupt).

²² "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the

assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided, always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the acts for the relief of trustees." 36 & 37 Vict. c. 66, § 25 (6).

²³ *In re Lake* [1903], 1 K. B. 151; *In re Phillips' Trusts* [1903], 1 ch. 183; *Montefiore v. Guedalla* [1903], 2 ch. 26.

§ 2276. Necessity of notice as against claimants other than bona fide purchasers—Assignee and assignor. The practical application of the principles with reference to the necessity of notice by an assignee to the debtor to protect his rights against third persons, depends in part upon the theory of the necessity of notice which the particular jurisdiction adopts, and also upon the relation of the parties between whom the question of the priority of the first assignment is raised. In jurisdictions in which notice is regarded as necessary solely in order to protect the debtor, a logical application of this theory would require priority to be given to the first assignee in point of time; and this result is usually reached in these jurisdictions. In jurisdictions in which the theory prevails that notice to the debtor is necessary to divest the title of the assignor, a logical application of this theory would result in denying to the first assignee in point of time priority over a subsequent claimant who had acquired a complete title. This result can be avoided only by contending that the first assignee acquires at least an equitable interest and that the "title" which he gains by notice is something different from an equitable interest even where the right which is assigned is an equitable right, or by restating the general principle so as to make it apply only to protect subsequent bona fide purchasers for value. Except in cases in which the prior claimant in point of time is an attaching creditor, the theory that notice to the debtor is necessary to divest the title of the assignor is limited on one ground or the other, and it is generally held that the first assignee in point of time, who took for value, has priority as against a claimant other than a bona fide purchaser for value, who is subsequent in point of time.¹ As between the assignor and the assignee, the title of the assignor is divested in

¹ **England.** *Hobson v. Bell*, 2 Beav. 17; *Burn v. Carvalho*, 4 Myl. & Cr. 690; *Rodick v. Gandell*, 1 De G. M. & G. 763; *Gorring v. Irwell*, 34 Ch. D. 128; *Arden v. Arden*, 29 Ch. Div. 703; *In re Wallis* [1902], 1 K. B. 719; *Brandt's (William) Sons & Co. v. Dunlop Rubber Co.* [1905], A. C. 454; *In re Bristow* [1906], 2 I. R. 215; *Justice v. Wynne*, 12 Ir. Ch. 289.

United States. *Greey v. Dockendorff*, 231 U. S. 513, 58 L. ed. 339; *In re Cincinnati Iron Store Co.*, 167 Fed. 486, 93 C. C. A. 122.

Maryland. *Werntz v. Wells*, 130 Md. 53, 99 Atl. 956.

Massachusetts. *Wakefield v. Martin*, 3 Mass. 558.

Minnesota. *MacDonald v. Kneeland*, 5 Minn. 352; *Quigley v. Welter*, 95 Minn. 383, 104 N. W. 236.

New Jersey. *Cogan v. Conover Mfg. Co.*, 69 N. J. Eq. 809, 115 Am. St. Rep. 629, 64 Atl. 973.

North Carolina. *Virginia-Carolina Chemical Co. v. McNair*, 139 N. Car. 326, 51 S. E. 949.

favor of the assignee by the assignment itself, and notice to the debtor is not necessary to perfect the title of the assignee.²

§ 2277. Assignee and debtor. As between the debtor and the assignee, notice is not necessary to enable the assignee to enforce the contract against the debtor, if the debtor has not suffered a detriment by reason of the assignee's failure to give notice.¹ But until notice or knowledge the debtor is justified in treating the assignor as the party in interest, and payment by the debtor to the assignor before notice will discharge the debt in whole or in part.² A release given by the assignor to the debtor before notice and before the debtor has knowledge of the assignment, is operative as against the assignee.³ If the debtor has actual knowledge of the assignment, the original creditor can not release him.⁴

§ 2278. Assignee and claimant other than attaching creditor. A like principle applies as between the assignee and those who succeed to the title of the assignor, but who are not purchasers for

¹ **England.** *Hobson v. Bell*, 2 Beav. 17; *Burn v. Carvalho*, 4 Myl. & Cr. 690; *Rodick v. Gandell*, 1 De G. M. & G. 763; *Gorring v. Irwell*, 34 Ch. D. 128; *Brandt's (William) Sons & Co. v. Dunlop Rubber Co.* [1905], A. C. 454.

Maryland. *Werntz v. Wells*, 130 Md. 53, 99 Atl. 956.

Massachusetts. *Wakefield v. Martin*, 3 Mass. 558.

Minnesota. *MacDonald v. Kneeland*, 5 Minn. 352; *Quigley v. Welter*, 95 Minn. 383, 104 N. W. 236.

North Carolina. *Virginia-Carolina Chemical Co. v. McNair*, 130 N. Car. 326, 51 S. E. 949.

¹ *Knickerbocker Trust Co. v. Coyle*, 139 Fed. 792; *Allyn v. Allyn*, 154 Mass. 570, 28 N. E. 779; *Board of Education v. Duparquet*, 50 N. J. Eq. 234, 24 Atl. 922.

² **Alabama.** *Vann v. Marbury*, 100 Ala. 438, 46 Am. St. Rep. 70, 23 L. R. A. 325, 14 So. 273.

Connecticut. *City Bank v. Thorp*, 78 Conn. 211, 61 Atl. 428.

Louisiana. *Johnson v. Boice*, 40 La. Ann. 273, 8 Am. St. Rep. 528, 4 So. 163.

Maine. *Woods v. Ronco*, 85 Me. 124, 26 Atl. 1056.

Minnesota. *Nielsen v. Albert Lea*, 91 Minn. 392, 98 N. W. 195, 197.

Nebraska. *Consterdine v. Moore*, 65 Neb. 291, 101 Am. St. Rep. 620, 96 N. W. 1021.

Nevada. *Washoe County Bank v. Campbell*, 41 Nev. 153, 167 Pac. 643.

Oklahoma. *Pittsburg Mortgage Investment Co. v. Robins*, — Okla. —, 158 Pac. 929.

Pennsylvania. *Commonwealth v. Sides*, 176 Pa. St. 616, 35 Atl. 136.

South Carolina. *Harvin v. Galluchat*, 28 S. Car. 211, 13 Am. St. Rep. 671, 5 S. E. 359; *Willoughby v. Florence*, 51 S. Car. 462, 29 S. E. 242.

³ *Bush v. Prescott & N. W. R. Co.*, 76 Ark. 497, 89 S. W. 86.

⁴ *Nance v. Polk*, 116 Ark. 538 [memorandum opinion], 171 S. W. 1195.

value, such as receivers,¹ or trustees in bankruptcy.² It may be noted that the doctrine requiring notice to perfect the title of the assignee first arose in bankruptcy cases,³ and that under modern statutes which do not contain the same language as that of the bankrupt act of James I,⁴ the prior assignee in point of time prevails over a subsequent assignee or trustee in bankruptcy.

Notice to the debtor is not necessary as against the creditors of the assignor.⁵ An assignment under a construction contract is valid as against subcontractors or materialmen who have not obtained liens,⁶ even if the amount which is assigned is part of the fund retained by the debtor to protect him against claims of materialmen, laborers, and the like.⁷

If the second assignee does not pay value, the first assignee in point of time has priority, although he has not given notice until after the second assignee.⁸ If the first assignment is inoperative because it is not in writing,⁹ the first assignee can not claim priority as against a subsequent assignee on the ground that the subsequent assignee has not furnished any additional consideration, but has taken such assignment for a pre-existing debt.¹⁰

¹ *Arden v. Arden*, 29 Ch. Div. 703; *In re Bristow* [1906], 2 I. R. 215; *Cogan v. Conover Mfg. Co.*, 69 N. J. Eq. 809, 115 Am. St. Rep. 629, 64 Atl. 973.

² *In re Wallis* [1902], 1 K. B. 719; *Greedy v. Dockendorff*, 231 U. S. 513, 58 L. ed. 339; *In re Cincinnati Iron Store Co.*, 167 Fed. 486, 93 C. C. A. 122; *In re Hawley Down-Draft Furnace Co.*, 238 Fed. 122, 151 C. C. A. 198; *Jennings v. Whitney*, 224 Mass. 138, 112 N. E. 655.

³ *Ryall v. Rowles*, 1 Ves. Sr. 348, 9 Bligh (N.S.) 377 [sub nomine, *Ryall v. Rolle*, 1 Atk. 165].

See § 2275.

⁴ For the bankrupt act of James I, see § 2275, note 2.

"The rule of the English statutes as to reputed owners may extend to debts growing due to the bankrupt in the course of his business but we have no such statute." *Greedy v. Dockendorff*, 231 U. S. 513, 58 L. ed. 339.

⁵ *Greedy v. Dockendorff*, 231 U. S. 513, 58 L. ed. 339; *Williams v. Ingersoll*, 89 N. Y. 508.

⁶ *United States Fidelity & G. Co. v. Newark*, 79 N. J. Eq. 584, 37 L. R. A. (N.S.) 575, 81 Atl. 758 [citing and following *Grassmann v. Bonn*, 30 N. J. Eq. 490; *Shannon v. Hoboken*, 37 N. J. Eq. 123 (affirmed, *Shannon v. Hoboken*, 37 N. J. Eq. 318), and *Essex County v. Lindley*, 41 N. J. Eq. 180, 3 Atl. 391]; *National Surety Co. v. American Savings Bank & Trust Co.*, 101 Wash. 213, 172 Pac. 264.

⁷ *United States Fidelity & G. Co. v. Newark*, 79 N. J. Eq. 584, 37 L. R. A. (N.S.) 575, 81 Atl. 758.

⁸ *Justice v. Wynne*, 12 Ir. Ch. 289.

⁹ See §§ 2291 and 2292.

¹⁰ *American Exch. National Bank v. Federal National Bank*, 226 Pa. St. 483, 27 L. R. A. (N.S.) 666, 75 Atl. 683.

§ 2279. Assignee and attaching creditor. If the contest arises between an assignee who has failed to give notice to the debtor and a subsequent creditor of the assignor who seeks to attach the debt in the hands of the original debtor in an action against the assignor, we find a greater divergence of authority than in the foregoing cases. In England it is held that the prior assignee has priority over a subsequent attaching creditor, both before the enactment of the Judicature Act,¹ and after.² In the United States the great weight of authority is to the effect that the assignee who is prior in point of time has priority over a subsequent attaching creditor, as long as the contest is between such assignee and such attaching creditor.³ Notice by the assignee is given in time,

¹ *Scott v. Hastings*, 4 Kay & J. 633; *Pickering v. Ilfracombe Ry. Co.*, L. R. 3 C. P. 235; *Robinson v. Nesbitt*, L. R. 3 C. P. 264.

² *Ex parte Whitehouse* 32 Ch. D. 512; *Badeley v. Consolidated Bank*, 38 Ch. D. 238; *Davis v. Freethy*, 24 I. B. D. 619.

³ *United States. Young v. Upson*, 115 Fed. 192.

Alabama. *Jones v. Lowery Banking Co.*, 104 Ala. 252, 16 So. 11.

California. *McIntyre v. Hauser*, 131 Cal. 11, 63 Pac. 69.

Colorado. *Chamberlin v. Gilman*, 10 Colo. 94, 14 Pac. 107.

Georgia. *Chattanooga, etc., Bank v. Steel Co.*, 87 Ga. 435, 13 S. E. 586; *Walton v. Horkan*, 112 Ga. 814, 81 Am. St. Rep. 77, 38 S. E. 105.

Illinois. *Knight v. Griffey*, 161 Ill. 85, 43 N. E. 727.

Indiana. *Hoadley v. Caywood*, 40 Ind. 239.

Iowa. *Steltzer v. Condon*, 139 Ia. 754, 118 N. W. 39.

Kansas. *Hall v. Kansas City Terra Cotta Co.*, 97 Kan. 103, L. R. A. 1916D, 361, 154 Pac. 210.

Massachusetts. *Mayer v. Daniels*, 113 Mass. 129.

Michigan. *Blumenthal v. Simons*, 110 Mich. 42, 67 N. W. 1102.

Minnesota. *Lewis v. Bush*, 30 Minn. 244, 15 N. W. 113.

Mississippi. *Schofield v. Hirsh*, 71 Miss. 55, 42 Am. St. Rep. 450, 14 So. 528.

Montana. *State v. Conrow*, 19 Mont. 104, 47 Pac. 640.

Nebraska. *Scott v. Rohman*, 43 Neb. 618, 47 Am. St. Rep. 767, 62 N. W. 46.

New Hampshire. *Pollard v. Pollard*, 68 N. H. 356, 39 Atl. 329; *Glauber Mfg. Co. v. Voter*, 71 N. H. 68, 51 Atl. 270.

New Jersey. *Flostroy v. William B. Corby Coal Co.*, 80 N. J. Eq. 547, 85 Atl. 578.

New York. *Williams v. Ingersoll*, 89 N. Y. 508; *Edison Electric Illuminating Co. v. People's National Bank*, 221 N. Y. 1, L. R. A. 1917F, 1123, 116 N. E. 369.

Ohio. *Copeland v. Manton*, 22 O. S. 398.

Oklahoma. *Market National Bank v. Raspberry*, 34 Okla. 243, L. R. A. 1916E, 79, 124 Pac. 758.

Oregon. *Meier v. Hess*, 23 Or. 599, 32 Pac. 755.

Rhode Island. *Abbott v. Davidson*, 18 R. I. 91, 25 Atl. 839.

Virginia. *Mack Mfg. Co. v. Smoot*, 102 Va. 724, 47 S. E. 859.

Washington. *Bellingham Bay Boom Co. v. Brisbois*, 14 Wash. 173, 44 Pac. 153.

West Virginia. *Tingle v. Fisher*, 20 W. Va. 497.

although it is given after service of the attachment, as long as it is given in time to enable the debtor to protect himself in the attachment proceedings.⁴ As between the assignee and the debtor, the notice of the assignee comes too late if it is not given until after judgment has been rendered against the debtor in favor of the attaching creditor.⁵ Payment by the debtor before notice to an officer making proper levy or attaching discharges his liability to the assignee.⁶ It will be noted by a comparison of the cases here cited with those cited in a following section,⁷ that many jurisdictions, in which it is held that a subsequent bona fide assignee who takes for value and without notice has priority over a prior assignee who failed to give notice and that priority of notice controls rather than priority of time of assignment, hold that as between an assignee who has failed to give notice to the debtor and a subsequent attaching creditor, priority is to be given according to the time of the assignment, and not according to the time of notice to the debtor. At the same time it is held in a number of jurisdictions that where the contest is between the prior assignee and the subsequent attaching creditor, priority of notice rather than priority of assignment prevails, and that the subsequent attaching creditor has therefore priority over an assignee prior in point of time, but who did not give notice until after notice was given to the debtor in the attachment proceedings.⁸ Various reasons have been given for this result. It is said that, until notice, the title of the assignee is inchoate, and it may be divested by

⁴ England. *Scott v. Hastings*, 4 Kay & J. 633.

California. *Walling v. Miller*, 15 Cal. 38.

Illinois. *Knight v. Griffey*, 161 Ill. 85, 43 N. E. 727; *Williams v. West Chicago Street Ry.*, 109 Ill. 57, 64 N. E. 1024.

Oklahoma. *Market National Bank v. Raspberry*, 34 Okla. 243, L. R. A. 1916E, 79, 124 Pac. 758.

Rhode Island. *Abbott v. Davidson*, 18 R. I. 91, 25 Atl. 839.

Washington. *Bellingham Bay Boom Co. v. Brisbois*, 14 Wash. 173, 44 Pac. 238.

⁵ *Walters v. Washington Ins. Co.*, 1 Ia. 404, 63 Am. Dec. 451; *McGuire v.*

Pitt's Son, 42 Ia. 535; *Wood v. Partidge*, 11 Mass. 488; *Corbett v. Fitchburg Ry. Co.*, 110 Mass. 204; *Richards v. Griggs*, 16 Mo. 416, 57 Am. Dec. 240; *Peterson v. Kingman*, 59 Neb. 667, 81 N. W. 847.

⁶ *Faber v. Wagner*, 10 N. D. 287, 86 N. W. 963.

⁷ See § 2280.

⁸ *Vanbuskirk v. Hartford Fire Ins. Co.*, 14 Conn. 141, 36 Am. Dec. 473; *Bernard v. Whitney National Bank*, 43 La. Ann. 50, 12 L. R. A. 302, 8 So. 702; *Newman v. Irwin*, 43 La. Ann. 1114, 10 So. 181; *Rodes v. Haynes*, 95 Tenn. 673, 33 S. W. 564; *Dillingham v. Traders' Ins. Co.*, 120 Tenn. 302, 16 L. R. A. (N.S.) 220, 108 S. W. 1148.

seizure by the creditors of the assignor.⁹ In Connecticut it is said that "an attaching creditor stands in a situation very similar to that of a subsequent purchaser."¹⁰ In Vermont, by statute, negotiable paper, whether overdue or not, was subject to trustee process, "unless it shall appear that the same had been negotiated and notice thereof given to the maker or indorser before the service of process on him."¹¹ Under such a statute, notice is, of course, necessary to protect the assignee against a subsequent attaching creditor.¹² Knowledge on the part of the debtor is insufficient.¹³ It has, however, been said that "upon principle, subsequent purchasers and attaching creditors must stand upon the same ground,"¹⁴ and that it "is needless to cite cases to show the necessity of such notice."¹⁵

§ 2280. Necessity of notice as against subsequent bona fide purchaser. If the assignor has assigned the same claim at different times to different assignees, each of whom has paid value, and the second of whom has taken without notice, the difference in the application of the two theories as to the necessity of notice is the most sharply marked, since the subsequent bona fide assignee is to be given the fullest protection that is possible. In jurisdictions in which it is held that the first assignment passes the interest of the assignor to the assignee even before notice is given by the assignee to the debtor, there is no interest left in the assignor to assign to the second assignee, and accordingly the first assignee in point of time prevails,¹ so that if assignments are made at the same time

⁹ *Bernard v. Whitney National Bank*, 43 La. Ann. 50, 12 L. R. A. 302, 8 So. 702.

¹⁰ *Vanbuskirk v. Hartford Fire Ins. Co.*, 14 Conn. 141, 36 Am. Dec. 473.

¹¹ *Vermont. Acts of 1841*, p. 6.

¹² *Barney v. Douglass*, 19 Vt. 98; *Webster v. Moranville*, 30 Vt. 701.

¹³ *Peck v. Walton*, 25 Vt. 33.

¹⁴ *Ward v. Morrison*, 25 Vt. 593.

¹⁵ *Nichols v. Hooper*, 61 Vt. 295, 17 Atl. 134.

¹ *District of Columbia. Metropolitan Loan & Trust Co. v. Schafer*, 44 D. C. App. 356.

Illinois. Sutherland Reeve, 151 Ill. 384, 38 N. E. 130.

Indiana. White v. Wiley, 14 Ind. 496.

Kentucky. Columbia, etc., Co. v. Bank 116 Ky. 364, 76 S. W. 156; *Lexington Brewing Co. v. Hamon*, 155 Ky. 711, 160 S. W. 264.

Massachusetts. Herman v. Connecticut Mutual Life Ins. Co., 218 Mass. 181, 105 N. E. 450 (obiter).

Minnesota. MacDonald v. Kneeland, 5 Minn. 352.

New Jersey. Kennedy v. Parke, 17 N. J. Eq. 415.

New York. Fortunato v. Patten, 147 N. Y. 277, 41 N. E. 572.

Oregon. Meier v. Hess, 23 Or. 599, 32 Pac. 755.

their priorities are equal, even if one assignee gives notice to the debtor before the others do.² This is the logical result of the theory that notice is intended only for the benefit of the debtor. It assumes that the first assignee has not been guilty of laches or negligence which will justify the court in postponing his right in favor of the second assignee whom he has thus misled.

A different question arises where the conduct of the first assignee has been such as to enable the assignor to mislead the second assignee. Where it is a general principle of law that wherever "an owner has so acted as to mislead a third person into an honest belief that the one dealing with the property had a right to do so, he is estopped from showing the truth,"³ the first assignee may estop himself by his negligence in perfecting the indicia of the owner to remain in the hands of the assignor, and under such circumstances he will be postponed to a subsequent bona fide purchaser who was misled thereby, even in jurisdictions in which, in the absence of estoppel, priority of the time of assignment would prevail rather than priority of the time of notice.⁴ If the assignee of an insurance policy which contains a provision to the effect that assignment thereof must be in writing, permits it to remain in the hands of the assignor or his agent and he accepts a separate assign-

Texas. *Brander v. Young*, 12 Tex. 332.

West Virginia. *Turk v. Skiles*, 45 W. Va. 82, 30 S. E. 234.

²*Skobis v. Ferge*, 102 Wis. 122, 78 N. W. 426.

³*Baker v. Davie*, 211 Mass. 429, 97 N. E. 1094.

See to the same effect, *London Joint Stock Bank v. Simmons* [1892], A. C. 201; *Brocklesby v. Temperance Permanent Building Society* [1895], A. C. 173; *Farquaharson v. King* [1901], 2 K. B. 697; *Scollans v. Rollins*, 173 Mass. 275, 53 N. E. 863; *Gardner v. Beacon Trust Co.*, 190 Mass. 27, 78 N. E. 455; *Washington v. First National Bank*, 147 Mich. 571, 111 N. W. 349.

⁴*Bridge v. Connecticut Mutual Life Ins. Co.*, 152 Mass. 343, 25 N. E. 612; *Herman v. Connecticut Mutual Life Ins. Co.*, 218 Mass. 181, 105 N. E. 450; *Washington Township v. Huntington*

First National Bank, 147 Mich. 571, 111 N. W. 349, 111 N. W. 349 [distinguishing, *Miner v. Vedder*, 66 Mich. 101, 33 N. W. 47, as a case in which the second assignee was not a bona fide purchaser]. "The bridge company was permitted to retain the original contract, and this without notice of any rights of the prior assignees. It was known that the only method of payment was by orders drawn on the township treasurer, and that these must come to the hands of the bridge company as the apparent owner. The bridge company was thus invested with every indicia of ownership, and, within the rule stated, one who was thus induced to purchase these orders, and who parts with value upon the strength of this apparent ownership, may well assert that the prior assignees have estopped themselves." *Washington Township v.*

ment in writing,⁵ or if he permits such policy and assignment to remain in the hands of the assignor, the assignment being fastened to the policy with paste so that it could be removed readily,⁶ or if he permits the original of a public contract to remain in the hands of the assignor, knowing that such contract is to be paid for by orders which will be made payable to the assignor unless the assignee notifies the public corporation of his interest therein,⁷ such conduct on the part of the first assignee is held to estop him from setting up his prior assignment as against a subsequent assignee who takes for value and without notice of the prior assignment. If the first assignee has in fact given notice to the debtor, he is not guilty of negligence in omitting to bring action to recover the assigned debt when it became due; and if after such notice the debtor pays the assignor upon his demand that the debtor pay no attention to assignments, the assignor may recover such payment from the debtor.⁸

In other jurisdictions the English rule is adopted, and it is held that as between two bona fide assignees the one who gives notice to the debtor first has priority, although his assignment may have been later in point of time.⁹ In some of the jurisdictions in which

First National Bank, 147 Mich. 571, 11 L. R. A. (N.S.) 471, 111 N. W. 349.

"The plaintiff took his assignment by an instrument separate and apart from the policy itself. He allowed the possession of the policy to remain unaltered. It is true that he did this on the false representation that it was held by the insurance company as security for a premium loan; but the fact remains that it was his voluntary act. He took no other precaution, either by giving notice to the company or otherwise. He testified that he did not even tell Sommer that the policy had not been delivered to him. He trusted everything to Williams; and his own testimony was that he did this by reason of his 'full confidence in Williams.' He knowingly allowed the circumstances to be such as to indicate that Sommer retained the full ownership of the policy, and such that no inquiry of the company

would disclose anything to the contrary or throw any doubt upon Sommer's title. For this reason, such cases as *Mente v. Townsend*, 68 Ark. 391, are not applicable here. The case is a stronger one than *Bridge v. Connecticut Mutual Life Ins. Co.*, 152 Mass. 343, and the reasoning of that opinion is decisive against the plaintiff. There are no circumstances upon which any distinction can be made in his favor." *Herman v. Connecticut Mutual Life Ins. Co.*, 218 Mass. 181, 105 N. E. 450.

⁵ *Herman v. Connecticut Mutual Life Ins. Co.*, 218 Mass. 181, 105 N. E. 450.

⁶ *Bridge v. Connecticut Mutual Life Ins. Co.*, 152 Mass. 343, 25 N. E. 612.

⁷ *Washington Township v. First National Bank*, 147 Mich. 571, 11 L. R. A. (N.S.) 471, 111 N. W. 349.

⁸ *City Bank v. Thorp*, 79 Conn. 194, 64 Atl. 205.

⁹ *England. Dearle v. Hall*, 3 Russ. 1; *Wigram v. Buckley* [1894], 3 Ch. 483;

this rule has been adopted, it has been justified upon the same theory as that upon which the English courts have justified the rule,¹⁰ and it is said that the first assignee does not divest the assignor of his interest in the fund until he has given notice of the assignment to the debtor.¹¹ In other jurisdictions the same rule has been adopted, but for different reasons. This rule is said to be adopted by the courts of Tennessee, contrary to the weight of American authority, "not to prevent a multiplicity of suits, but because it was considered to be the more reasonable and safe, practical

In re Lake [1903], 1 K. B. 151; In re Phillips [1903], 1 Ch. 183.

United States. Spain v. Hamilton's Administrator, 68 U. S. (1 Wall.) 604, 17 L. ed. 619 (the first assignment was a "blind assignment," naming no amount, and no assignee, and not describing the fund assigned); Christmas v. Russell, 81 U. S. (14 Wall.) 69, 20 L. ed. 762 (no assignment held to exist); Laclede Bank v. Schuler, 120 U. S. 511, 30 L. ed. 704 (a check held to give no lien on the deposit until presentation, as against an assignee for the benefit of creditors); Burck v. Taylor, 152 U. S. 634, 38 L. ed. 578 (a contract non-assignable by statute as well as by express contractual provision); Methven v. Power Co., 66 Fed. 113, 13 C. C. A. 362; In re Hawley Down-Draft Furnace Co., 233 Fed. 451 (denying rehearing, In re Hawley Down-Draft Furnace Co., 230 Fed. 471).

California. Graham Paper Co. v. Pembroke, 124 Cal. 117, 71 Am. St. Rep. 26, 44 L. R. A. 632, 56 Pac. 627 (evidences of debt left with assignor so as to mislead second assignee; Widenmann v. Weniger, 164 Cal. 667, 130 Pac. 421).

Connecticut. Vanbuskirk v. Hartford Fire Ins. Co., 14 Conn. 141, 36 Am. Dec. 473.

Iowa. Van Laningan v. Chicago, Milwaukee & St. Paul Ry., 164 Ia. 161, 145 N. W. 464.

Louisiana. Newman v. Irwin, 43 La. Ann. 1114, 10 So. 181.

Maryland. Lambert v. Morgan, 110 Md. 1, 132 Am. St. Rep. 412, 17 Am. & Eng. Ann. Cas. 439, 72 Atl. 407.

Missouri. Richards v. Griggs, 16 Mo. 416, 57 Am. Dec. 240.

Mississippi. Enochs-Havis Lumber Co. v. Newcomb, 79 Miss 462, 30 So. 608.

New Jersey. Jenkinson v. New York Finance Co., 79 N. J. Eq. 247, 82 Atl. 36.

Oklahoma. Jack v. National Bank, 17 Okla. 430, 89 Pac. 219 [overruling, Gillette v. Murphy, 7 Okla. 91, 54 Pac. 413], Market National Bank v. Raspberry, 34 Okla. 243, L. R. A. 1916E, 79, 124 Pac. 758.

Pennsylvania. Phillips' Estate (No. 3), 205 Pa. St. 515, 97 Am. St. Rep. 746, 66 L. R. A. 760, 55 Atl. 213, American Exch. National Bank v. Federal National Bank, 226 Pa. St. 483, 27 L. R. A. (N.S.) 666, 75 Atl. 683.

Tennessee. Clodfelter v. Cox, 33 Tenn. (1 Sneed) 330, 69 Am. Dec. 157; Peters v. Goetz, 136 Tenn. 257, 188 S. W. 1144.

Vermont. Ward v. Morrison, 25 Vt. 593.

Virginia. Coffman v. Liggett's Administrator, 107 Va. 418, 59 S. E. 392.

¹⁰ See § 2275.

¹¹ "To constitute an assignment of a debt or other chose in action, in equity, no particular form is necessary. A draft drawn by A or B in favor of C for a valuable consideration, amounts to a valid assignment to C of so much

rule."¹² In Oklahoma it was first held that priority in time of assignment was the test.¹³ This case was subsequently overruled, without discussion, on the theory that since Oklahoma was then a territory, the decisions of the United States courts were "binding and conclusive" upon the courts of Oklahoma.¹⁴ The latter case was followed in turn, without discussion, after the admission of Oklahoma as a state.¹⁵ Sometimes the reasons given for ignoring the first assignment go far beyond all questions of notice.¹⁶

Even under such rule, however, if the second assignee in point of time is the first to give notice, he must have taken the assignment for value and without notice of the first assignment.¹⁷

of the funds of A in the hands of B. Any order, writing, or act which makes an appropriation of a fund, amounts to an equitable assignment of the fund. The reason is, that the fund being a matter not assignable at law, nor capable of manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it is held good in a court of equity. As the assignee is generally entitled to all the remedies of the assignor, so he is subject to all the equities between the assignor and his debtor. But in order to perfect his title against the debtor it is indispensable that the assignee should immediately give notice of the assignment to the debtor, for otherwise a priority of right may be obtained by a subsequent assignee, or the debt may be discharged by a payment to the assignee before such notice. No cases can be cited, or were in conflict with those upon which we rely for the judgment which we are about to give in this case." *Spain v. Hamilton's Administrator*, 68 U. S. (1 Wall.) 604, 17 L. ed. 619.

¹² *Peters v. Goetz*, 136 Tenn. 257, 188 S. W. 1144.

¹³ *Gillette v. Murphy*, 7 Okla. 91, 54 Pac. 413.

¹⁴ *Jack v. National Bank*, 17 Okla. 430, 89 Pac. 219 [citing and following. *Spain v. Hamilton's Administrator*, 68

U. S. (1 Wall.) 604, 17 L. ed. 619, and *Methven v. Staten Island Light, Heat & Power Co.*, 66 Fed. 113].

¹⁵ *Market National Bank v. Raspberry*, 34 Okla. 243, L. R. A. 1916E, 79, 124 Pac. 758.

¹⁶ "It is a mistake to suppose that the profits to be derived from the performance of a contract, as yet unexecuted, are something separable from the performance—as a coupon is detachable from a bond—and can be sent floating through the channels of commerce as a separate obligation. The profits are tied up in the contract to such an extent that the promise in respect to them becomes of value only when he who makes the promise shall have earned the profits through the performance of the contract. And when the contract, being wholly executory, is transferred to a third party who is accepted by the promisor in lieu of the original contractor, such third party enters upon the performance of the contract free from any disposition of the profits made by the original [contractor] contract or before the substitution." *Burek v. Taylor*, 152 U. S. 634, 38 L. ed. 578.

¹⁷ *Newton v. Newton*, 46 Minn. 33, 48 N. W. 450; *Phillips' Estate* (No. 3), 205 Pa. St. 515, 97 Am. St. Rep. 746, 55 Atl. 213.

§ 2281. Contents and service of notice. The notice of assignment given to the debtor must be such as to apprise him of the fact of assignment.¹ Apart from this, no special form is necessary.² If the notice is sufficiently clear, it is not necessary that the assignment be shown to the debtor.³ If, however, the notice is vague and uncertain,⁴ or if it is in a language unknown to the debtor, and it is taken away by the assignee who tells the debtor that it is a note which the assignee wishes the debtor to sign,⁵ it is not sufficient. Mere failure to give the month and date of an order by a depositor on a savings bank does not invalidate the notice.⁶ Mere knowledge that the attorney of the adversary party is to receive a certain per cent. of the recovery is not notice that the transaction amounts to an assignment.⁷

Pinning a notice of assignment to a written claim against a municipal corporation is sufficient as service, even though such notice becomes unpinned later, after the municipal corporation has received it.⁸

Under a statute providing that if an assignment is written and filed it shall operate as constructive notice, actual notice to the debtor is sufficient as between the assignee and the debtor, though the statutory notice is not given.⁹ A similar statutory provision, when read in connection with the entire statute, has been held to apply only to assignments made by a building contractor, which would prejudice the rights of materialmen, subcontractors, and the like,¹⁰ and it has been held not to apply to a contest between an assignee of a building contractor and one who has obtained judgment against such building contractor for personal injuries and who seeks to reach the amount due under the building contract by proceedings in aid of execution.¹¹

¹ Bunnell v. Bronson, 78 Conn. 679, 63 Atl. 396; Mueller v. University, 195 Ill. 236, 88 Am. St. Rep. 194, 63 N. E. 110; Dale v. Kimpton, 46 Vt. 76.

² Brandt v. Dunlop Rubber Co. [1905], A. C. 454, 74 L. J. K. B. 898 [reversing Brandt v. Dunlop Rubber Co. [1904], 1 K. B. 387; Bunnell v. Bronson, 78 Conn. 679, 63 Atl. 396; Sintes v. Commerford, 112 La. 706, 36 So. 656.

³ North Penn. Iron Co. v. International Lithoid Co., 217 Pa. St. 538 66 Atl. 860.

⁴ Mueller v. University, 195 Ill. 236, 88 Am. St. Rep. 194, 63 N. E. 110.

⁵ Crouch v. Muller, 141 N. Y. 495, 36 N. E. 304

⁶ Weld v. Bank, 158 Mass. 339, 33 N. E. 519.

⁷ Rose v. Fretz, 109 Fed. 810.

⁸ Brooks v. Hinton State Bank, 26 Okla. 56, 30 L. R. A. (N.S.) 807, 110 Pac. 46.

⁹ Kansas City, Ft. S. & M. R. Co. v. Joslin, 74 Ark. 551, 86 S. W. 435; Galveston, etc., Ry. v. Ginther, 96 Tex. 295, 72 S. W. 166.

¹⁰ Edison Electric Illuminating Co. v. People's National Bank, 221 N. Y. 1, L. R. A. 1917F, 1123, 116 N. E. 369.

¹¹ Edison Electric Illuminating Co. v. People's National Bank, 221 N. Y. 1, L. R. A. 1917F, 1123, 116 N. E. 369.

§ 2282. To whom notice should be given. Notice should be given to the debtor or to his duly authorized agent.¹ Notice may be given to the agent through whom his principal has been accustomed to receive notice,² even if in the particular case he omits to forward such notice to his principal. Notice to a firm is sufficient if given to the bookkeeper in charge of the store, where the partners are all absent.³

If the notice is actually communicated to the debtor it is sufficient, even if given to another person to be communicated.⁴ Notice to one who is not a duly authorized agent is insufficient if the debtor does not actually receive knowledge thereof.⁵ If the debtor has paid the fund into court, notice to the clerk is insufficient.⁶

§ 2283. Effect of notice. After notice of an assignment the debtor is liable to the assignee.¹ Subsequent payment to the assignor,² or to subsequent attaching creditors,³ or a subsequent con-

¹ *Hellen v. Boston*, 194 Mass. 579, 80 N. E. 603; *Peters v. Goetz*, 136 Tenn. 257, 188 S. W. 1144.

² *Illinois Central Ry. v. Bryant*, 70 Miss. 665, 12 So. 592.

³ *May v. Hill*, 14 Mont. 338, 36 Pac. 877.

⁴ *Holt v. Babcock*, 63 Vt. 634, 22 Atl. 450 (where the notice is given to the debtor's wife and is communicated by her to him).

⁵ *Hellen v. Boston*, 194 Mass. 579, 80 N. E. 603; *Peters v. Goetz*, 136 Tenn. 257, 188 S. W. 1144.

⁶ *Peters v. Goetz*, 136 Tenn. 257, 188 S. W. 1144.

¹ *England. Liquidation Estate Purchase Co. v. Willoughby (H. L.)* (1898), A. C. 321.

Connecticut. City Bank v. Thorp, 79 Conn. 194, 64 Atl. 205.

Florida. Johnston v. Allen, 22 Fla. 224, 1 Am. St. Rep. 180.

Louisiana. Sintès v. Commerford, 112 La. 706, 36 So. 656.

Minnesota. Schilling v. Mullen, 55 Minn. 122, 43 Am. St. Rep. 475, 56 N. W. 586.

New York. Beardsley v. Cook, 154 N. Y. 707, 49 N. E. 126.

Pennsylvania. North Penn. Iron Co.

v. International Lithoid Co., 217 Pa. St. 538, 66 Atl. 860; *First National Bank v. Geske*, 85 Wash. 477, 148 Pac. 593.

² *Alabama. Ivy Coal & Coke Co. v. Long*, 139 Ala. 535, 36 So. 722.

Connecticut. City Bank v. Thorp, 79 Conn. 194, 64 Atl. 205.

Florida. Johnston v. Allen, 22 Fla. 224, 1 Am. St. Rep. 180.

New Jersey. Bank v. Bayonne, 48 N. J. Eq. 246, 21 Atl. 478; *Herter v. Goss, etc., Co.*, 57 N. J. L. 42, 30 Atl. 252.

New York. Beardsley v. Cook, 154 N. Y. 707, 49 N. E. 126.

Virginia. Chesapeake Classified Building Association v. Coleman, 94 Va. 433, 26 S. E. 843.

Washington. Taggart v. Bank, 12 Wash. 538, 41 Pac. 892.

Payment to a creditor of the assignor, whose claim against the assignor the debtor has guaranteed orally, is not a defense as against the assignee. *First National Bank v. Geske*, 85 Wash. 477, 148 Pac. 593.

³ *Ruthven v. Clarke*, 109 Ia. 25, 79 N. W. 454; *Merchants', etc., Bank v. Barnes*, 18 Mont. 335, 56 Am. St. Rep. 586, 47 L. R. A. 737, 45 Pac. 218.

tract with the assignor,⁴ or a settlement with him,⁵ or release from him,⁶ will not protect the debtor as against the assignee. So the debtor can not set off against the assigned debt subsequent advances made by him to the assignor.⁷ But if the claim assigned is invalid, the debtor is not liable to the assignee for a payment made to the assignor to avoid litigation.⁸ However, if notice of assignment is given to a debtor after he has given his check to the assignor, he is not bound to stop the check in order to protect himself from liability to the assignee.⁹

If notice has been given properly, the first assignee may recover from the second assignee, to whom the debtor has paid the claim.¹⁰

§ 2284. Effect of assignment for sole purpose of collection.

Whether an assignee who takes the legal title to the contract for the purpose of enforcing it, but who does not take the beneficial interest, and who is to account to his assignor for what he receives thereunder can be regarded as an assignee and can sue thereon in his own name, is a question on which the courts differ. Some hold that such an assignee can sue.¹ This rule is based on the theory that as payment to the assignee discharges the debt, it is immaterial to the debtor what the real relation between the assignor and

⁴ *Quick v. Colchester*, 30 Ont. 645.

⁵ *McCarthy v. Water Co.*, 110 Cal. 687, 43 Pac. 391; *A. K. McInnis Lumber Co. v. Rather*, 111 Miss. 55, 71 So. 264; *Ashby v. Winston*, 34 Mo. 311.

⁶ *Webb v. Steele*, 13 N. H. 230.

⁷ *Blakistone v. Bank*, 87 Md. 302, 39 Atl. 855.

⁸ *Beran v. Bank*, 137 N. Y. 450, 33 N. E. 593.

⁹ *Bence v. Shearman*, 67 L. J. N. S. (Ch. Div.) 513.

¹⁰ *Brooks v. Hinton State Bank*, 26 Okla. 56, 30 L. R. A. (N.S.) 807, 110 Pac. 46.

¹ *England. Comfort v. Betts* [1891], 1 Q. B. 737; *Fitzroy v. Cave* [1905], 2 K. B. 364.

United States. Feidler v. Bartleson, 161 Fed. 30 (under statutes of Washington).

California. Greig v. Riordan, 99 Cal. 316, 33 Pac. 913; *Bauer v. State*, 144 Cal. 740 78 Pac. 280.

Connecticut. Metropolitan Life Ins. Co. v. Fuller, 61 Conn. 252, 29 Am. St. Rep. 196, 23 Atl. 193.

Iowa. Kandler v. Sharp, 36 Ia. 232.

Louisiana. Wenar v. Schwartz, 120 La. 1, 44 So. 902.

Michigan. Brown v. Stoerkel, 74 Mich. 269, 3 L. R. A. 430, 41 N. W. 921.

Minnesota. Anderson v. Reardon, 46 Minn. 185, 48 N. W. 777; *Jackson v. Severson*, 79 Minn. 275, 82 N. W. 634.

New York. Allen v. Brown, 44 N. Y. 228.

Oregon. Sloan v. Woodward, 25 Or. 223, 35 Pac. 450; *Falconio v. Larsen*, 31 Or. 137, 37 L. R. A. 254, 48 Pac. 703.

South Dakota. Citizens' Bank v. Corkings, 9 S. D. 614, 62 Am. St. Rep. 891, 70 N. W. 1059.

Utah. Wines v. Ry., 9 Utah, 228, 33 Pac. 1042.

Washington. Olsen v. Hagan, 102 Wash. 321, 172 Pac. 1173; *McGillivray*

the assignee is.² Another reason given therefor is that the assignee is the trustee of an express trust, and as such can sue in his own name.³ If the assignment is a legal one, it is said that the action is one to enforce a legal right resulting from a valid assignment.⁴ In some jurisdictions there is a specific statutory provision authorizing the assignee to sue, although the assignor retains an interest.⁵ The assignor can not, therefore, make a valid subsequent assignment of an account which has already been assigned for collection.⁶ Such an assignment has been said to make the assignor and assignee owners in common if they were to divide the proceeds of the claim.⁷

Other courts hold that such an assignee can not maintain an action in his own name,⁸ on the theory that he is not the real party in interest. He is not a "bona fide assignee" within the meaning of a statute authorizing a bona fide assignee to sue in his own name.⁹

The fact that the consideration is a small sum and "other sufficient and valuable consideration," does not show that the assignment is for collection or speculation.¹⁰

§ 2285. Elements of assignment—General nature. An assignment which is affected by the voluntary act of the assignor and the assignee, is controlled by the ordinary rules of law which control other contracts.¹ The general question of the capacity of the par-

v. Columbia Salmon Co., 104 Wash. 623, 177 Pac. 660.

Wisconsin. Chase v. Dodge, 111 Wis. 70, 86 N. W. 548.

² Chase v. Dodge, 111 Wis. 70, 86 N. W. 548.

³ Citizens' Bank v. Corkings, 9 S. D. 614, 62 Am. St. Rep. 891, 70 N. W. 1059.

⁴ Fitzroy v. Cave [1905], 2 K. B. 364.

⁵ Section 191 of Remington's Code (Washington) of 1915; Olsen v. Hagen, 102 Wash. 321, 172 Pac. 1173; McGillivray v. Columbia Salmon Co., 104 Wash. 623, 177 Pac. 660.

⁶ Works v. Merritt, 105 Cal. 467, 38 Pac. 1109.

⁷ Weakley v. Hall, 13 Ohio, 167.

⁸ Connecticut. Gaffney v. Tammany, 72 Conn. 701, 46 Atl. 156; Slade v. Zeitfuss, 77 Conn. 457, 59 Atl. 406;

Muller v. Witte, 78 Conn. 495, 62 Atl. 756.

Kansas. Stewart v. Price, 64 Kan. 191, 67 Pac. 553.

Maine. Waterman v. Merrow, 94 Me. 237, 47 Atl. 157; Coombs v. Harford, 99 Me. 426, 59 Atl. 529.

Ohio. Brown v. Ginn, 66 O. S. 316, 64 N. E. 123.

Oregon. Li Sai Cheuk v. Lee Lung, 79 Or. 563, 156 Pac. 254.

Pennsylvania. Verstine v. Yeaney, 210 Pa. St. 109, 59 Atl. 689.

⁹ Slade v. Zeitfuss, 77 Conn. 457, 59 Atl. 406.

¹⁰ Jahn v. Champagne Lumber Co., 147 Fed. 631.

¹ O'Connell v. Worcester, 225 Mass. 159, 114 N. E. 201; Sherman v. Harris, 36 S. D. 50, 153 N. W. 925

ties, the genuineness of the offer and acceptance, and the like, need not be repeated here. The questions which arise most frequently involve the intention of the parties to make an assignment and the necessity of consideration. The assent of the assignee will be presumed where the assignment was beneficial to the assignee.² If the assignee of a contract for the sale of realty causes the title to be examined and a deed to be prepared, and requires the assignor to perfect title to a part of the premises covered by the contract, such conduct is sufficient to show acceptance on his part.³ If the assignor has delivered a written assignment to the assignee, such delivery is ordinarily conclusive as between the assignee and the debtor if the rights of third parties are not involved.⁴ Acceptance of an offer of assignment made by mail is said to be complete when the order of acceptance is mailed.⁵ Acceptance of an assignment will relate back to the original offer.⁶ If A gives an order to pay to C, and such order operates as an assignment, it takes effect on C's acceptance from the time that it was made.⁷ The debtor is not protected as against the original creditor, by payments made in excess of the terms of the assignment.⁸ An order by A to B to pay C as C performs his contract with A, does not protect B if B pays C before C has performed such contract.⁹ An assignment may be subject to a condition. A deed purporting to convey an interest in a contract operates as an assignment,¹⁰ even if invalid as a deed.¹¹ So does a mortgage if so intended.¹² The destruction of a quitclaim deed which operated as an assignment of an interest in a contract for the sale of realty does not defeat the assignment unless the parties intended it as a reassignment.¹³ After the owner of

² *Kaufman v. State Savings Bank*, 151 Mich. 65, 123 Am. St. Rep. 259, 114 N. W. 863.

³ *Evans v. Stratton*, 142 Ky. 615, 34 L. R. A. (N.S.) 393, 134 S. W. 1154.

⁴ *Hixson Map Co. v. Nebraska Post Co. (Neb.)*, 98 N. W. 872.

⁵ *Couret v. Conner*, 118 Miss. 374, 79 So. 230.

⁶ *Rinehart & Dennis Co. v. McArthur*, 123 Va. 556, 96 S. E. 829.

⁷ *Rinehart & Dennis Co. v. McArthur*, 123 Va. 556, 96 S. E. 829.

⁸ *Sparks v. Jasper County*, 213 Mo. 218, 112 S. W. 265.

⁹ *Sparks v. Jasper County*, 213 Mo. 218, 112 S. W. 265; *O'Connell v. Worcester*, 225 Mass. 159, 114 N. E. 201.

¹⁰ *Brock v. Pearson*, 87 Cal. 581, 25 Pac. 963. (Here the deed purported to convey one-fourth of the land contracted for and was treated as an assignment of one-fourth of the contract.)

¹¹ *Marchant v. Morton* [1901], 2 K. B. 829. (Since executed by one partner only, in the partnership name.)

¹² *Dutton's Estate*, 181 Pa. St. 426, 37 Atl. 582.

¹³ *Brock v. Pearson*, 87 Cal. 581, 25 Pac. 963.

realty has contracted with one person for its sale, his conveyance to another subject to such contract does not operate as an assignment of the contract.¹⁴

§ 2286. Intent to reserve control to assignor. No particular form of words is necessary to assign a contract unless some statute provides therefor. Any language or conduct which shows the intention of the assignor to transfer his interest in the contract to the assignee is sufficient.¹ To constitute an assignment, however, it must be the intention of the assignor to pass control over the contract or the fruits thereof to the assignee.² An assignment to C of a business which A has bought from B, does not necessarily operate as an assignment of a contract by B not to compete with

¹⁴ O'Brien v. Evans, 107 Mich. 623, 65 N. W. 571.

¹ England. Brandt v. Dunlop Rubber Co. [1905] A. C. 454, 74 L. J. K. B. 898 [reversing, Brandt v. Dunlop Rubber Co. (1904) 1 K. B. 387].

United States. Spain v. Hamilton's Administrator, 68 U. S. (1 Wall.) 604, 17 L. ed. 619.

Alabama. Strickland v. Lesesne, 160 Ala. 213, 49 So. 233.

Florida. Clarkson v. Louderbach, 36 Fla. 660, 19 So. 887.

Georgia. Johnson v. Brewer, 134 Ga. 828, 31 L. R. A. (N.S.) 332, 68 S. E. 590.

Illinois. Savage v. Gregg, 150 Ill. 161, 37 N. E. 312.

Massachusetts. Weed v. Jewett, 43 Mass. (2 Met.) 608, 37 Am. Dec. 175.

Minnesota. Smith v. Meyer, 84 Minn. 455, 87 N. W. 1122.

Missouri. Macklin v. Kinealy, 141 Mo. 113, 41 S. W. 893.

West Virginia. Bentley v. Ins. Co., 40 W. Va. 729, 23 S. E. 584; McConaughy v. Bennett, 50 W. Va. 172, 40 S. E. 540; Millan v. Bartlett, 78 W. Va. 367, 89 S. E. 711.

Wisconsin. Northwestern Mutual Life Ins. Co. v. Wright, 153 Wis. 252, Ann. Cas. 1914D. 697, 140 N. W. 1078.

² United States. Smedley v. Speckman, 157 Fed. 815, 85 C. C. A. 179.

Colorado. Duncan v. Guillet, 62 Colo. 220, 161 Pac. 299.

Illinois. Mathison v. Magnuson, 226 Ill. 368, 80 N. E. 885.

Iowa. Carey v. Chase, — Ia. —, 175 N. W. 60.

Kansas. Metz v. Clay, 101 Kan. 45, 165 Pac. 809.

Minnesota. Smith v. Meyer, 84 Minn. 455, 87 N. W. 1122; Reed v. R. M. Chapman Basting Co., 137 Minn. 442, 163 N. W. 794.

Missouri. Interurban Construction Co. v. Hayes, 191 Mo. 248, 89 S. W. 927.

New Jersey. Weaver v. Roofing Co., 57 N. J. Eq. 547, 40 Atl. 858.

New York. Hanna v. Florence Iron Co., 222 N. Y. 290, 118 N. E. 629.

Oklahoma. Guaranteed State Bank v. D'Yarmett, — Okla. —, 169 Pac. 639.

Oregon. Wakefield v. Parkhurst, 84 Or. 483, 165 Pac. 578. "To constitute an equitable assignment there must be an assignment or transfer of the fund or some definite portion of it so that the person owing the debt or holding the fund on which the order is drawn can safely pay the order, and is compellable to do so, though forbidden by the drawer." Hicks v. Brick Co., 94 Va. 741, 745, 27 S. E. 596.

An agreement to assign in the future is not operative as a present assignment. Carey v. Chase, — Ia. —, 175 N. W. 60.

A, if A retains another business which would be affected by B's competition.³ The fact that A has delivered to C paving bonds which were issued by B, does not operate as an assignment of A's claim against B for such work in case that the bonds proved to be void.⁴ A mere agreement to pay out of particular fund which does not give the promisee any right to control the fund or any part of the fund, is not an assignment.⁵ A's request to B to send checks to A in care of C, does not amount to an assignment of A's claim against B, at least as far as the rights of A's surety for the performance of his contract with B are concerned.⁶ A promise by A to pay to C the proceeds of a fund which A is to collect from B, does not operate as an assignment of such fund, since such transaction leaves the ownership and the control of the fund in A until A has collected it from B.⁷ The fact that A makes a contract with C for the purpose of enabling A to perform his contract with B, does not amount to an assignment to C of A's contract with B,⁸ even if the terms of A's contract with C are substantially

³ Metz v. Clay, 101 Kan. 45, 165 Pac. 809.

⁴ Guaranteed State Bank v. D'Yar-mett, — Okla. —, 169 Pac. 639.

⁵ United States. Christmas v. Russell, 81 U. S. (14 Wall.) 69, 20 L. ed. 762; Speckman v. Smedley, 153 Fed. 771; Smedley v. Speckman, 157 Fed. 815, 85 C. C. A. 179; In re Clark Realty Co., 234 Fed. 576, 148 C. C. A. 342.

Arkansas. Dickey v. Southwestern Surety Co., 119 Ark. 12, 173 S. W. 398.

California. Maier v. Freeman, 112 Cal. 8, 53 Am. St. Rep. 151, 44 Pac. 357.

Colorado. Nichols v. Orr, — Colo. —, 2 A. L. R. 449, 166 Pac. 561.

District of Columbia. DeWinter v. Thomas, 34 D. C. App. 80, 27 L. R. A. (N.S.) 634.

Illinois. Mathison v. Magnuson, 226 Ill. 368, 80 N. E. 885.

Indiana. Ford v. Garner, 15 Ind. 298.

Kentucky. People's Bank v. Barbour (Ky.), 19 S. W. 585; Little v. Berry (Ky.), 113 S. W. 902.

Maryland. Kellas v. Slack & Slack Co., 129 Md. 535, 99 Atl. 677.

Michigan. Morse v. Allen, 99 Mich. 303, 58 N. W. 327.

Minnesota. Hale v. Dressen, 76 Minn. 183, 78 N. W. 1045.

Missouri. Pearce v. Roberts, 27 Mo. 179; Atchison County Bank v. Durfee, 118 Mo. 431, 40 Am. St. Rep. 396, 24 S. W. 133; Spencer v. Wyandotte Construction Co., — Mo. —, 201 S. W. 554.

Nebraska. Fairbanks v. Welshans, 55 Neb. 362, 75 N. W. 865; Phillips v. Hogue, 63 Neb. 192, 88 N. W. 180.

New Jersey. Cogan v. Conover Mfg. Co., 69 N. J. Eq. 809, 115 Am. St. Rep. 629, 64 Atl. 973.

New York. Beran v. Bank, 137 N. Y. 450, 33 N. E. 593.

Ohio. Christmas v. Griswold, 8 O. S. 558.

Rhode Island. Browning v. Parker, 17 R. I. 183, 20 Atl. 835.

Wisconsin. Dirimple v. State Bank, 91 Wis. 601, 65 N. W. 501.

⁶ Duncan v. Guillet, 62 Colo. 220, 161 Pac. 299.

⁷ Speckman v. Smedley, 153 Fed. 771; In re Clark Realty Co., 234 Fed. 576, 148 C. C. A. 342; Interurban Construction Co. v. Hayes, 191 Mo. 248, 89 S. W. 927.

⁸ Deed v. R. M. Chapman Basting Co., 137 Minn. 442, 163 N. W. 794; Spencer

those of A's contract with B.⁹ If A appoints B as A's agent, to collect a debt, and instructs B to pay such money over to C, the transaction does not amount to an assignment of such debt to C.¹⁰ A covenant in a contract between A and B, to the effect that B may retain sufficient funds to pay any claims of subcontractors or materialmen against A, does not amount to an assignment of such fund to subcontractors and materialmen.¹¹ A clause in an insurance policy, making the proceeds payable to the mortgagee as his interests may appear, is not an assignment of the proceeds of the mortgage.¹²

Even a transaction which purports to be an assignment is not such in legal effect if its effect is to leave the assignor in control of the contract assigned.¹³ Thus an agreement by a client to pay his attorney a certain per cent. of the amount recovered is not an assignment to the attorney of such per cent. of the claim.¹⁴ If such a contract shows an intention on the part of the client to pass an interest in the subject of the litigation to the attorney, it operates as an assignment.¹⁵ An agreement to deliver a certain number of bonds out of an issue to be made thereafter, is not an assignment of any part of such issue.¹⁶ A's request to B that B would "please to return proceeds" of certain property to C, has been held not to be an assignment, but to be an attempted novation.¹⁷

§ 2287. Intent to transfer control to assignee. On the other hand, a transaction whereby one party transfers to another ownership and control of a chose in action, amounts to an assignment.¹

v. Wyandotte Construction Co., — Mo. —, 201 S. W. 554; Hanna v. Florence Iron Co., 222 N. Y. 290, 118 N. E. 629.

⁹ Reed v. R. M. Chapman Basting Co., 137 Minn. 442, 163 N. W. 794; Spencer v. Wyandotte Construction Co., — Mo. —, 201 S. W. 554; Hanna v. Florence Iron Co., 222 N. Y. 290; 118 N. E. 629.

¹⁰ Wakefield v. Parkhurst, 84 Or. 483, 165 Pac. 578.

¹¹ Kellas v. Slack & Slack Co., 129 Md. 535, 99 Atl. 677.

¹² Erie Brewing Co. v. Ohio Farmers' Ins. Co., 81 O. S. 1, 89 N. E. 1065.

¹³ Beran v. Bank, 137 N. Y. 450, 33 N. E. 593.

¹⁴ Nichols v. Orr, — Colo. —, 2 A. L. R. 449, 166 Pac. 561; Hargett v. McCadden, 107 Ga. 773, 33 S. E. 666; Story v. Hull, 143 Ill. 506, 32 N. E. 265; Tone v. Shankland, 110 Ia. 525, 81 N. W. 789; Gillette v. Murphy, 7 Okla. 91, 54 Pac. 413.

¹⁵ Holmes v. Evans, 129 N. Y. 140, 29 N. E. 233, Cullers v. May, 81 Tex. 110, 16 S. W. 813.

¹⁶ Cushing v. Chapman, 115 Fed. 237.

¹⁷ Lane v. Magdebury, 81 Wis. 344, 51 N. W. 562.

¹ England. Alexander v. Steinhard [1903], 2 K. B. 208.

United States. Clark v. Iron Co., 81 Fed. 310.

An agreement by a mortgagor who is effecting a new loan to take up a pre-existing mortgage that the subsequent mortgagee shall pay the proceeds directly to the first mortgagee, operates as an assignment.² So an agreement between the next of kin that the administrator should make an equal division of the proceeds of a benefit certificate, made before it was known who was the beneficiary, operates as an assignment.³ An arrangement between a mortgagor, his agent and a mortgagee, whereby the mortgagor instructs the agent to pay the rents of the mortgaged property to the mortgagee, and the agent opens an account, charging himself in favor of the mortgagee for the rent when collected, amounts to an assignment.⁴

To effect an assignment of a fund, the fund must be described with sufficient certainty.⁵ A valid partial assignment in equity must indicate the portion of the fund assigned.⁶ An order addressed to a debtor, ordering payment out of the amount due from him to the drawer, is sufficient where there is but one fund thus owing.⁷ An order on a village to pay and "charge the same to our account," on a specified street, is sufficient where given by contractors who are to be paid only out of special assessments.⁸

California. *Binford v. Boyd*, — Cal. —, 174 Pac. 56.

Illinois. *Carlyle v. Carlyle, etc., Co.*, 140 Ill. 445, 29 N. E. 556.

Kentucky. *Lafferty v. Hall (Ky.)*, 44 S. W. 426.

Massachusetts. *Kingsbury v. Burrill*, 151 Mass. 199, 24 N. E. 36; *O'Connell v. Worcester*, 225 Mass. 159, 114 N. E. 201.

Minnesota. *Second National Bank of Grand Forks v. Sproat*, 55 Minn. 14, 56 N. W. 254; *Hurley v. Bendel*, 67 Minn. 41, 69 N. W. 477.

Montana. *National Bank v. Ingle*, 53 Mont. 414, 164 Pac. 535.

New Hampshire. *Marsh v. Garney*, 69 N. H. 236, 45 Atl. 745.

Pennsylvania. *Spott's Estate*, 156 Pa. St. 281, 27 Atl. 132.

Rhode Island. *Supreme Assembly, etc., Good Fellows v. Campbell*, 17 R. I. 402, 13 L. R. A. 601, 22 Atl. 307.

Wisconsin. *Baillie v. Stephenson*, 95 Wis. 500, 70 N. W. 660.

² *Leonard v. Marshall*, 82 Fed. 396.

³ *Supreme Assembly, etc., Good Fellows v. Campbell*, 17 R. I. 402, 13 L. R. A. 601, 22 Atl. 307.

⁴ *Baillie v. Stephenson*, 95 Wis. 500, 70 N. W. 660. But in *In re Cleary*, 9 Wash. 605, 38 Pac. 79, a similar transaction was held not to amount to an assignment of uncollected rents.

⁵ *Percival v. Dunn*, 29 Ch. D. 128; *Windsor Cement Co. v. Thompson*, 86 Conn. 511, 86 Atl. 1; *National Surety Co. v. American Savings Bank & Trust Co.*, 101 Wash. 213, 172 Pac. 264.

⁶ *Story v. Hull*, 143 Ill. 506, 32 N. E. 265.

⁷ *Bank v. Gibson*, 21 Ont. 613; *In re Hanna*, 105 Fed. 587; *Harris County v. Campbell*, 68 Tex. 22, 2 Am. St. Rep. 467, 3 S. W. 243.

⁸ *Dolese v. McDougall*, 182 Ill. 486, 55 N. E. 547.

An erroneous description of a contract,⁹ as where the date of the contract is stated erroneously,¹⁰ does not render the assignment invalid if there is only one transaction to which the assignment could refer. An assignment of a contractor's interest in assessments on specified lots stated to be owned by a specified person, is sufficient, though the assessment is made as against an unknown owner.¹¹ A written promise to pay a given person, addressed the city treasurer, is a sufficient assignment of the amount due the promisor.¹² An order for a certain sum is sufficient as an assignment where only one claim is due from the debtor, the amount of which is substantially that named in the assignment.¹³

§ 2288. Transfer of control—Orders as assignments. An order by a creditor to a debtor to pay to a designated third person a specified fund which such debtor owes to such creditor, operates as an assignment of such fund if it purports to transfer ownership and control thereof to such third person; and it operates as such assignment according to the weight of authority whether the debtor accepts such order or not.¹ If the order is accepted by the debtor and he agrees to pay the amount of the debt to the person indi-

⁹ *Binford v. Boyd*, — Cal. —, 174 Pac. 56.

¹⁰ *Binford v. Boyd*, — Cal. —, 174 Pac. 56.

¹¹ *Gill v. Dunham* (Cal.), 34 Pac. 68.

¹² *Harlow v. Bartlett*, 96 Me. 294, 52 Atl. 638.

¹³ *Jenness v. Wharff*, 87 Me. 307, 32 Atl. 908.

¹ *Canada. Bank v. Gibson*, 21 Ont. 613.

United States. *United States v. Ferguson*, 78 Fed. 103; *In re Hanna*, 105 Fed. 587; *Third National Bank v. Atlantic City*, 130 Fed. 751, 65 C. C. A. 177.

California. *Joyce v. Wing Yet Lung*, 87 Cal. 424, 25 Pac. 545.

Colorado. *Central Nat. Bank v. Spratlen*, 7 Colo. App. 430, 43 Pac. 1048.

Delaware. *New Castle County National Bank v. Taylor*, 8 Del. Ch. 456, 68 Atl. 387.

Georgia. *Walton v. Horkan*, 112 Ga.

814, 38 S. E. 105; *Western & A. Ry. Co. v. Union Inv. Co.*, 128 Ga. 74, 57 S. E. 100 (an equitable assignment).

Iowa. *Metcalf v. Kincaid*, 87 Ia. 443, 43 Am. St. Rep. 391, 54 N. W. 867.

Kentucky. *Lutter v. Grosse*, — Ky. —, 82 S. W. 278, 26 Ky. L. Rep. 585.

Maine. *Jenness v. Wharff*, 87 Me. 307, 32 Atl. 908; *Harlow v. Bartlett*, 96 Me. 294, 52 Atl. 638.

Massachusetts. *O'Connell v. Worcester*, 225 Mass. 159, 114 N. E. 201.

Minnesota. *Griggs v. St. Paul*, 56 Minn. 150, 57 N. W. 461; *Union Iron Works v. Kilgore*, 65 Minn. 497, 67 N. W. 1017; *Hurley v. Bendel*, 67 Minn. 41, 69 N. W. 477.

Montana. *Merchants' & M. Nat. Bank v. Barnes*, 18 Mont. 335 56 Am. St. Rep. 586, 47 L. R. A. 737, 45 Pac. 218; *Harmon v. Conrow*, 19 Mont. 104, 47 Pac. 640.

New York. *Weniger v. Fourteenth Street Store*, 191 N. Y. 423, 84 N. E. 394.

cated in such order, the order and the acceptance thereof, when taken together, operate as an assignment.² If the order does not purport to transfer the ownership or control of the fund to the person indicated therein, but is merely an authority to the debtor to discharge his debt to the creditor by making such payment, such instrument is not an assignment until the debtor has made such payment.³ Accordingly, such authority may be revoked,⁴ and the creditor who is given such order may upon revocation thereof, recover from the original debtor the amount which the original debtor has not paid to the third person who is indicated in the order.⁵

To effect an assignment, however, the order must indicate a specific fund. An order drawn generally, not indicating any specific fund to be paid to the holder thereof, is not an assignment by the weight of authority.⁶ So an order to a city official to deliver warrants to a specified company is not an assignment of the fund against which such warrants are drawn.⁷ Accordingly, a debt due

Ohio. *Robbins v. Klein*, 60 O. S. 189, 54 N. E. 94.

Oklahoma. *Gillette v. Murphy*, 7 Okla. 91, 54 Pac. 413.

Oregon. *McDaniel v. Maxwell*, 21 Or. 202, 28 Am. St. Rep. 740, 27 Pac. 952; *Willard v. Bullen*, 41 Or. 25, 67 Pac. 924; *Morris v. Leach*, 82 Or. 509, 162 Pac. 253; *Wakefield v. Parkhurst*, 84 Or. 483, 165 Pac. 578.

Tennessee. *Bank v. Rhea County* (Tenn. Ch. App.), 59 S. W. 442.

Virginia. *Chesapeake Classified Building Association v. Coleman*, 94 Va. 433, 26 S. E. 843; *Rinehart & Dennis Co. v. McArthur*, 123 Va. 556, 96 S. E. 829.

Washington. *Dickerson v. Spokane*, 26 Wash. 292, 66 Pac. 381.

Wisconsin. *Dirimple v. Bank*, 91 Wis. 601, 65 N. W. 501.

² *Third National Bank v. Atlantic City*, 130 Fed. 751, 65 C. C. A. 177; *Morris v. Leach*, 82 Or. 509, 162 Pac. 253.

³ *Rodick v. Gandell*, 1 De G. M. & G. 763; *Langdon v. Langdon*, 70 Mass. (4 Gray) 186; *Ives v. New Bern Lumber Co.*, 147 N. Car. 306, 61 S. E. 70;

Day v. Charlton, — Okla. —, 160 Pac. 606.

⁴ *Ives v. New Bern Lumber Co.*, 147 N. Car. 306, 61 S. E. 70.

⁵ *Ives v. New Bern Lumber Co.*, 147 N. Car. 306, 61 S. E. 70.

⁶ **Canada.** *Thomson v. Huggins*, 23 Ont. App. 191.

California. *Cashman v. Harrison*, 90 Cal. 207, 27 Pac. 283.

Maine. *Hall v. Flanders*, 83 Me. 242, 22 Atl. 158.

Massachusetts. *Holbrook v. Payne*, 151 Mass. 383, 21 Am. St. Rep. 456, 24 N. E. 210.

New Jersey. *Bradley-Currier Co. v. Bernz*, 55 N. J. Eq. 10, 35 Atl. 832.

Oregon. *Commercial National Bank v. Portland*, 37 Or. 33, 60 Pac. 563, 54 Pac. 814.

Texas. *Harris County v. Campbell*, 68 Tex. 22, 2 Am. St. Rep. 467, 3 S. W. 243; *Jones v. Cunningham*, 4 Tex. Civ. App. 26, 15 S. W. 38.

⁷ *Commercial National Bank v. Portland*, 37 Or. 33, 60 Pac. 563, 54 Pac. 814.

from the drawee to the drawer may be attached before acceptance, and the attachments will have priority over the order.⁸ But subsequent verbal agreement of the parties may specify the fund, though not specified in the order, and thus constitute an assignment.⁹

An order to pay less than the entire amount of the debt is, of course, a partial assignment at best, and it can not operate as an assignment at law.¹⁰ An order to pay a certain number of dollars "of any money due or to become due,"¹¹ or an order to pay a part of a debt due,¹² have been held not to be assignments at law. According to the weight of authority, partial assignment is operative in equity if due notice is given to the debtor,¹³ and, accordingly, an order for a part of the fund is operative in equity if it contains the remaining elements of a valid assignment.

§ 2289. Drafts as assignments. In accordance with the principles which apply to orders, a draft which is not payable out of any specific fund does not amount to an assignment of a debt owing by the drawer to the drawee, as long as it is not accepted, since it does not purport to convey any designated fund.¹ This

⁸ *Holbrook v. Payne*, 151 Mass. 383, 21 Am. St. Rep. 456, 24 N. E. 210.

⁹ *McDaniel v. Maxwell*, 21 Or. 202, 28 Am. St. Rep. 740, 27 Pac. 952.

¹⁰ *Goldman v. Murray*, 164 Cal. 419, 120 Pac. 462; *Emerson-Brantingham Co. v. Lyons*, 102 Kan. 733, 172 Pac. 513; *Wamsley v. Ward*, 61 W. Va. 65, 55 S. E. 998.

¹¹ *Nelson v. Bennett Co.*, 31 Wash. 116, 71 Pac. 749.

¹² *Andrews v. Frierson*, 134 Ala. 626, 33 So. 6; *Wamsley v. Ward*, 61 W. Va. 65, 55 S. E. 998 (not a legal assignment).

¹³ See § 2261.

¹ *United States. Fourth Street National Bank v. Yardley*, 165 U. S. 634, 41 L. ed. 855; *In re Hollens*, 215 Fed. 41, L. R. A. 1915B, 438; *Macy v. Roedenbeck*, 227 Fed. 346.

California. Cashman v. Harrison, 90 Cal. 297, 27 Pac. 283.

Connecticut. Windsor Cement Co. v. Thompson, 86 Conn. 511, 86 Atl. 1.

Georgia. Baer v. English, 84 Ga. 403, 20 Am. St. Rep. 372, 11 S. E. 453; *Talladega Mercantile Co. v. Robinson, etc., Co.*, 96 Ga. 815, 22 S. E. 1003.

Illinois. Abt v. Savings Bank, 159 Ill. 467, 50 Am. St. Rep. 175, 42 N. E. 856 (controlled by New York law).

Kansas. Clark v. Toronto Bank, 72 Kan. 1, 115 Am. St. Rep. 173, 2 L. R. A. (N.S.) 93, 82 Pac. 582.

Massachusetts. Duryea v. Harvey, 183 Mass. 429, 67 N. E. 351.

Michigan. Grammel v. Carmer, 55 Mich. 201, 54 Am. Rep. 363, 21 N. W. 418.

Minnesota. Lewis v. Bank, 30 Minn. 134, 14 N. W. 587.

Missouri. Kimball v. Donald, 20 Mo. 577, 64 Am. Dec. 209.

Oklahoma. First National Bank v. School District No. 4, 31 Okla. 139, 39 L. R. A. (N.S.) 655, 120 Pac. 614.

rule has been carried into the Negotiable Instruments Law by express statutory provision.²

The drawer may order the drawee not to pay the draft, and if such order is given to the drawee before acceptance and payment, the drawee can not charge to the account of the drawer a subsequent payment made in defiance of such order.³ Such draft does not assign an interest in collateral held by the drawer to meet a proposed overdraft.⁴ If the drawee makes an assignment before acceptance the payee has no claim against such assignee.⁵ If the drawer makes an assignment after giving the draft and before it is presented for payment, the funds in the hands of the drawee should be paid to the assignee.⁶ If the property of the drawer passes into the hands of a receiver after the draft is issued and before it is accepted or paid, the holder of the draft has no priority as to funds belonging to the drawer in the hands of the drawee.⁷ If a creditor of the drawer attaches the funds of the drawer in the hands of the drawee before the draft is accepted, such creditor obtains priority over the payee.⁸ This rule has been applied where the draft is for the exact amount of the debt due from the drawee,⁹ or for a less amount,¹⁰ or where a particular fund has been designated, out of which the drawee is to be reimbursed, as long as the draft is payable generally on acceptance by the drawee.¹¹ In some

Oregon. *Erickson v. Inman*, 34 Or. 44, 54 Pac. 949.

Pennsylvania. *Commonwealth v. Ins. Co.*, 162 Pa. St. 586, 42 Am. St. Rep. 844, 29 Atl. 660.

Tennessee. *Akin v. Jones*, 93 Tenn. 353, 42 Am. St. Rep. 921, 25 L. R. A. 523, 27 S. W. 669.

Virginia. *Gardner v. Moore's Administrator*, 122 Va. 10, 94 S. E. 162.

Washington. *Frederick v. Spokane Grain Co.*, 47 Wash. 85, 91 Pac. 570.

² *Fulton v. Gesterding*, 47 Fla. 150, 36 So. 56; *Gardner v. Moore's Administrator*, 122 Va. 10, 94 S. E. 162; *Frederick v. Spokane Grain Co.*, 47 Wash. 85, 91 Pac. 570.

³ *First National Bank v. School District No. 4*, 31 Okla. 139, 39 L. R. A. (N.S.) 655, 120 Pac. 614.

⁴ *Macy v. Roedenbeck*, 227 Fed. 346, L. R. A. 1916C, 12.

⁵ *Abt v. Savings Bank*, 159 Ill. 467, 50 Am. St. Rep. 175, 42 N. E. 856. So where a receiver is appointed for the drawee. *Bosworth v. Bank*, 64 Fed. 615, 12 C. C. A. 331.

⁶ *Covert v. Rhodes*, 48 O. S. 66, 27 N. E. 94.

⁷ *Clark v. Toronto*, 72 Kan. 1, 115 Am. St. Rep. 173, 2 L. R. A. (N.S.) 83, 82 Pac. 582.

⁸ *Baer v. English*, 84 Ga. 403, 20 Am. St. Rep. 372, 11 S. E. 453.

⁹ *Fulton v. Gesterding*, 47 Fla. 150, 36 So. 56 (decided under the Negotiable Instruments Law).

¹⁰ *Bush v. Foote*, 58 Miss. 5, 38 Am. Rep. 310.

¹¹ *Whitney v. Bank*, 137 Mass. 351, 50 Am. Rep. 316; *Schmittler v. Simon*, 101 N. Y. 554, 54 Am. Rep. 737, 5 N. E. 452.

jurisdictions it has been held, apparently contrary to the intention of the parties, that a draft for the whole amount due from the drawee to the drawer is an assignment of such fund.¹² In other jurisdictions a draft for part of the amount due from the drawee to the drawer is an assignment in equity.¹³

By agreement outside of the draft, the parties may cause it to operate as an assignment to the payee of the funds in the hands of the drawee.¹⁴ Thus a letter asking the drawee to pay to the holder of the draft the amount due to the drawer, even if the drawee should not pay the draft, is an assignment.¹⁵ A direction to the consignee of goods to apply the proceeds to paying a bill of exchange, does not effect an assignment unless the bill was negotiated under an agreement that such proceeds should be applied to its payment.¹⁶

Acceptance of a bill by the drawee is said to bind the funds of the drawer in the hands of the drawee; and accordingly it is held that if the bill of exchange is accepted, it effects an assignment of the funds in the hands of the drawee,¹⁷ even if it is drawn on the drawee at his previous request.¹⁸ On the other hand, acceptance does far more than merely bind the funds of the drawer in the hands of the drawee. It makes the drawee personally liable to the holder, without regard to the existence of funds of the drawer in the hands of the drawee. For this reason it has been held that acceptance is not assignment.¹⁹

If a draft is drawn upon a specific fund for the whole of such fund, and such draft is in the control of the payee, it has been held to be an assignment of such fund as it places it in the control

¹² *Abt v. Savings Bank*, 159 Ill. 467, 50 Am. St. Rep. 175, 42 N. E. 856; *Brady v. Chadbourne*, 68 Minn. 117, 70 N. W. 981; *Nimocks v. Woody*, 97 N. Car. 1, 2 Am. St. Rep. 268, 2 S. E. 249.

¹³ *Warren v. Bank*, 149 Ill. 9, 25 L. R. A. 746, 38 N. E. 122.

¹⁴ *Lawrence National Bank v. Kowalsky*, 105 Cal. 41, 38 Pac. 517 (the draft being for the full amount of the debt); *First National Bank v. Steel Co.*, 87 Ga. 435, 13 S. E. 586; *First National Bank v. Ry.*, 52 Ia. 378, 35 Am. Rep. 280, 3 N. W. 395; *Throop Grain Cleaner Co. v. Smith*, 110 N. Y. 83, 17 N. E. 671.

¹⁵ *First National Bank v. Steel Co.*, 87 Ga. 435, 13 S. E. 586.

¹⁶ *Shannon v. Wolf*, 173 Ill. 253, 50 N. E. 682.

¹⁷ *Mandeville v. Welch*, 16 U. S. (5 Wheat.) 277, 5 L. ed. 87; *Wells v. Brigham*, 60 Mass. (6 Cush.) 6, 52 Am. Dec. 750; *Buttrick Lumber Co. v. Collins*, 202 Mass. 413, 89 N. E. 138; *White v. Fernald-Woodward Co.*, 76 N. H. 83, 79 Atl. 641.

¹⁸ *Walcott v. Richman*, 94 Me. 364, 47 Atl. 901.

¹⁹ *Cowperthwaite v. Sheffield*, 3 N. Y. 243.

of the payee.²⁰ Whether a draft for a part of a particular fund can operate as an assignment thereof is discussed in connection with partial assignments.²¹

§ 2290. Checks as assignments. The same principles that apply to orders and to bills of exchange apply in most jurisdictions to bank checks. The relation between a bank and a depositor is that of debtor and creditor, and not that of bailor and bailee. By the weight of authority an unaccepted check is not an assignment of the fund in the hands of the drawee, but merely an authority to the bank to pay the amount of such check to the holder.¹ This rule has been enacted in statutory form in the Negotiable Instruments Law, and no liability is created against the drawee by giving a check which has not been accepted or certified by the

²⁰ **United States.** *Christmas v. Russell*, 81 U. S. (14 Wall.) 69, 20 L. ed. 762.

Minnesota. *Varley v. Sims*, 100 Minn. 331, 117 Am. St. Rep. 694, 8 L. R. A. (N.S.) 828, 10 Am. & Eng. Ann. Cas. 473, 111 N. W. 269.

New Jersey. *Cope v. C. B. Walton Co.*, 77 N. J. Eq. 512, 76 Atl. 1044.

Ohio. *Gardner v. Bank*, 39 O. S. 600.

Wisconsin. *Croak v. First National Bank*, 83 Wis. 31, 35 Am. St. Rep. 17, 52 N. W. 1131.

²¹ See § 2261.

¹ **United States.** *Laclede Bank v. Schuler*, 120 U. S. 511, 30 L. ed. 704; *Mining Co. v. Brown*, 124 U. S. 385, 31 L. ed. 424; *Bowker v. Haight & Freese Co.*, 146 Fed. 257; *Eastern Milling & Export Co. v. Eastern Milling & Export Co.*, 146 Fed. 761 [decree affirmed, *Corn Exch. National Bank v. Locher*, 151 Fed. 764, 81 C. C. A. 388]; *Eastman Kodak Co. v. National Park Bank*, 231 Fed. 320.

California. *Donohue-Kelly Banking Co. v. Pacific Co.*, 138 Cal. 183, 94 Am. St. Rep. 28, 71 Pac. 93.

Georgia. *Reviere v. Chambliss*, 120 Ga. 714, 48 S. E. 122.

Indiana. *Harrison v. Wright*, 100 Ind. 515, 50 Am. Rep. 805.

Indian Territory. *Love v. Ardmore Stock Exch.*, 5 Ind. Terr. 202, 67 L. R. A. 617, 82 S. W. 721; *Poland v. Love*, 7 Ind. Terr. 42, 103 S. W. 759.

Kansas. *Clark v. Toronto Bank*, 72 Kan. 1, 115 Am. St. Rep. 173, 2 L. R. A. (N.S.) 83, 82 Pac. 582.

Massachusetts. *Carr v. Bank*, 107 Mass. 45, 9 Am. Rep. 6.

Michigan. *Brennan v. Bank*, 62 Mich. 343, 28 N. W. 881; *Lonier v. State Savings Bank*, 149 Mich. 483, 112 N. W. 1119.

Minnesota. *Northern Trust Co. v. Rogers*, 60 Minn. 208, 51 Am. St. Rep. 526, 62 N. W. 273; *First National Bank v. McConnell*, 103 Minn. 340, 123 Am. St. Rep. 336, 14 L. R. A. (N.S.) 616, 114 N. W. 1129.

Nebraska. *Superior National Bank v. National Bank of Commerce*, 99 Neb. 833, 157 N. W. 1023.

New Jersey. *National Bank v. Ber-rall*, 70 N. J. L. 757, 103 Am. St. Rep. 821, 66 L. R. A. 599, 58 Atl. 189.

Ohio. *Bank v. Brewing Co.*, 50 O. S. 151, 40 Am. St. Rep. 660, 33 N. E. 1054; *Cincinnati, etc., R. R. v. Bank*, 54 O. S. 60, 56 Am. St. Rep. 700, 31 L. R. A. 653, 42 N. E. 700.

drawee.² Even under the Negotiable Instruments Law, a check has been held to amount to an assignment as between the drawer and the drawee;³ and the drawer's administrator can not recover from the drawee the amount of a check which is paid after drawer's death and in ignorance thereof.⁴

As between the bank and the holder of the check, the holder of the check can not maintain an action against the bank, if the bank on which the check is drawn refuses payment, even if the bank has in its hands funds of the drawer.⁵ The bank may refuse to pay the check if the depositor is indebted to the bank on an overdue note

Oklahoma. *Walters National Bank v. Bantock*, 41 Okla. 153, L. R. A. 1915C, 531, 137 Pac. 717; *Day v. Charlton*, — Okla. —, 160 Pac. 606.

Pennsylvania. *Bank v. Shoemaker*, 117 Pa. St. 94, 2 Am. St. Rep. 649, 11 Atl. 304.

Tennessee. *Akin v. Jones*, 93 Tenn. 353, 42 Am. St. Rep. 921, 25 L. R. A. 523, 27 S. W. 669.

Virginia. *Jones v. Crumpler*, 119 Va. 143, 89 S. E. 232.

Washington. *Commercial Bank v. Chilberg*, 14 Wash. 247, 53 Am. St. Rep. 873, 44 Pac. 264; *National Market Co. v. Maryland Casualty Co.*, 100 Wash. 377, 174 Pac. 479 [sub nomine, *National Market Co. v. Coit*, 1 A. L. R. 450] (on rehearing).

An assignment of a check which is given for a labor claim does not amount to an assignment of such claim and does not give a right of action on the contractor's bond. *National Market Co. v. Maryland Casualty Co.*, 100 Wash. 377, 174 Pac. 479 [sub nomine, *National Market Co. v. Coit*, 1 A. L. R. 450] (on rehearing).

²**United States.** *Eastman Kodak Co. v. National Park Bank*, 231 Fed. 320.

Nebraska. *Superior National Bank v. National Bank of Commerce*, 99 Neb. 833, 157 N. W. 1023.

New Mexico. *Elgin v. Gross-Kelly*, 20 N. M. 450, L. R. A. 1916A, 711, 150 Pac. 922.

Oklahoma. *Walters National Bank v. Bantock*, 41 Okla. 153, L. R. A. 1915C, 531, 137 Pac. 717.

Tennessee. *People's National Bank v. Swift*, 134 Tenn. 175, 183 S. W. 725.

Virginia. *Baltimore & O. R. Co. v. First National Bank*, 102 Va. 753, 47 S. E. 837; *Jones v. Crumpler*, 119 Va. 143, 89 S. E. 232.

Washington. *National Market Co. v. Maryland Casualty Co.*, — Wash. —, 174 Pac. 479.

³*McClain v. Torkelson*, — Ia. —, 174 N. W. 42; *Elgin v. Gross-Kelly*, 20 N. M. 450, L. R. A. 1916A, 711, 150 Pac. 922.

⁴*Elgin v. Gross-Kelly*, 20 N. M. 450, L. R. A. 1916A, 711, 150 Pac. 922.

⁵**United States.** *Washington First National Bank v. Whitman*, 94 U. S. 343, 24 L. ed. 229.

Massachusetts. *Carr v. Bank*, 107 Mass. 45, 9 Am. Rep. 6.

Michigan. *Lonier v. State Savings Bank*, 149 Mich. 483, 112 N. W. 1119.

New Jersey. *Creveling v. Bank*, 46 N. J. L. 255, 50 Am. Rep. 417; *National Bank v. Berrall*, 70 N. J. L. 757, 103 Am. St. Rep. 821, 66 L. R. A. 599, 58 Atl. 189.

New York. *First National Bank v. Clark*, 134 N. Y. 368, 17 L. R. A. 580, 32 N. E. 38.

Ohio. *Cincinnati, etc., R. R. v. Bank*, 54 O. S. 60, 56 Am. St. Rep. 700, 31 L. R. A. 653, 42 N. E. 700.

in a sum in excess of the amount in which his deposit exceeds the check.⁶ Hence, if the drawer becomes insolvent and makes an assignment, the funds in the hands of the drawee should be paid to the assignee of the drawer and not to the payee.⁷ So if before the check is presented a creditor of the drawer brings proceedings in garnishment, to which the bank is made a party, such creditor's claim is superior to that of the holder of the check.⁸ Even if the check is given for the exact amount of the deposit it is not an assignment.⁹ Hence, cashing indorsed time checks and holding them as vouchers does not amount to an assignment of the claims of the laborers evidenced thereby.¹⁰

A bank, differing from the ordinary debtor, is bound as between itself and the depositor to honor his checks. Accordingly, it is held in some jurisdictions that, except as the rule may be modified by statute, a check is an assignment of the money owing from the drawee to the drawer up to the amount of the check.¹¹

⁶ *Bank v. Brewing Co.*, 50 O. S. 151, 40 Am. St. Rep. 660, 33 N. E. 1054.

⁷ *Laclede Bank v. Schuler*, 120 U. S. 511, 30 L. ed. 704; *Harrison v. Wright*, 100 Ind. 515, 50 Am. Rep. 805; *Akin v. Jones*, 93 Tenn. 353, 42 Am. St. Rep. 921, 25 L. R. A. 523, 27 S. W. 669.

⁸ *Duncan v. Berlen*, 60 N. Y. 151; *Commercial Bank v. Chilberg*, 14 Wash. 247, 53 Am. St. Rep. 873, 44 Pac. 264.

⁹ Hence drawer's death revokes the check. *Bernard v. Bank*, 43 La. Ann. 50, 12 L. R. A. 302, 8 So. 702. The holder has no right of action against the bank. *First National Bank v. Clark*, 134 N. Y. 368, 17 L. R. A. 580, 32 N. E. 38.

¹⁰ *United States v. Rundle*, 107 Fed. 227, 52 L. R. A. 505.

¹¹ *Illinois*. *Niblack v. Bank*, 169 Ill. 517, 61 Am. St. Rep. 203, 39 L. R. A. 159, 48 N. E. 438; *Gage Hotel Co. v. Bank*, 171 Ill. 531, 63 Am. St. Rep. 270, 39 L. R. A. 479, 49 N. E. 420.

Iowa. *Kuhnes v. Cahill*, 128 Ia. 594, 104 N. W. 1025; *McClain v. Torkelson*, — Ia. —, 174 N. W. 42 (obiter, since the case was controlled by the Negotiable Instruments Law).

Kentucky. *Boswell v. Citizens' Savings Bank*, 123 Ky. 485, 96 S. W. 797 (before the Negotiable Instruments Law).

Maine. *Whitehouse v. Whitehouse*, 90 Me. 468, 60 Am. St. Rep. 278, 38 Atl. 374.

Maryland. *Kellas v. Slack & Slack Co.*, 129 Md. 535, 99 Atl. 677.

Minnesota. *Varley v. Sims*, 100 Minn. 331, 117 Am. St. Rep. 694, 111 N. W. 269.

Nebraska. *Fonner v. Smith*, 31 Neb. 107, 28 Am. St. Rep. 510, 11 L. R. A. 528, 47 N. W. 632.

South Carolina. *Loan & Savings Bank v. Farmers' & Merchants' Bank*, 74 S. Car. 210, 114 Am. St. Rep. 991, 54 S. E. 364.

Texas. *Harris County v. Campbell*, 68 Tex. 22, 2 Am. St. Rep. 467, 3 S. W. 243; *Neely v. Bank*, 25 Tex. Civ. App. 513, 61 S. W. 559.

Wisconsin. *Raesser v. Bank*, 112 Wis. 591, 88 Am. St. Rep. 979, 56 L. R. A. 174, 88 N. W. 618 (before the Negotiable Instruments Law).

Where this view is entertained the death of the drawer does not revoke the check.¹² The holder of an unaccepted check has a right to the fund against a creditor of the drawer who attaches after the check is drawn and before it is presented.¹³ So where A had deposited a fund in his own name, the equitable interest of which belonged to B, and A gave B a check for the fund which B indorsed to C, C has a claim to the fund prior to the attaching creditors of B.¹⁴ The holder of the check may maintain an action against the bank if having funds of the drawer in its hands it refuses payment.¹⁵ even if the check is drawn for less than the amount of the fund,¹⁶ and if the bank has made an assignment he has the same rights as against the assignee that the drawer would have had.¹⁷ Even where a check operates as an assignment, the bank may before presentment appropriate the money due the drawer to the payment of a debt due from him to the bank, and such appropriation will be upheld as against the holder of the check,¹⁸ though it has been held that the bank can not make such appropriation after presentment.¹⁹ If the bank assigns, before payment of the check, he has no greater rights than the drawer would have had.²⁰ Even where a check operates as an assignment, a cashier's check evidencing a deposit is a mere change in the form of the evidence of indebtedness and gives no priority to the holder as against a receiver of the bank.²¹

¹² *Raesser v. Bank*, 112 Wis. 591, 88 Am. St. Rep. 979, 56 L. R. A. 174, 88 N. W. 618.

¹³ *Neely v. Bank*, 25 Tex. Civ. App. 513, 61 S. W. 559; *Dillman v. Carlin*, 105 Wis. 14, 76 Am. St. Rep. 902, 80 N. W. 932.

See also *Boswell v. Citizens' Savings Bank*, 123 Ky. 485, 96 S. W. 797.

This is true especially where the check is for the entire amount of the deposit. *Varley v. Sims*, 100 Minn. 331, 117 Am. St. Rep. 694, 111 N. W. 269.

¹⁴ *Hemphill v. Yerkes*, 132 Pa. St. 545, 19 Am. St. Rep. 607, 19 Atl. 342.

¹⁵ *Gage Hotel Co. v. Bank*, 171 Ill. 531, 63 Am. St. Rep. 270, 39 L. R. A. 479, 40 N. E. 420; *Lester v. Given*, 71 Ky. (8 Bush.) 357; *Fogarties v. Bank*, 12 Rich. (S. Car.) 518, 78 Am. Dec. 468;

Loan & Savings Bank v. Farmers' & Merchants' Bank, 74 S. Car. 210, 114 Am. St. Rep. 991, 54 S. E. 364.

¹⁶ *Fonner v. Smith*, 31 Neb. 107, 28 Am. St. Rep. 510, 11 L. R. A. 528, 47 N. W. 632.

¹⁷ *Howes v. Blackwell*, 107 N. Car. 196, 22 Am. St. Rep. 870, 12 S. E. 245.

¹⁸ *Bank v. Trust Co.*, 149 Ill. 343, 23 L. R. A. 611, 36 N. E. 1029; *Wyman v. Bank*, 181 Ill. 279, 72 Am. St. Rep. 259, 48 L. R. A. 565, 54 N. E. 946.

¹⁹ *Niblack v. Bank*, 169 Ill. 517, 61 Am. St. Rep. 203, 39 L. R. A. 159, 48 N. E. 438.

²⁰ *Howes v. Blackwell*, 107 N. Car. 196, 22 Am. St. Rep. 870, 12 S. E. 245.

²¹ *Clark v. Trust Co.*, 186 Ill. 440, 78 Am. St. Rep. 294, 53 L. R. A. 232, 57 N. E. 1061.

Even where a check does not, of itself, operate as an assignment, the entire transaction, of which the delivery of the check was a part, may show that an assignment was intended; and in such case full effect will be given to such intention.²² If the bank delivers to A a pass-book, and A sells this pass-book to C, and also gives to C a check on such bank for such amount, the transaction amounts to an assignment by A to C of such account.²³ The fact that A makes a special deposit to pay the check,²⁴ especially if he indorses the deposit slip over to the payee of the check,²⁵ or the fact that A leaves an amount in the bank to meet an outstanding check,²⁶ is held, in some jurisdictions, to show that an assignment is intended.

§ 2291. Form of assignment. In the absence of statute no special form of assignment is necessary.¹

While it has been said that "it is uniformly holden that an assignment of an instrument under seal must be by deed—in other words, that the instrument of transfer must be of as high a nature as the instrument transferred,"² this rule is, at most, limited to assignments at law,³ and in equity sealed instruments may be assigned by parol.⁴ The tendency to relax requirements of mere form, and

²² *Venturi v. Silvio*, 197 Ala. 607, 73 So. 45; *Hove v. Stanhope State Bank*, 138 Ia. 39, 115 N. W. 476.

²³ *Venturi v. Silvio*, 197 Ala. 607, 73 So. 45.

²⁴ *Central National Bank v. Connecticut Mutual Life Ins. Co.*, 104 U. S. 54, 26 L. ed. 693; *Hove v. Stanhope State Bank*, 138 Ia. 39, 115 N. W. 476.

²⁵ *Hove v. Stanhope State Bank*, 138 Ia. 39, 115 N. W. 476.

²⁶ *Saylor v. Bushong*, 100 Pa. St. 23, 45 Am. Rep. 353.

¹ *Alabama*. *Venturi v. Silvio*, 197 Ala. 607, 73 So. 45.

Colorado. *Galbraith v. Wallrich*, 45 Colo. 537, 102 Pac. 1085.

Iowa. *Jewett Lumber Co. v. Anderson Coal Co.*, 181 Ia. 950, 165 N. W. 211.

Kentucky. *Poage Milling Co. v. Economy Fuel Co. (Ky.)*, 128 S. W. 311.

Maine. *Hayes v. Rich*, 101 Me. 314, 115 Am. St. Rep. 314, 64 Atl. 659.

Montana. *Flinner v. McVay*, 37 Mont. 306, 96 Pac. 340.

Oregon. *Levins v. Stark*, 57 Or. 189, 110 Pac. 980.

Texas. *Scott v. Farmers' & Merchants' National Bank*, 97 Tex. 31, 104 Am. St. Rep. 835, 75 S. W. 7.

² *Wood v. Partridge*, 11 Mass. 488 (obiter, as it was held that notice of the assignment was not given in such form as to enable the debtor to protect himself against trustee process). *Speer v. Post*, 3 N. J. L. 585 (endorsement and delivery of sealed bill held insufficient as an assignment).

³ *Dennis v. Twitchell*, 51 Mass. (10 Met.) 180.

⁴ *Dennis v. Twitchell*, 51 Mass. (10 Met.) 180.

to protect assignments, at least if given upon valuable consideration,⁵ has resulted in the general rule that a sealed contract may be assigned without a sealed assignment.⁶

A logical application of the rule that an assignment must be of as high a nature as the right to be assigned, would have led to the result that a judgment could not be assigned at all, except possibly by acknowledging the assignment in open court. The general relaxation of the rule that an assignment must be of as high a nature as the right to be assigned, has led to the result that a judgment may be assigned by a writing which is not under seal,⁷ such as a writing endorsed upon the writ of execution.⁸ The delivery of the execution has been held to amount to an assignment of a judgment, if such was the agreement between the parties.⁹

Since no particular form of assignment is necessary, a contract may be assigned without a deed, even if it is for the sale of an interest in realty.¹⁰

Rights under a non-negotiable contract may be assigned by a written instrument separate from the contract assigned,¹¹ without delivery of the evidence of the right which is assigned;¹² or by an indorsement on the contract assigned;¹³ or by an oral contract of

⁵ *Vose v. Handry*, 2 Greenleaf (Me.) 322 (a bond may be assigned by delivery but not a mortgage).

⁶ *England. Fenner v. Mears*, 2 W. Bl. 1269.

Illinois. Barrett v. Hinckley, 124 Ill. 32, 7 Am. St. Rep. 331, 14 N. E. 863.

Iowa. Hoffman v. Smith, 94 Ia. 495, 63 N. W. 182.

Massachusetts. Dunn v. Snell, 15 Mass. 481.

New Jersey. Allen v. Pancoast, 20 N. J. L. 68.

New York. Prescott v. Hull, 17 Johns. 284.

⁷ *Schmidt v. Shaver*, 196 Ill. 108, 89 Am. St. Rep. 250, 63 N. E. 655 (assignment apparently not under seal, but invalid for want of authority of agent); *Hayes v. Rich*, 101 Me. 314, 115 Am. St. Rep. 314, 64 Atl. 659.

⁸ *Brown v. Maine Bank*, 11 Mass. 153.

⁹ *Dunn v. Snell*, 15 Mass. 481.

¹⁰ *Fruhauf v. Bendheim*, 127 N. Y. 587, 28 N. E. 417; *Sayre v. Mohnney*, 30 Or. 238, 47 Pac. 197.

¹¹ *United States. Spring v. Ins. Co.*, 21 U. S. (8 Wheat.) 268, 5 L. ed. 614. *Illinois. Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331, 14 N. E. 863.

Michigan. In re Smith, 191 Mich. 694, 158 N. W. 148.

North Dakota. Erickson v. Kelly, 9 N. D. 12, 81 N. W. 77.

Ohio. Leonard v. Kebler, 50 O. S. 444, 34 N. E. 659.

Pennsylvania. Bond v. Bunting, 78 Pa. St. 210.

Virginia. Rinehart & Dennis Co. v. McArthur, 123 Va. 556, 96 S. E. 829 (sufficient as an equitable assignment).

¹² *In re Smith*, 191 Mich. 694, 158 N. W. 148.

¹³ *Williamson v. Yager*, 91 Ky. 282, 34 Am. St. Rep. 184, 15 S. W. 660; *Brown v. Bank*, 11 Mass. 153; *Kulp v. March*, 181 Pa. St. 627, 59 Am. St. Rep. 687, 37 Atl. 913.

assignment.¹⁴ even if the contract to be assigned is in writing.¹⁵ Accordingly, an oral assignment is not invalidated either because

¹⁴ **Alabama.** *Venturi v. Silvio*, 197 Ala. 607, 73 So. 45.

Georgia. *Yates v. Bank*, 148 Ga. 240, 96 S. E. 427.

Iowa. *Jewett Lumber Co. v. Anderson Coal Co.*, 181 Ia. 950, 165 N. W. 211; *State Central Savings Bank v. St. Paul Fire & Marine Insurance Co.*, — Ia. —, 168 N. W. 201.

Maine. *Lord v. Downs*, 112 Me. 396, 92 Atl. 327 (sufficient as an equitable assignment).

Montana. *Flinner v. McVay*, 37 Mont. 306, 96 Pac. 340 (obiter, as other conditions were not performed); *National Bank v. Ingle*, 53 Mont. 414, 164 Pac. 535.

North Dakota. *McLennan v. Plummer*, 34 N. D. 269, 158 N. W. 269.

An oral assignment of a book account is held to be sufficient. *Moore v. Lowrey*, 25 Ia. 336, 95 Am. Dec. 790; *Wilt v. Huffman*, 46 W. Va. 473, 33 S. E. 279; *Chapman v. Plummer*, 36 Wis. 262.

Delivery of the account book is sufficient. *Clark v. Wiss*, 34 Kan. 553, 9 Pac. 281.

A delivery of a copy of the account has been held to be sufficient. *Porter v. Bullard*, 26 Me. 448.

Contra, *American Exchange National Bank v. Federal National Bank*, 226 Pa. St. 483, 134 Am. St. Rep. 1071, 27 L. R. A. (N.S.) 666, 18 Am. & Eng. Ann. Cas. 444, 75 Atl. 683.

¹⁵ **United States.** *Leonard v. Marshall*, 82 Fed. 396.

Colorado. *Chamberlain v. Gilman*, 10 Colo. 94, 14 Pac. 107; *Perkins v. Peterson*, 2 Colo. App. 242, 29 Pac. 1135.

Indiana. *State v. Tomlinson*, 16 Ind. App. 662, 59 Am. St. Rep. 335, 45 N. E. 1116.

Iowa. *Moore v. Lowrey*, 25 Ia. 336,

95 Am. Dec. 790; *Howe v. Jones*, 57 Ia. 130, 8 N. W. 451, 10 N. W. 299; *Hoffman v. Smith*, 94 Ia. 495, 63 N. W. 182; *Seymour v. Aultman*, 109 Ia. 297, 80 N. W. 401; *Tone v. Shankland*, 110 Ia. 525, 81 N. W. 789; *State Central Savings Bank v. St. Paul Fire & Marine Insurance Co.*, — Ia. —, 168 N. W. 201.

Kansas. *McCubbin v. Atchinson*, 12 Kan. 166.

Kentucky. *Beard v. Sharp* (Ky.), 65 S. W. 810; *Newby v. Hill*, 59 Ky. (2 Met.) 530.

Maine. *Porter v. Bullard*, 26 Me. 448.

Massachusetts. *Jones v. Witter*, 13 Mass. 304.

Michigan. *Draper v. Fletcher*, 26 Mich. 154; *Harris v. Chamberlain*, 126 Mich. 280, 85 N. W. 728; *Kaufman v. State Savings Bank*, 151 Mich. 65, 123 Am. St. Rep. 259, 18 L. R. A. (N.S.) 630, 114 N. W. 863.

Nebraska. *Sackett v. Montgomery*, 57 Neb. 424, 73 Am. St. Rep. 522, 77 N. W. 1083.

New Hampshire. *Thompson v. Emery*, 27 N. H. 269.

New Jersey. *Hutchinson v. Low*, 13 N. J. L. 246.

North Dakota. *Roberts v. Bank*, 8 N. D. 474, 79 N. W. 993.

New York. *Hooker v. Eagle Bank*, 30 N. Y. 83, 86 Am. Dec. 351; *Risley v. Phoenix Bank*, 83 N. Y. 318, 38 Am. Rep. 421; *Jones v. Reynolds*, 120 N. Y. 213, 24 N. E. 279.

South Carolina. *Miller v. Newell*, 20 S. Car. 123, 47 Am. Rep. 833; *Barron v. Williams*, 58 S. Car. 280, 79 Am. St. Rep. 840, 36 S. E. 561.

Tennessee. *Cook v. Shute*, 3 Tenn. (Cook) 67.

Texas. *Rollison v. Hope*, 18 Tex. 446.

it is evidenced by a written instrument executed at a later date,¹⁶ or because such written assignment, intended to be executed subsequently, is never in fact executed.¹⁷

If the assignment is in writing and there is no prior valid oral assignment, delivery is essential to its validity.¹⁸ Hence, if placed by the assignor in an envelope addressed to the assignee and taken by the assignee while the assignor is unconscious from the effect of poison, no delivery exists and the assignment has no effect.¹⁹

Delivery of a written non-negotiable contract or memorandum with intent to assign the same operates as an assignment.²⁰ It has been said, however, that the mere indorsement and delivery of a non-negotiable note does not of itself amount to an assignment.²¹ A building contractor's marking a bill "approved," rendered for

Vermont. *Hackett v. Moxley*, 65 Vt. 71, 25 Atl. 898.

Washington. *Seattle National Bank v. Emmons*, 16 Wash. 585, 48 Pac. 262.

West Virginia. *Bentley v. Ins. Co.*, 40 W. Va. 729, 23 S. E. 584; *Wilt v. Huffman*, 46 W. Va. 473, 33 S. E. 279.

Wisconsin. *Northwestern Mutual Life Ins. Co. v. Wright*, 153 Wis. 252, Ann. Cas. 1914D, 697, 140 N. W. 1078. Contrary statements have been qualified as applicable at most to law and not to equity.

See *Palmer v. Merrill*, 60 Mass. (6 Cush.) 382, 52 Am. Dec. 782, as qualified in *Richardson v. White*, 167 Mass. 58, 44 N. E. 1072. See also, *Ebel v. Piehl*, 134 Mich. 64, 95 N. W. 1004.

¹⁶ *Vanderlip v. Barnes*, 101 Neb. 573, 163 N. W. 856; *Roberts v. Bank*, 8 N. D. 474, 79 N. W. 993.

¹⁷ *Kenneweg v. Schilansky*, 45 W. Va. 521, 31 S. E. 949.

¹⁸ *Erickson v. Kelly*, 9 N. D. 12, 81 N. W. 77; *Leonard v. Kebler*, 50 O. S. 444, 34 N. E. 659. But see *Kulp v. Marsh*, 181 Pa. St. 627, 59 Am. St. Rep. 687, 37 Atl. 913, where an assignment was held valid though not delivered, but written on the insurance contract to be assigned. And see to the same effect, *Williamson v. Yager*,

91 Ky. 282, 34 Am. St. Rep. 184, 15 S. W. 660.

¹⁹ *Leonard v. Kebler*, 50 O. S. 444, 34 N. E. 659.

²⁰ **Alabama.** Insurance policy. *Hanchey v. Hurley*, 129 Ala. 306, 30 So. 742.

Iowa. Account book. *Preston v. Peterson*, 107 Ia. 244, 77 N. W. 864.

Maine. *Gledhill v. McCoombs*, 110 Me. 341, 45 L. R. A. (N.S.) 26, 86 Atl. 247.

Massachusetts. Coupons. *Tyndale v. Randall*, 154 Mass. 103, 27 N. E. 882; *Bone v. Holmes*, 105 Mass. 495, 81 N. E. 290.

Minnesota. Time check. *Citizens' State Bank v. Bonness*, 76 Minn. 45, 78 N. W. 875.

New York. *Risley v. Phenix Bank*, 83 N. Y. 318, 38 Am. Rep. 421.

North Carolina. Chattel mortgage. *Hodges v. Wilkinson*, 111 N. Car. 56, 17 L. R. A. 545, 15 S. E. 941 (assignment indorsed on margin).

Pennsylvania. *Hani v. Ins. Co.*, 197 Pa. St. 276, 80 Am. St. Rep. 819, 47 Atl. 200.

West Virginia. *Bentley v. Ins. Co.*, 40 W. Va. 729, 23 S. E. 584.

²¹ *Chicago, etc., Bank v. Trust Co.*, 190 Ill. 404, 83 Am. St. Rep. 138, 60 N. E. 586.

material furnished for the building, is not an assignment of so much of the contract price as is sufficient to pay such bill.²² A power of attorney to collect a debt is not of itself an assignment,²³ but it may be a means of effecting an assignment if such is the intention of the parties,²⁴ as where the attorney is to retain the amount owed him by the principal.²⁵ If A is indebted to B, and C pays A's debt to B under contract with B to assign to C A's indebtedness, such contract operates as an assignment, at least, in equity.²⁶ But if C makes such payment as a loan to A, and without any contract for an assignment with either A or B, no assignment exists.²⁷

Discounting a draft with a bill of lading or other collateral attached, gives a qualified interest in such collateral, which becomes absolute if the drawee does not accept the draft.²⁸ But until the draft is paid or discounted no title passes.²⁹ Assignment of a time check given by a contractor to a laborer, does not operate as an assignment of the right of such laborer to bring an action upon the bond of such contractor.³⁰ Under the Negotiable Instruments Law, a bank check does not have this effect.³¹

²² *Flaherty v. Lumber Co.*, 58 N. J. Eq. 467, 44 Atl. 186.

²³ *Rogers v. Lindsey*, 51 U. S. (13 How.) 441, 14 L. ed. 215; *Halliburton v. Nance*, 46 Ark. 161; *Watson v. Philadelphia*, 142 Pa. St. 179, 21 Atl. 815 (hence the debtor can set off damages for a breach by the principal of another contract).

²⁴ *Murphy v. Bordwell*, 83 Minn. 54, 52 L. R. A. 849, 85 N. W. 915; *National Bank v. Trust Co.*, 17 D. C. App. 112.

²⁵ *Key's Estate*, 137 Pa. St. 565, 21 Am. St. Rep. 896, 20 Atl. 710.

²⁶ *Crumlish v. Improvement Co.*, 38 W. Va. 390, 45 Am. St. Rep. 872, 23 Bank v. Trust Co., 17 D. C. App. 112.

²⁷ *United States v. Rundle*, 107 Fed. 227, 52 L. R. A. 505; *Bartholomew v. Bank*, 57 Kan. 594, 47 Pac. 519; *Crumlish v. Improvement Co.*, 38 W. Va. 390, 45 Am. St. Rep. 872, 23 L. R. A. 120, 18 S. E. 456.

²⁸ *Alabama*. *American National Bank v. Henderson*, 123 Ala. 612, 82 Am. St. Rep. 147, 26 So. 498.

Iowa. *Shaffer Bros. v. Rhynders*, 116 Ia. 472, 89 N. W. 1099.

Massachusetts. *Hathaway v. Haynes*, 124 Mass. 311.

New York. *City Bank v. Ry.*, 44 N. Y. 136.

Ohio. *Emery v. Bank*, 25 O. S. 360, 18 Am. Rep. 290.

Oklahoma. *Marsh Milling & Grain Co. v. Guaranty State Bank*, — Okla. —, L. R. A. 1918D, 704, 171 Pac. 1122.

Pennsylvania. *Richardson v. Nathan*, 167 Pa. St. 513, 31 Atl. 740.

Texas. *Provident National Bank v. C. D. Hartnett Co.*, 100 Tex. 214, 97 S. W. 689.

West Virginia. *Neill v. Produce Co.*, 41 W. Va. 37, 23 S. E. 702.

²⁹ *Kentucky Refining Co. v. Refining Co.*, 104 Ky. 559, 84 Am. St. Rep. 468, 42 L. R. A. 353, 47 S. W. 602 (hence the goods are liable to attachment by creditors of the consignor).

³⁰ *Northwestern National Bank v. Guardian Casualty and Guaranty Co.*, 93 Wash. 635, 161 Pac. 473.

³¹ *National Market Co. v. Maryland Casualty Co.*, 100 Wash. 377, 171 Pac. 479 (on rehearing, the check having been held at the original hearing, 100

An agreement to pay a certain amount out of a certain fund may, as between the assignor and the assignee, amount to a partial assignment in equity, giving a lien on such fund.³² Acquiescence in performance by a third party may amount to assignment to such third party.³³ If an oral chose in action is to be assigned, it is said that an assignment in writing or something equivalent thereto is necessary.³⁴ The fact that the assignor is a corporation, that the assignee is its president, and that he has power to transfer such chose on the books of the corporation, does not dispense with the necessity of a written assignment.³⁵

§ 2292. Statutory formalities. Some statutes prescribe formalities for assigning certain kinds of contracts.¹ Where such statutes are exclusive, and make other forms of assignment invalid, effect must be given to such provisions. Thus assignments of wages to be valid against third persons must, in Maine, be filed where the assignor is "commorant."² If not so filed it is invalid as against a subsequent assignment duly filed.³ Under a similar statute, filing an assignment where the assignor resides is sufficient, though he removes to another town thereafter and it is not refiled.⁴ Notice to an inferior clerk of a municipal officer is not a sufficient filing.⁵ If two assignments of wages are filed at the same time, the debtor is not bound to pay either assignee.⁶ Filing an assignment has been held to be unnecessary as against one who has actual notice thereof.⁷ A statute which regulates the assignment of future "earnings," does not apply to an assignment of profits under a

Wash. 370, 170 Pac. 1009, to operate as an assignment).

³² Sanborn v. Maxwell, 18 D. C. App. 245; Leupold v. Weeks, 96 Md. 280, 53 Atl. 937.

³³ Scott v. Farmers' & Merchants' National Bank, 97 Tex. 31, 104 Am. St. Rep. 835, 75 S. W. 7.

³⁴ Adams v. Merced Stone Co., 176 Cal. 415, 3 A. L. R. 928, 178 Pac. 498; Hawn v. Stoler, 208 Pa. St. 610, 65 L. R. A. 813, 57 Atl. 1115.

³⁵ Adams v. Merced Stone Co., 176 Cal. 415, 3 A. L. R. 928, 178 Pac. 498.

¹ Bush v. Prescott & N. W. R. Co., 76 Ark. 497, 80 S. W. 86; Berlin Iron Bridge Co. v. Connecticut River Banking Co., 76 Conn. 477, 57 Atl. 275; Turk v. Cook, 63 Ga. 681; Flinner v. McVay, 37 Mont. 306, 96 Pac. 340.

If a contract for the sale of realty

creates an equitable interest in realty, assignment of such contract must be evidenced by a writing, signed by the assignor. Flinner v. McVay, 37 Mont. 306, 96 Pac. 340.

See § 1257.

² Whitcomb v. Waterville, 99 Me. 75, 58 Atl. 68.

Under such statute a river driver is not "commorant." Gilman v. Inman, 85 Me. 105, 26 Atl. 1049.

³ Peabody v. Lewiston, 83 Me. 286, 22 Atl. 171.

⁴ Garland v. Linsky, 19 R. I. 713, 36 Atl. 837.

⁵ Hellen v. Boston, 194 Mass. 579, 80 N. E. 603.

⁶ Whitcomb v. Waterville, 99 Me. 75, 58 Atl. 68.

⁷ Kansas City, Ft. S. & M. R. Co. v. Joslin, 74 Ark. 551, 86 S. W. 435.

contract, since earnings is equivalent to "wages."⁸ A statute requiring contracts for future wages to be recorded does not apply to building contracts.⁹

Recording and filing of assignments are not necessary unless required by statute.¹⁰

Under other statutes an assignment must be in writing.¹¹ Under some statutes an assignment of wages is insufficient unless it is in writing and executed by the wife of the assignor.¹² A statute requiring a written assignment to pass the legal title does not require a writing to cancel an assignment.¹³ So if the statute provides that a purchaser's certificate at judicial sale may be assigned by indorsement thereon, and legal title will thus pass, assignment on a separate paper will not pass legal title.¹⁴

If statutes which provide for assignment are cumulative merely, an assignment is valid though not in conformity thereto. Thus a judgment may be assigned by parol, though the statute provides a form therefor.¹⁵

§ 2293. Necessity of consideration. If an assignment is executed and passes legal title, then as between the assignor and the assignee no consideration is necessary. Such assignment is valid even though gratuitous.¹ If the assignment is executed and passes

⁸ *Berlin Iron Bridge Co. v. Connecticut River Banking Co.*, 76 Conn. 477, 57 Atl. 275.

⁹ *Abbott v. Davidson*, 18 R. I. 91, 25 Atl. 839.

¹⁰ *In re Floyd*, 225 Fed. 262; *McDonald v. Bank*, 111 Mich. 649, 70 N. W. 143.

¹¹ *Foster v. Sutlive*, 110 Ga. 297, 34 S. E. 1037; *Ovett Land & Lumber Co. v. Wimberly*, 109 Miss. 601, 68 So. 855; *American Exchange National Bank v. Federal National Bank*, 226 Pa. St. 483, 27 L. R. A. (N.S.) 666, 75 Atl. 683.

¹² *Porte v. Chicago & N. W. Ry. Co.*, 162 Wis. 446, 156 N. W. 469.

¹³ *Rennie v. Block*, 26 Can. S. C. 356.

¹⁴ *Chytraus v. Smith*, 141 Ill. 231, 30 N. E. 450.

¹⁵ *Gardner v. R. R.*, 102 Ala. 635, 48 Am. St. Rep. 84, 15 So. 271.

¹ *Hambleton v. Brown* [1917], 2 K. B. 93; *Burkett v. Doty*, 176 Cal. 89, 167 Pac. 518; *Rutan v. Huck*, 30 Utah 217, 83 Pac. 833.

Bank-book in savings bank. Hallowell Savings Institution v. Titecomb, 96 Me. 62, 51 Atl. 249; *Whalen v. Milholland*, 89 Md. 199, 44 L. R. A. 208, 43 Atl. 45; *Dunn v. Houghton* (N. J. Eq.), 51 Atl. 71; *Ridden v. Thrall*, 125 N. Y. 572, 21 Am. St. Rep. 758, 11 L. R. A. 684, 26 N. E. 627; *Polley v. Hicks*, 58 O. S. 218, 41 L. R. A. 858, 50 N. E. 809.

Certificate of deposit. Telford v. Patton, 144 Ill. 611, 33 N. E. 1119; *Cowen v. Bank*, 94 Tex. 551, 63 S. W. 532, 64 S. W. 778.

Insurance policy. Hani v. Ins. Co., 197 Pa. St. 276, 47 Atl. 200; *Lord v. Ins. Co.*, 95 Tex. 216, 66 S. W. 290.

Account. Yates v. Bank, 148 Ga. 246, 96 S. E. 427; *Wallace v. Leroy*, 57 W. Va. 263, 110 Am. St. Rep. 777, 50 S. E. 243.

For the necessity of a written assignment in case of a gratuitous transfer of an oral chose in action, see *Adams v. Merced Stone Co.*, 176 Cal. 415, 3 A. L. R. 928, 178 Pac. 498.

full title to the assignee, the debtor can not object that the assignment was without consideration,² or that it was given for a pre-existing debt,³ or for due-bills of the assignee,⁴ or is otherwise invalid.⁵ Creditors of the debtor can not object to his payment of such account as fraudulent.⁶ Lack of consideration may tend to show, however, that the assignor retains the claim and that the assignee is not the real party in interest.⁷ The fact that the consideration appears upon the assignment to be a small sum and "other sufficient and valuable consideration," is not sufficient to show that the assignment did not transfer the interest to the assignee.⁸ A gratuitous assignment is inoperative if made by one who acts in a representative capacity, and who is not assigning his own interest.⁹

As between two successive assignees of the same fund, the prior must show that he took for value if he is to prevail against a subsequent bona fide assignee for value.¹⁰

If the assignment is executory and operative only in equity, it is said to be a contract to be enforced in equity by treating the equitable interest as passing thereunder. Such a contract, like any other, requires consideration.¹¹ Where a consideration is regarded as necessary to the validity of an assignment, a written assignment is prima facie upon consideration, if a consideration is pre-

See, *Gifts of Choses in Action*, by Oliver S. Rundell, 27 *Yale Law Journal*, 643; *Consideration and the Assignment of Choses in Action*, by Edward Jenks, 16 *Law Quarterly Review*, 241, and *Gifts Inter Vivos of Choses in Action*, by Geo. P. Costigan, 27 *Law Quarterly Review*, 326.

² *Kentucky*. *Jones v. Moore*, 102 Ky. 591, 44 S. W. 126.

Louisiana. *Bonner v. Beard*, 43 La. Ann. 1036, 10 So. 373.

Massachusetts. *Phipps v. Bacon*, 183 Mass. 5, 66 N. E. 414.

Michigan. *Coe v. Hinkley*, 109 Mich. 608, 67 N. W. 915; *Hicks v. Steel*, 126 Mich. 408, 85 N. W. 1121.

Nebraska. *Barnett v. Ellis*, 34 Neb. 539, 52 N. W. 368.

Utah. *Rutan v. Huck*, 30 Utah 217, 83 Pac. 833.

West Virginia. *Wallace v. Leroy*, 57 W. Va. 263, 110 Am. St. Rep. 777, 50 S. E. 243.

³ *Shaford v. Bank*, 125 Mich. 431, 84

N. W. 624; *Rinehart & Dennis Co. v. McArthur*, 123 Va. 556, 96 S. E. 829; *Howland v. Barre Savings Bank & Trust Co.*, 89 Vt. 200, 95 Atl. 679.

⁴ *Glendale Fruit Co. v. Hirst*, 6 Ariz. 428, 59 Pac. 103.

⁵ *Cornish, etc., Co. v. Marty*, 76 Minn. 493, 79 N. W. 507.

⁶ *Yates v. Bank*, 148 Ga. 246, 96 S. E. 427.

⁷ *Muller v. Witte*, 78 Conn. 495, 62 Atl. 756.

⁸ *Jahn v. Champagne Lumber Co.*, 147 Fed. 631.

⁹ *Flynn v. Chicago Great Western R. R.*, 159 Ia. 571, 45 L. R. A. (N.S.) 1098, 141 N. W. 401.

¹⁰ *The Elmbank*, 72 Fed. 610.

¹¹ *Edwards v. Daley*, 14 La. Ann. 384; *Tallman v. Hoey*, 89 N. Y. 537. "Assignment of choses in action have been said to be executory contracts, which are not to be enforced without consideration." *Lonsdale's Estate*, 29 Pa. St. 407, 410.

sumed in case of written instruments.¹² An antecedent indebtedness is sufficient consideration for an assignment.¹³

An assignment may be effected by an instrument under seal without regard to the existence of a valuable consideration.¹⁴

§ 2294. What constitutes acceptance by debtor. Where an acceptance by the debtor is material, such acceptance can be made only by such words or conduct on his part as to show his willingness to accept.¹ If the debtor has paid a check upon a forged endorsement, such payment is not such an acceptance of the check that the payee may maintain action thereon as against the bank on which it is drawn.² Any words or conduct on the part of the debtor, which disclose to the assignee the intention of the debtor to accept the assignment, are sufficient.³ The fact that the debtor has marked an assignment "accepted,"⁴ or that he has taken the notice of assignment without objection and filed it,⁵ has been held to amount to a sufficient acceptance of the assignment.

Under some statutes, however, a written acceptance is necessary.⁶

§ 2295. Necessity of acceptance by debtor. It is not necessary that the debtor assent to the assignment to make it valid.¹ Hence, an assignment is valid if notice is given to the proper officer,

¹² *Driscoll v. Driscoll*, 143 Cal. 528, 77 Pac. 471.

¹³ *Alexander v. Clarkson*, 100 Kan. 294, L. R. A. 1917F, 1006, 164 Pac. 294; *Howland v. Barre Savings Bank & Trust Co.*, 89 Vt. 290, 95 Atl. 679.

¹⁴ *Matson v. Abbey*, 141 N. Y. 179, 36 N. E. 11; *Bond v. Bunting*, 78 Pa. St. 210; *Wilson v. Kiesel*, 9 Utah 397, 85 Pac. 488.

¹ *State v. Bank of Commerce*, 133 Ark. 498, L. R. A. 1918F, 538, 202 S. W. 834; *Fleming v. Law*, 163 Cal. 227, 124 Pac. 1018.

² *State v. Bank of Commerce*, 133 Ark. 498, L. R. A. 1918F, 538, 202 S. W. 834.

³ *Montgomery Door & Sash Co. v. Atlantic Lumber Co.*, 206 Mass. 144, 92 N. E. 71; *Lamoreux v. Morin*, 72 N. H. 76, 54 Atl. 1023.

⁴ *Lamoreux v. Morin*, 72 N. H. 76, 54 Atl. 1023.

⁵ *Montgomery Door & Sash Co. v. Atlantic Lumber Co.*, 206 Mass. 144, 92 N. E. 71.

⁶ *Berlin Mills Co. v. Poole*, 62 N. H. 439 (hence if the debtor pays future wages to an assignee he is liable to a creditor of the assignor who attached the wages after the notice of the assignment was served but before the wages were paid).

¹ *United States. Fourth Street National Bank v. Yardley*, 165 U. S. 634, 41 L. ed. 855.

California. *Goldman v. Murray*, 164 Cal. 419, 129 Pac. 462.

Iowa. *Schollmier v. Schoendelen*, 78 Ia. 426, 16 Am. St. Rep. 455, 43 N. W. 282.

Kentucky. *Philadelphia Veneer & L. Co. v. Garrison*, 160 Ky. 329, 169 S. W. 714.

Massachusetts. *Foss v. Bank*, 111 Mass. 285; *Tripp v. Brownell*, 66 Mass. (12 Cush.) 376.

Minnesota. *Cross v. Page & Hill Co.*, 116 Minn. 123, 133 N. W. 178.

Montana. *Bank v. Barnes*, 18 Mont. 335, 56 Am. St. Rep. 586, 47 L. R. A.

though it is accepted by him without authority.² Accordingly, a subsequent assignee with notice,³ or subsequent attaching creditors,⁴ take subject to the assignment which is prior in point of time, though unaccepted.

If the assignment is partial, assent of the debtor is necessary to its validity at law,⁵ but not in equity.⁶ The necessity of the assent of the debtor in cases in which the contract is non-assignable, is discussed elsewhere.⁷

§ 2296. Effect of acceptance. Acceptance of the assignment by the debtor and his assent thereto, constitute a new contract between himself and the assignee.¹ On acceptance of a note payable at a bank in which the maker has funds sufficient to meet such note, the risk of the failure of the bank is on the maker under a statute making such note equivalent to a check.²

Under such new contract the rights of the assignee may be greater than those of the assignor under the original contract. Thus if an insurance company assents to an assignment, it waives a right of forfeiture which it had as against the assignor.³ If the

737. 45 Pac. 218; *Oppenheimer v. Bank*, 20 Mont. 192, 50 Pac. 419.

Nebraska. *Slobodisky v. Curtis*, 58 Neb. 211, 78 N. W. 522.

New Jersey. *Bank v. Bayonne*, 48 N. J. Eq. 246, 21 Atl. 478.

New York. *Risley v. Phenix Bank*, 83 N. Y. 318, 38 Am. Rep. 421; *Coates v. First National Bank*, 91 N. Y. 20.

Oklahoma. *Gillette v. Murphy*, 7 Okla. 91, 54 Pac. 413.

Pennsylvania. *Nesmith v. Drum*, 8 Watts & S. (Pa.) 9, 42 Am. Dec. 260.

Tennessee. *Bank v. Rhea County* (Tenn. Ch. App.), 59 S. W. 442.

² *Seattle v. Liberman*, 9 Wash. 276, 37 Pac. 433.

³ *Sykes v. Bank*, 2 S. D. 242, 49 N. W. 1058.

⁴ *Union Iron Works v. Kilgore*, 65 Minn. 497, 67 N. W. 1017; *Burditt v. Porter*, 63 Vt. 296, 25 Am. St. Rep. 763, 21 Atl. 955.

⁵ *Kansas City, etc., Ry. v. Robertson*, 109 Ala. 296, 19 So. 432; *Grain v. Aldrich*, 38 Cal. 514, 99 Am. Dec. 423;

Gibson v. Cooke, 37 Mass. (20 Pick.) 15, 32 Am. Dec. 194; *James v. Newton*, 142 Mass. 366, 56 Am. Rep. 692, 8 N. E. 122; *Bradley v. Berns*, 51 N. J. Eq. 437, 26 Atl. 908.

⁶ *Gillette v. Murphy*, 7 Okla. 91, 54 Pac. 413.

⁷ See §§ 2250 et seq.

¹ *Chicago, etc., Ry. v. Ry.*, 143 U. S. 596, 36 L. ed. 277; *Evans v. Stratton*, 142 Ky. 615, 34 L. R. A. (N.S.) 393, 134 S. W. 1154; *Hanover Ins. Co. v. Brown*, 77 Md. 64, 39 Am. St. Rep. 386, 25 Atl. 989, 27 Atl. 314; *Baldwin's Bank v. Smith*, 215 N. Y. 76, L. R. A. 1918F, 1089, 109 N. E. 138.

² *Baldwin's Bank v. Smith*, 215 N. Y. 76, L. R. A. 1918F, 1089, 109 N. E. 138.

³ *Manchester Ins. Co. v. Glenn*, 13 Ind. App. 365, 55 Am. St. Rep. 225, 40 N. E. 926, 41 N. E. 847; *Medearis v. Ins. Co.*, 104 Ia. 88, 65 Am. St. Rep. 428, 73 N. W. 495; *Hall v. Ins. Co.*, 93 Mich. 184, 32 Am. St. Rep. 497, 18 L. R. A. 135, 53 N. W. 727.

debtor who has accepted a partial assignment pays to the assignor such an amount upon his debt that the balance due is less than the amount assigned, the debtor is liable to the assignee for the amount assigned to him.⁴ If the drawee of an order accepts it unconditionally, he may thereby become liable to the holder in excess of his liability to the drawer.⁵ If, however, the drawee accepts upon condition,⁶ as where he promises to pay out of a specified fund,⁷ or on the completion of certain work,⁸ he incurs no liability in excess of the terms of his acceptance.

If the assignor notifies the debtor of defenses to the assignment, the debtor can not treat a subsequent payment to the assignee, made without interposing such defense, as a payment on the assignor's account.⁹

§ 2297. Covenants running with the land—Freehold estates—Covenants conferring right upon grantee. At common law, at a time at which assignment of contract rights was not given any recognition, contracts which were intended by the parties thereto to operate between them by reason of their ownership of their respective estates in realty, or by reason of their respective relations to realty, were regarded as assignable not by themselves alone, but in connection with the transfer of the realty with reference to which they were made. The fact that such a contract could be enforced by the grantee of the promisee in some cases, or against the grantee of the promisor in other cases, made this class of contracts a distinct and well-marked class at common law. They were known as covenants running with the land, since the rights in some cases, the liabilities in others, and both rights and liabilities in still other cases, passed with the transfer of the land. At a time when ordinary contracts could not be assigned at law, this was a very important class at common law. Its importance has greatly decreased because of the general adoption of the rule permitting assignment of contracts generally. If land is conveyed under circumstances which show an intention to convey the bene-

⁴ *Weniger v. Fourteenth Street Store*, 191 N. Y. 423, 84 N. E. 394.

⁵ *Blakistone v. Bank*, 87 Md. 302, 39 Atl. 855; *Herter v. Goss, etc., Co.*, 57 N. J. L. 42, 30 Atl. 252.

⁶ *Herter v. Goss, etc., Co.*, 57 N. J. L. 42, 30 Atl. 252; *Greene v. Duncan*, 37 S. Car. 239, 15 S. E. 956.

⁷ *Williams v. Gallyon*, 107 Ala. 439, 18 So. 162; *Moody v. Newmark*, 121 Cal. 446, 53 Pac. 944.

⁸ *Smith v. Trust Co.*, 12 D. C. App. 192; *Baker v. Dobbins*, 87 Ga. 545, 13 S. E. 524.

⁹ *Porte v. Chicago & N. W. Ry. Co.*, 162 Wis. 446, 156 N. W. 460.

fits of a contract which in itself is assignable, it makes little difference at modern law whether such contract passed with the land at common law or not. From the nature of the rights and liabilities which are involved, a detailed discussion of these covenants is unnecessary in a treatment of the general subject of contracts. They are discussed here for the purpose of illustrating a special class of cases to which the common-law rule against assignment did not apply. If the benefit or liability of a covenant passed to a grantee, to whom the original grantee might convey the realty, such covenant was said to run with the land.¹ To be distinguished from these two classes of contracts are those which are intended to operate between the parties thereto without reference to their estates in realty, though such contract may be part of the transaction whereby such realty is conveyed by one party to the other. Such covenants are said to be personal covenants.² A right of action on a covenant running with the land can not be assigned apart from the land.³ So if A conveys to B by warranty deed, and B conveys to C without warranty, C may enforce A's warranty. B can not retain the benefit of such covenant apart from the land, nor can he assign it without such realty.⁴ To run with the land the covenant must show in some form the intent that it shall inure to the benefit of ultimate grantees. However, if the habendum clause is to the grantee, his heirs and assigns, a covenant of warranty will run with the land, even if the word "assigns" is not in the covenant.⁵

As the law is laid down by Lord Coke in *Spencer's case*, a covenant which extends to a thing which is not in being, does not bind

¹ *Lyman v. Ry.*, 190 Ill. 320, 52 L. R. A. 645, 60 N. E. 515; *Miller v. Clary*, 210 N. Y. 127, L. R. A. 1918E, 222, 103 N. E. 1114; *Hickey v. Ry.*, 51 O. S. 40, 46 Am. St. Rep. 545, 23 L. R. A. 396, 36 N. E. 672; *Hennen v. Deveny*, 71 W. Va. 629, L. R. A. 1917A, 524, 77 S. E. 142.

See, *Covenants Running with the Land*, by A. E. Randall, 25 *Law Quarterly Review*, 280; *Contractual Obligations Attaching to Land*, by W. Strachan, 23 *Law Quarterly Review*, 432; *The Running With the Land of Agreements to Pay for a Portion of the Cost of Party Walls*, by Ralph W.

Aigler, 10 *Michigan Law Review*, 187.

² *Lisenby v. Newton*, 120 Cal. 571, 65 Am. St. Rep. 203, 52 Pac. 813; *Lincoln v. Burrage*, 177 Mass. 378, 52 L. R. A. 110, 59 N. E. 67; *Brown v. Southern Pacific Co.*, 36 Or. 128, 78 Am. St. Rep. 761, 47 L. R. A. 409, 58 Pac. 1104; *Clement v. Bank*, 61 Vt. 298, 4 L. R. A. 425, 17 Atl. 717.

³ *Ravenal v. Ingram*, 131 N. Car. 549, 42 S. E. 967.

⁴ *Ravenal v. Ingram*, 131 N. Car. 549, 42 S. E. 967.

⁵ *Wiggins v. Pender*, 132 N. Car. 628, 61 L. R. A. 772, 44 S. E. 362.

the assignee unless express reference to the assignments of the covenantor is made.⁶ The actual decision in this case,⁷ seems to be at variance with this resolution; and it has been suggested that the report in Coke gives the arguments and opinions which were expressed, while the case in Moore gives the ultimate decision.⁸ In a number of American jurisdictions the resolution has been followed as being a final and authoritative statement of the common law.⁹ It has, however, been frequently criticized;¹⁰ and in a number of jurisdictions the courts have refused to follow the distinction and have held that a covenant which concerns the thing granted or leased runs with the land and binds the assignees, although they are not expressly named.¹¹

⁶ *Spencer's Case*, 5 Coke, 16a.

⁷ *Anonymous*, F. Moore, 159, 300.

See also, *Smith v. Arnold*, 3 Salk. 4.

⁸ *Minshull v. Oakes*, 2 Hurl. & N., 793.

⁹ *Illinois*. *Hansen v. Meyer*, 81 Ill. 321, 25 Am. Rep. 282.

Maryland. *Maryland & Pennsylvania Ry. v. Silver*, 110 Md. 510, 73 Atl. 297.

Massachusetts. *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335.

Tennessee. *Bream v. Dickerson*, 21 Tenn. (2 Humph.) 126.

Texas. *Gulf, Colorado & Santa Fe Ry. v. Smith*, 72 Tex. 122, 2 L. R. A. 281, 9 S. W. 865.

¹⁰ *Purvis v. Shuman*, 273 Ill. 286, L. R. A. 1917A, 121, 112 N. E. 679; *Sexauer v. Wilson*, 136 Ia. 357, 14 L. R. A. (N.S.) 185, 15 Am. & Eng. Ann. Cas. 54, 113 N. W. 941; *Bald Eagle Valley Ry. v. Nittany Valley Ry.*, 171 Pa. St. 284, 50 Am. St. Rep. 807, 29 L. R. A. 423, 33 Atl. 239.

¹¹ *Illinois*. *Purvis v. Shuman*, 273 Ill. 286, L. R. A. 1917A, 121, 112 N. E. 679; *Midland Ry. v. Fisher*, 125 Ind. 19, 21 Am. St. Rep. 189, 8 L. R. A. 604, 24 N. E. 756.

Ohio. *Pittsburgh, etc., Ry. v. Bosworth*, 46 O. S. 81, 2 L. R. A. 199, 18 N. E. 533.

Oregon. *Brown v. Southern Pacific*

Ry. 36 Or. 128, 78 Am. St. Rep. 761, 47 L. R. A. 409, 58 Pac. 1104.

Tennessee. *Doty v. Chattanooga Union Ry.*, 103 Tenn. 564, 48 L. R. A. 160, 53 S. W. 944.

"The test whether a covenant runs with the land or is merely personal is whether the covenant concerns the thing granted and the occupation or enjoyment of it, or is a collateral and personal covenant, not immediately concerning the thing granted. If a covenant concerns the land and the enjoyment of it, its benefit or obligation passes with the ownership; but, to have that effect, the covenant must respect the thing granted or demised, and the act to be done or permitted must concern the land or estate conveyed. An illustration of the rule is found in *Wiggins Ferry Co. v. Ohio & M. R. Co.*, 94 Ill. 83. In that case the Wiggins' Ferry Company conveyed to a railroad company rights and easements in two parcels of ground, and the railroad company covenanted to employ the ferry company to transport across the Mississippi River persons and property brought to the river upon the railroad or to be transported on the railroad. The Ohio & Mississippi Railway Company purchased the railroad property, and the suit was for a breach of covenant. The court said

It is generally said that covenants must "touch and concern" the realty conveyed in order to run with the land. A contract not contained in a conveyance of some estate in realty can not run with such land.¹² A covenant by one who has only a dower interest in the realty conveyed, is said not to run with the land.¹³

Covenants of warranty on the part of the grantor of the fee,¹⁴ for quiet enjoyment,¹⁵ that grantor and those claiming under him would never claim any interest or estate in the land conveyed;¹⁶ a contract by an adjoining lot owner to pay the other one half the cost of constructing a party-wall when he should make use of it;¹⁷ or to refrain from building within a certain distance of the realty which is conveyed;¹⁸ or to grant a certain amount of power from

that in order that a covenant may run with the land, its performance or non-performance must affect the nature, quality, or value of the property demised, independent of collateral circumstances, or must affect the mode of enjoyment. The covenant, having nothing to do with the two parcels of land in which the easement was granted, was held to be personal." *Purvis v. Shuman*, 273 Ill. 286, L. R. A. 1917A, 121, 112 N. E. 679.

¹² *Ford v. Oregon Electric Ry.*, 60 Or. 278, 36 L. R. A. (N.S.) 358, Ann. Cas. 1914A, 280, 117 Pac. 809; *Hurxthal v. Lumber Co.*, 53 W. Va. 87, 97 Am. St. Rep. 954, 44 S. E. 520.

¹³ *H. T. & C. Co. v. Whitehouse*, 47 Utah 323, 154 Pac. 950.

See also, *Warner v. Flack*, 278 Ill. 303, 116 N. E. 197; *White v. Grand Rapids & I. Ry. Co.*, 190 Mich. 1, 155 N. W. 719.

¹⁴ *United States. Peters v. Bowman*, 98 U. S. 56, 25 L. ed. 91.

Illinois. Wead v. Larkin, 54 Ill. 489, 5 Am. Rep. 149.

Kentucky. Thomas v. Bland, 91 Ky. 1, 14 S. W. 955; *Asher Lumber Co. v. Cornett (Ky.)*, 63 S. W. 974; *Shepherd v. Bank of Montreal*, 156 Ky. 495, 161 S. W. 214.

Nebraska. Walton v. Campbell, 51 Neb. 788, 71 N. W. 737; *Troxell v. Stevens*, 57 Neb. 329, 77 N. W. 781.

Ohio. King v. Kerr, 5 Ohio 154, 22 Am. Dec. 777.

Pennsylvania. Williams v. O'Donnell, 225 Pa. St. 321, 26 L. R. A. (N.S.) 1094, 74 Atl. 205.

Tennessee. Kenney v. Norton, 57 Tenn. (10 Heisk.) 384.

Vermont. Tillotson v. Prichard, 60 Vt. 94, 6 Am. St. Rep. 95, 14 Atl. 302.

West Virginia. McConaughy v. Bennett, 50 W. Va. 172, 40 S. E. 540.

Wisconsin. Patterson v. Cappon, 125 Wis. 198, 102 N. W. 1083.

¹⁵ *Butler v. Barnes*, 60 Conn. 170, 12 L. R. A. 273, 21 Atl. 419; *Fisher v. Parry*, 68 Ind. 465; *Schwallback v. Ry.*, 69 Wis. 292; 2 Am. St. Rep. 740, 34 N. W. 128.

¹⁶ *Trull v. Eastman*, 44 Mass. (3 Met.) 121, 37 Am. Dec. 126.

¹⁷ *Parsons v. Baltimore, etc., Association*, 44 W. Va. 335, 67 Am. St. Rep. 769, 20 S. E. 999 [citing *Hart v. Lyon*, 90 N. Y. 663].

See also, *Crawford v. Krollpfeiffer*, 195 N. Y. 185, 133 Am. St. Rep. 783, 88 N. E. 29.

But in *Lincoln v. Burrage*, 177 Mass. 378, 52 L. R. A. 110, 59 N. E. 67, a similar covenant was held not to run with the land in favor of the grantor personally.

¹⁸ *Hennen v. Deveny*, 71 W. Va. 629, L. R. A. 1917A, 524, 77 S. E. 142.

a wheel in the mill belonging to the grantor;¹⁹ to stop trains on the land of the grantor;²⁰ and a covenant to erect a depot in consideration of a grant of a right of way,²¹ run with the land up to the time that they are broken. A covenant of right to convey,²² or a covenant of seizin,²³ or a covenant against encumbrances,²⁴ are each by the weight of authority broken when made, if at all, and therefore can not run with the land. In England,²⁵ and in some American jurisdictions,²⁶ such covenants are held to be continuing covenants and to run with the land. This question is complicated with considerations of what constitutes a breach. Covenants which require affirmative action on the part of the grantor,²⁷

¹⁹ *Miller v. Clary*, 210 N. Y. 127, L. R. A. 1918E, 222, 103 N. E. 1114.

²⁰ *Ford v. Oregon Electric Ry.*, 60 Or. 278, 36 L. R. A. (N.S.) 358, Ann. Cas. 1914A, 280, 117 Pac. 809.

²¹ *Lyman v. Ry.*, 190 Ill. 320, 52 L. R. A. 645, 60 N. E. 515.

²² *United States. Le Roy v. Beard*, 49 U. S. (8 How.) 451, 12 L. ed. 1151.

Massachusetts. Ladd v. Noyes, 137 Mass. 151.

Nebraska. Real v. Hollister, 20 Neb. 112, 29 N. W. 189.

New York. Mygatt v. Coe, 124 N. Y. 212, 11 L. R. A. 646, 26 N. E. 611.

North Dakota. Browne v. Walcott, 1 N. D. 497, 48 N. W. 426.

²³ *Bolinger v. Brake*, 57 Kan. 663, 47 Pac. 537; *Bryant v. Mosher*, 96 Neb. 555, 148 N. W. 329; *Faller v. Davis*, 30 Okla. 56, Ann. Cas. 1913B, 1181, 118 Pac. 382.

²⁴ *Alabama. Brodie v. New England Mortgage Security Co.*, 166 Ala. 170, 51 So. 861.

California. Lawrence v. Montgomery, 37 Cal. 183; *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542; *McPike v. Heaton*, 131 Cal. 109, 82 Am. St. Rep. 335, 63 Pac. 179.

Connecticut. Mitchell v. Warner, 5 Conn. 497; *Musial v. Kudlik*, 87 Conn. 164, Ann. Cas. 1914D, 1172, 87 Atl. 551.

Massachusetts. Smith v. Richards, 155 Mass. 79, 28 N. E. 1132.

Michigan. Davenport v. Davenport, 52 Mich. 587, 18 N. W. 371.

Nebraska. Chapman v. Kimball, 7 Neb. 399; *Sears v. Broady*, 66 Neb. 207, 92 N. W. 214; *Water's Estate v. Bagley* (Neb.), 92 N. W. 637.

New Hampshire. Moore v. Merrill, 17 N. H. 75, 43 Am. Dec. 593.

Tennessee. Kenney v. Norton, 57 Tenn. (10 Heisk.) 380.

Vermont. Swasey v. Brooks, 30 Vt. 692.

Virginia. Marbury v. Thornton, 82 Va. 702, 1 S. E. 909.

West Virginia. Smith v. White, 71 W. Va. 639, 48 L. R. A. (N.S.) 623, 78 S. E. 378.

²⁵ *Kingdon v. Nottle*, 1 M. & S. 355, 4 M. & S. 53.

²⁶ *Illinois. Hazle v. Bondy*, 173 Ill. 302, 50 N. E. 671.

Indiana. Scott v. Stetter, 128 Ind. 385, 27 N. E. 721.

Iowa. Boon v. McHenry, 55 Ia. 202, 7 N. W. 503.

Minnesota. Security Bank v. Holmes, 68 Minn. 538, 71 N. W. 699, s. c., 65 Minn. 531, 68 N. W. 113.

New York. Geiszler v. De Graaf, 166 N. Y. 339, 82 Am. St. Rep. 659, 59 N. E. 993.

Ohio. Foote v. Burnet, 10 Ohio 317, 36 Am. Dec. 90; *Lescalleet v. Rickner*, 16 Ohio C. C. 461, 9 Ohio C. D. 422.

²⁷ *London & Southwestern Ry. v. Gomm*, L. R. 20 Ch. D. 562; *Kidder v.*

such as a contract to haul goods,²² or to construct and maintain a shaft to carry power,²³ have been held not to run with the land. However, a contract to operate a street railroad,²⁴ or to build a side-track,²⁵ have been held to run with the land.

§ 2298. Covenants imposing burden upon grantees. At common law, covenants for the benefit of the realty could run with the land. Covenants imposing burdens thereon could not run with the land unless they created some recognized legal estate or interest.¹ In equity, however, a greater latitude has been indulged in by the courts in enforcing covenants which, while not technically running with the land, are, nevertheless, intended to limit the use and enjoyment thereof. A covenant by a grantee to fence,² or by a grantor to fence;³ or a contract between adjoining lot owners to construct a party-wall,⁴ to maintain a stairway,⁵ or an elevator,⁶ to furnish gas to the lessor;⁷ to pay a certain proportion of the mineral mined on certain land, in consideration of the maintenance of a ditch;⁸ and covenants which restrict the use of the realty conveyed as to use it for certain purposes only,⁹ are each enforceable against any grantee with notice, either actual or constructive, into whose hands the realty may come.

Port Henry Iron Ore Co., 201 N. Y. 445, 94 N. E. 1070; Miller v. Clary, 210 N. Y. 127, L. R. A. 1918E, 222, 103 N. E. 1114.

Contra, Whittenton Mfg. Co. v. Staples, 164 Mass. 319, 29 L. R. A. 500, 41 N. E. 441.

²² Kidder v. Port Henry Iron Ore Co., 201 N. Y. 445, 94 N. E. 1070.

²³ Miller v. Clary, 210 N. Y. 127, L. R. A. 1918E, 222, 103 N. E. 1114.

²⁴ Lakeview Land Co. v. Traction Co., 95 Tex. 252, 66 S. W. 766.

²⁵ Missouri, etc., Ry. v. Carter, 95 Tex. 461, 68 S. W. 159.

¹ Keppel v. Baily, 2 Myl. & K. 517.

² Hickey v. Ry., 51 O. S. 40, 46 Am. St. Rep. 545, 23 L. R. A. 306, 36 N. E. 672.

³ Easter v. R. R., 14 O. S. 48.

⁴ Adams v. Noble, 120 Mich. 545 [sub nomine, Noble v. Kendall, 79 N. W. 810].

⁵ Ring v. Mayberry, 168 N. Car. 563, 84 S. E. 846.

⁶ Globe Ins. Co. v. Wayne, 75 O. S. 451, 80 N. E. 13.

⁷ Harbert v. Hope Natural Gas Co., 76 W. Va. 207, L. R. A. 1915E, 570, 84 S. E. 770.

⁸ Crawford v. Witherbee, 77 Wis. 419, 9 L. R. A. 561, 46 N. W. 545.

⁹ England. Rogers v. Hosegood [1900], 2 Ch. 388.

United States. Los Angeles University v. Swarth, 107 Fed. 798, 54 L. R. A. 262.

Kentucky. Sutton v. Head, 86 Ky. 156, 9 Am. St. Rep. 274, 5 S. W. 410.

New Jersey. Atlantic City v. Steel-Pier Co., 62 N. J. Eq. 139, 49 Atl. 822.

New York. Clement v. Burtis, 121 N. Y. 708, 24 N. E. 1013.

Ohio. Stines v. Dorman, 25 O. S. 580.

Contra, under California statutes. Los Angeles, etc., Co. v. Muir, 136 Cal. 36, 68 Pac. 308; Weller v. Brown, 160 Cal. 515, 117 Pac. 517.

§ 2299. Effect of breach of covenant running with the land.

Even at common law the proper plaintiff in an action for the breach of a covenant running with the land is the holder of the title thereto at the time of breach, though he may not be the original grantee.¹ The lessor may enforce restrictions on the use of the premises leased, either against an assignee,² or a sublessee.³

When a covenant running with the land is broken, the right of action for such breach does not run with the land.⁴

§ 2300. Leasehold estates—Covenants passing to assignee of lease. Covenants which were intended to affect the property leased and which were contained in leases creating estates less than freehold, were said at common law to run with the land and not with the reversion. This meant that the benefits and liabilities of such a covenant passed to the assignee of the lease, but not to the assignee or grantee of the reversion. Thus covenants for quiet enjoyment,¹ or an option to purchase,² or to renew,³ pass to the assignee of the lease and may be enforced by him. On the other hand, covenants to insure,⁴ to pay taxes,⁵ to repair,⁶ or to cultivate

¹ Richard v. Bent, 50 Ill. 38, 14 Am. Rep. 1; Donnell v. Thompson, 10 Me. 170, 25 Am. Dec. 216; Alles v. Foley, 126 Minn. 14, 147 N. W. 670; Chapman v. Kimball, 7 Neb. 399.

² Wertheimer v. Hosmer, 83 Mich. 56, 47 N. W. 47.

³ Miller v. Prescott, 163 Mass. 12, 47 Am. St. Rep. 434, 39 N. E. 409.

⁴ United States. Peters v. Bowman, 98 U. S. 56, 25 L. ed. 91.

Alabama. Gulf Coal & Coke Co. v. Musgrove, 195 Ala. 219, 70 So. 179.

Kentucky. Bradford v. Long, 7 Ky. (4 Bibb.), 225.

Massachusetts. Smith v. Richards, 155 Mass. 79, 28 N. E. 1132.

New Jersey. De Long v. Spring Lake Improvement Co., 74 N. J. L. 250, 66 Atl. 591.

North Dakota. Bull v. Beiseker, 16 N. D. 290, 14 L. R. A. (N.S.) 514, 113 N. W. 870.

Oregon. Wesco v. Kern, 36 Or. 433, 59 Pac. 548, 60 Pac. 563.

Pennsylvania. Provident Trust Co. v. Fiss, 147 Pa. St. 232, 23 Atl. 560.

Vermont. Clement v. Bank, 61 Vt. 298, 4 L. R. A. 425, 17 Atl. 717.

Wisconsin. Wallace v. Pereles, 109 Wis. 316, 83 Am. St. Rep. 898, 53 L. R. A. 644, 85 N. W. 371.

Contra, by Georgia statute. Tucker v. McArthur, 103 Ga. 409, 30 S. E. 283.

¹ Shelton v. Codman, 57 Mass. (3 Cush.), 318; Hamilton v. Wright, 28 Mo. 199.

² Blakeman v. Miller, 136 Cal. 138, 89 Am. St. Rep. 120, 68 Pac. 587; Page v. Hughes, 41 Ky. (2 B. Mon.), 439; Hagar v. Buck, 44 Vt. 285, 8 Am. Rep. 368.

³ McClintock v. Joyner, 77 Miss. 678, 78 Am. St. Rep. 541, 27 So. 837.

⁴ Masury v. Southworth, 9 O. S. 340.

⁵ Ellis v. Bradbury, 75 Cal. 234, 17 Pac. 3; Mason v. Smith, 131 Mass. 510. Craig v. Summers, 47 Minn. 189, 15 L. R. A. 236, 49 N. W. 742; West Virginia, etc., Ry. v. McIntire, 44 W. Va. 210, 28 S. E. 696.

⁶ Coburn v. Goodall, 72 Cal. 498, 1 Am. St. Rep. 75, 14 Pac. 190. (Hence assignees of an undivided interest in

in a specified manner,⁷ or to build,⁸ or to pay rent,⁹ bind the assignee of the lease. The assignee is liable only for breaches while he holds the title to the property leased. He is not liable to the original lessor for a breach before the assignment, as for a covenant to put an oil-well down in a specified time,¹⁰ or for breach of a covenant to pay rent made before the assignment.¹¹ If, however, he specifically assumes liability on the covenants of the original lease, he is liable to the lessor for breach before the assignment, at least in jurisdictions where one can sue on a contract for his benefit, to which he is not a party.¹² Thus he may become liable for overdue rent¹³ or taxes.¹⁴ An assignee may discharge his liability on covenants running with the land by assigning the lease,¹⁵ unless he has specifically assumed and agreed to pay the rent stipulated in the lease.¹⁶

§ 2301. Covenants passing to assignee of reversion. A right of re-entry for breach of condition subsequent in a lease can not be assigned before breach. While covenants to pay rent could pass with the reversion under Act 32, Henry VIII. 34, the assignee of the reversion could not maintain an action against the tenant unless the tenant had done some act recognizing the grantee of the

the lease are jointly and severally liable on such covenants.)

⁷ *Gordon v. George*, 12 Ind. 408.

⁸ *Garnhart v. Finney*, 40 Mo. 449, 93 Am. Dec. 303.

⁹ *Connecticut. Benedict v. Everard*, 73 Conn. 157, 46 Atl. 870.

Illinois. Sexton v. Storage Co., 129 Ill. 318, 16 Am. St. Rep. 274, 21 N. E. 920.

Kentucky. Traube v. McAdams, 71 Ky. (8 Bush.), 74.

Nebraska. Hogg v. Reynolds, 61 Neb. 758, 87 Am. St. Rep. 522, 86 N. W. 479. (An assignee of an undivided one-half of the lease was here held liable for only one-half of the rent.)

Ohio. Sutliff v. Atwood, 15 O. S. 186.

Wisconsin. Wittman v. Watry, 45 Wis. 491.

A sub-tenant is not liable to the original lessor for rent. *Dunlap v. Bullard*, 131 Mass. 161; *St. Joseph, etc.*,

Ry. v. Ry., 135 Mo. 173, 33 L. R. A. 607, 36 S. W. 602; *Holman v. De Lin-River-Finley Co.*, 30 Or. 428, 47 Pac. 708.

¹⁰ *Washington Natural Gas Co. v. Johnson*, 123 Pa. St. 576, 10 Am. St. Rep. 553, 16 Atl. 799.

¹¹ *Thomas v. Connell*, 5 Pa. St. 13.

¹² *Martineau v. Steele*, 14 Wis. 272.

¹³ *Woodland Oil Co. v. Crawford*, 55 O. S. 161, 34 L. R. A. 62, 44 N. E. 1093.

¹⁴ *Fontaine v. Lumber Co.*, 109 Mo. 55, 32 Am. St. Rep. 648, 18 S. W. 1147.

¹⁵ *Johnson v. Sherman*, 15 Cal. 287, 76 Am. Dec. 481; *Bell v. Protective League*, 163 Mass. 558, 47 Am. St. Rep. 481, 28 L. R. A. 452, 40 N. E. 857; *Washington Natural Gas Co. v. Johnson*, 123 Pa. St. 576, 10 Am. St. Rep. 553, 16 Atl. 799.

¹⁶ *Springer v. De Wolf*, 194 Ill. 218, 88 Am. St. Rep. 155, 56 L. R. A. 465, 62 N. E. 542.

reversion as his landlord.¹ In England attornment was made unnecessary by statute.² This statute is in some states part of our common law.³ The common-law rule requiring attornment has been very generally abrogated by judicial decision as not in harmony with our theory of land ownership. The assignee of the reversion can generally sue at law on covenants to pay rent without attornment.⁴ The common-law rule already referred to, that covenants intended to bind the land could not pass with the reversion, was changed in England by statute.⁵ In some of the United States this statute is part of the common law.⁶ In others this common-law rule has been changed by judicial decision as not in harmony with the customs and habits of our people or with our general principles of law.⁷ In others the statute providing that the real party in interest may sue has been held to allow the assignee of the reversion to sue on covenants in the lease intended to protect the holder of the reversion.⁸ At modern law, therefore, covenants in a lease may be enforced by or against the assignee of the reversion. Thus the

¹ Doe v. Smith, 8 Ad. & El. 255. This was known as attornment. It was a relic of the feudal theory of the personal relation existing between landlord and tenant.

² 4 Anne, c. 16.

³ Baldwin v. Walker, 21 Conn. 168.

⁴ Illinois. Graham v. Le Sourd, 99 Ill. App. 223.

Michigan. Perrin v. Lepper, 34 Mich. 292.

Minnesota. Jones v. Rigby, 41 Minn. 530, 43 N. W. 390; Ohio Iron Co. v. Iron Co., 64 Minn. 404, 67 N. W. 221.

Ohio. Smith v. Harrison, 42 O. S. 180.

Vermont. Pelton v. Place, 71 Vt. 430, 46 Atl. 63.

⁵ 32 Hen. VIII., c. 34.

⁶ Fisher v. Deering, 60 Ill. 114; Howland v. Coffin, 29 Mass. (12 Pick.) 125.

Contra, Crawford v. Chapman, 17 Ohio 449.

⁷ Perrin v. Lepper, 34 Mich. 292.

⁸ "In consequence of the rule of the common law, that a chose in action was not assignable, the assignee of a reversion could not maintain an ac-

tion upon a covenant contained in a lease, against the lessee, though the covenant might run with the land. There was a distinction made between the assignee of the reversion and the assignee of the lease; and while the latter might maintain, and be liable to, an action upon such a covenant, it was different as to the former. To remedy this, the statute of 32 Hen. 8, cap. 34, was enacted, which gave, generally, to the assignee of the reversion the same right of action that the lessor had, upon the covenants in the lease. But this statute did not extend to mere personal and collateral covenants; it embraced those only which touched and concerned the thing demised. It has been decided by this court, that the statute of 32 Hen. 8, cap. 34, is not in force in this state, and that an assignee of the reversion can not maintain an action upon the covenant in the lease. But if the covenant be assignable in equity, so that an action might have been maintained in the name of the assignor, or relief obtained by a suit in equity, our code

assignee of the reversion is liable on covenants of his assignor,⁸ as for quiet enjoyment;¹⁰ or on a covenant giving the tenant an option to purchase,¹¹ or to renew;¹² or imposing on the lessor the duty to pay for improvements.¹³ So the assignee of the reversion may enforce a covenant by the tenant to insure,¹⁴ or may enforce a forfeiture of a prior lease.¹⁵ The general rule, therefore, is that both rights and liabilities pass to the assignee of the reversion.

§ 2302. Assignment by operation of law. The classes of assignment which we have been considering are those in which an interest in a contract is conferred by the voluntary act of one in whom such interest originally vested. There are many forms of transfer of contract rights by the operation of law without regard to the consent of the party to the contract whose right is thus transferred. Examples of such forms of transfer are the transfer of the contract rights of a decedent to his executor or administrator; a transfer of the contract rights of one who has been declared judicially to be incompetent to his guardian, trustee or committee; a transfer of contract rights from a bankrupt to his trustee or assignee in bankruptcy, and the like. While this form of transfer is frequently spoken of as assignment by operation of law, it deals with property rather than contract, and for that reason it will not be discussed in this connection.

of civil procedure operates upon the remedy even more extensively than the statute of 32 Hen. 8, cap. 34. For whether the covenant be collateral, or inhere in the land, if it be assigned, the assignee not only may, but, as the party beneficially interested, must sue in his own name." *Masury v. Southworth*, 9 O. S. 340, 346.

⁸ *Schoellkopf v. Coatsworth*, 166 N. Y. 77, 59 N. E. 710.

¹⁰ *Manchester, etc., Ry. v. Anderson* [1898], 2 Ch. 394.

¹¹ *Dietz v. Transfer Co.*, 95 Cal. 92, 30 Pac. 380.

¹² *Crenshaw-Gary Lumber Co. v. Norton*, 111 Miss. 720, L. R. A. 1916E, 1227, 72 So. 140.

¹³ *Purvis v. Shuman*, 273 Ill. 286, L. R. A. 1917A, 121, 112 N. E. 679.

¹⁴ *Masury v. Southworth*, 9 O. S. 340.

¹⁵ *Aye v. Philadelphia Co.*, 193 Pa. St. 451, 74 Am. St. Rep. 696, 44 Atl. 555.

CHAPTER LXXII

NEGOTIABILITY

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I

DEVELOPMENT OF IDEA OF NEGOTIABILITY

§ 2303. Origin of negotiability—The law-merchant. Certain types of contracts remained outside of the common-law rule which

forbade assignment,¹ as they remain outside of the modern-law rule that the assignee acquires only the rights of the assignor.² These contracts, however, were controlled at the outset by the law-merchant, the law of the fair courts, or the courts of piepowder, or the staple courts,³ and not by the common law, the law of the king's courts.⁴ The law-merchant consisted originally of the customs of the merchants of western Europe and England. It was the law of a class which extended through a number of countries rather than the law of any one country. It was frequently spoken of as a branch of international law.⁵ In its original form the law-merchant included many subjects which we do not at present regard as law at all. The law-merchant was adopted by the common-law courts, at first with reference only to mercantile transactions between merchants,⁶ and at the outset to mercantile transactions between foreign merchants and English merchants.⁷

§ 2304. Development of law-merchant—The Negotiable Instruments Law. The law-merchant has long since ceased to be the law of a class,¹ and its international character survives only in the fact that there is a greater resemblance as to mercantile transactions

¹ See § 2236.

² See §§ 2269 et seq.

³ See § 12.

⁴ See §§ 10 et seq.

⁵ "The law merchant, which is a branch of the law of nations." 4 Black Com. 67.

See also, Davies on Impositions; Luke v. Lyde, 2 Burr. 882.

⁶ After the development of assumpsit there could be a declaration in assumpsit upon a bill of exchange between parties who were not merchants and the bill could be given in evidence, but there could not be a declaration upon the law of merchants. Eaglechild's Case, Hetly 167.

Indebitatus assumpsit would not lie against the acceptor of a bill of exchange. The proper action was a special action on the case upon the custom of merchants. Browne v. London, 1 Mod. 285.

⁷ "I remember when actions upon inland bills of exchange did first begin."

Buller v. Crips, 6 Mod. 29. See discussion in Bromwich v. Loyd, 2 Lutw., f. 1582.

See, The Early History of Negotiable Instruments, by Edward Jenks, 9 Law Quarterly Review, 70, and The Origins and Early History of Negotiable Instruments, by W. S. Holdsworth, 31 Law Quarterly Review, 12, 173, 376, 32 Law Quarterly Review, 20.

¹ Woodward v. Rowe, 2 Keb. 105. The defense that the plaintiff was not a merchant but a gentleman was held to be insufficient because of "the suspicion which might increase amongst foreign merchants upon bills of exchange if persons who took upon themselves to draw such bills should not be liable to the payment thereof." Sarsfield v. Witherby, Carth. 82.

The law merchant is said to bind all mercantile transactions, whether between merchants or not. Cramlington v. Evans, 2 Vent. 307.

between the Anglo-American law and the law of the countries of western Europe than there is to other transactions. The law-merchant has been worked over and incorporated into Anglo-American law.²

The incorporation of the law-merchant has lead to its localization. While the great body of the law-merchant remained the same in all Anglo-American countries, different rules on special questions grew up in different jurisdictions, and this divergence of view resulted in confusion in transactions between persons residing in different jurisdictions. In order to secure, in part, the former international character of the law-merchant, the Negotiable Instruments Law has been enacted in many states. This law was intended as a codification of the general principles of the law-merchant as applicable to negotiable instruments.³ The Negotiable Instruments Law was intended to supersede the inconsistent rules theretofore in force in each state in which it was enacted;⁴ and, accordingly, it was intended to change the pre-existing law of each state to that extent.⁵ It was intended to secure uniformity throughout all the states in which it was adopted,⁶ but this attempt has not met with complete success.⁷ It was not retroactive and it did not apply to negotiable instruments which took effect before it was adopted.⁸ The Negotiable Instruments Law is remedial and is to be construed liberally.⁹ It was not intended to be retroactive,¹⁰ and it was not

² *Edie v. East India Company*, 2 Burr. 1216; *First National Bank v. McCullough*, 50 Or. 508, 17 L. R. A. (N.S.) 1105, 93 Pac. 366 [citing, *Woodbury v. Roberts*, 59 Ia. 348, 44 Am. Rep. 685, 13 N. W. 312].

³ *Parsons v. Utica Cement Co.*, 82 Conn. 332, 135 Am. St. Rep. 278, 73 Atl. 785; *Wettlaufer v. Baxter*, 137 Ky. 362, 26 L. R. A. (N.S.) 804, 125 S. W. 741.

⁴ *National Bank of Commerce v. Bossemeyer*, 101 Neb. 96, L. R. A. 1917E, 374, 162 N. W. 503.

⁵ *National Bank of Commerce v. Bossemeyer*, 101 Neb. 96, L. R. A. 1917E, 374, 162 N. W. 503; *Haddock, Blanchard & Co. v. Haddock*, 192 N. Y. 499, 19 L. R. A. (N.S.) 136, 85 N. E. 682; *Potts v. Crudup*, 48 Okla. 124, L. R. A. 1916B, 672, 150 Pac. 170; *Columbian Banking Co. v. Bowen*, 174 Wis. 218, 114 N. W. 451.

⁶ *Union Trust Co. v. McGinty*, 212 Mass. 205, Ann. Cas. 1913C, 525, 98 N. E. 679; *Rocheffeld v. First National Bank*, 77 O. S. 311, 14 L. R. A. (N.S.), 842, 83 N. E. 302; *Wisner v. First National Bank*, 220 Pa. St. 21, 17 L. R. A. (N.S.) 1266, 68 Atl. 955.

⁷ *Cedar Rapids National Bank v. Weber*, 180 Ia. 966, L. R. A. 1918A 432, 164 N. W. 233; *Holliday State Bank v. Hoffman*, 85 Kan. 71, 35 L. R. A. (N.S.) 390, Ann. Cas. 1912D 1, 116 Pac. 239.

⁸ *Parish v. Smith*, 134 Ark. 511, 204 S. W. 415; *Voris v. Birdsall*, — Okla. —, 162 Pac. 951.

⁹ *Page v. Ford*, 65 Or. 450, 45 L. R. A. (N.S.) 247, 131 Pac. 1013.

¹⁰ *Cox v. Kirkwood*, — Okla. —, 158 Pac. 930; *Voris v. Birdsall*, — Okla. —, 162 Pac. 951.

intended to apply to negotiable instruments which were executed and delivered before it was passed.¹¹ In cases for which no provision is made by the Negotiable Instruments Law, the rules of the law-merchant are still in force.¹²

For the purpose of this discussion only two of the general problems of the negotiable contract will be considered, and these are: (1) the elements which a contract must possess in order that it may be negotiable, including the extent to which the oral contract under which the negotiable contract was executed and delivered, is to be regarded as a part thereof; and (2) the effect of negotiability as distinguished from assignability.

II

ELEMENTS OF NEGOTIABLE INSTRUMENT

§ 2305. Elements of negotiable contracts—Writing. In order to be negotiable a contract must possess certain elements.¹ It must be in writing. If in writing, a lead pencil is sufficient though not to be commended.² Writing in this sense includes printing and the like.³ Since a negotiable contract must pass either by delivery or by indorsement and delivery, an oral negotiable contract is an impossibility.⁴

¹¹ *Cox v. Kirkwood*, 59 Okla. 183, 158 Pac. 930; *Voris v. Birdsall*, — Okla. —, 162 Pac. 951.

¹² *First National Bank v. Watson*, 56 Okla. 495, 155 Pac. 1152.

¹ A negotiable instrument is one "which runs to order or bearer, is payable in money, for a certain definite sum, on demand, at sight, or in a certain time, or upon the happening of an event which must occur, and payable absolutely and not on a contingency." *Hatch v. Bank*, 94 Me. 348, 80 Am. St. Rep. 401, 47 Atl. 908 [citing, *Roads v. Webb*, 91 Me. 406, 410, 64 Am. St. Rep. 246, 40 Atl. 128]; *Sivils v. Taylor*, 12 Okla. 47, 39 Pac. 867.

See also, *Farmers' Loan & Trust Co. v. McCoy & Spivey Bros.*, 32 Okla. 277, 40 L. R. A. (N.S.) 177, 122 Pac. 125. The addition of other terms does not destroy the quality of negotiabil-

ity if the requisite elements are not affected by such addition; *Bonart v. Rabito*, 141 La. 970, 76 So. 166.

For special provisions as to bonds issued by a corporation and secured by mortgage, see *Crocker National Bank v. Byrne*, — Cal. —, 173 Pac. 752.

² *Reed v. Roark*, 14 Tex. 329, 65 Am. Dec. 127; *Closson v. Stearns*, 4 Vt. 11, 23 Am. Dec. 245.

³ *Weston v. Myers*, 33 Ill. 424; *Farmers' Bank v. Ewing*, 78 Ky. 264, 39 Am. Rep. 231.

A telegram may be a sufficient writing. *Selma Savings Bank v. Webster County Bank*, 182 Ky. 604, 2 A. L. R. 1136, 206 S. W. 870.

See also, *Iowa State Savings Bank v. City National Bank*, 183 Ia. 1347, L. R. A. 1918F, 169, 168 N. W. 148.

⁴ *Louisville Banking Co. v. Gray*, 123 Ala. 251, 82 Am. St. Rep. 120, 26 So.

As will be shown in the following sections, no part of a negotiable contract can be oral. Whatever validity an incomplete written contract may have, it is impossible that it be negotiable.⁵ However, it has been held that where a bill or note does not show where it is to be paid, an oral agreement fixing the place of payment may be shown for the purpose of proving such demand as will bind the drawer and the indorser.⁶ The surrounding circumstances may, however, serve to explain words which would otherwise be indefinite. Thus where a note is made payable "twenty-five after date," the surrounding circumstances may be resorted to in order to show that "days" is the word omitted.⁷

The fact that a negotiable instrument contains blanks does not destroy its negotiability if the holder of such instrument is authorized to fill up such blanks.⁸ The delivery of an instrument which contains blanks, by one who knows that it is incomplete, confers implied authority to fill in such blanks, at least in a reasonable time.⁹ A blank left for the name of the person for whose liability collateral has been deposited with the note does not render the note non-negotiable,¹⁰ since, by construction, it will be assumed that reference is made to the maker of the note.¹¹

205. This rule has been repeated in express terms in the Negotiable Instruments Law. *Thorp v. Mindeman*, 123 Wis. 149, 107 Am. St. Rep. 1003, 48 L. R. A. 146, 101 N. W. 417. Accordingly, in such contracts extrinsic evidence is inadmissible which would be admissible under ordinary contracts in writing. See §§ 2151 et seq.

⁵ *New Haven Bank Nat. Banking Association v. Jordan Co.*, 92 Conn. 705, 104 Atl. 392; *Chestnut v. Chestnut*, 104 Va. 539, 2 L. R. A. (N.S.) 879, 52 S. E. 348.

The Negotiable Instruments Act provides that the acceptance of a check must be in writing; but a telegram is a compliance with this provision. *Selma Savings Bank v. Webster County Bank*, 182 Ky. 604, 2 A. L. R. 1136, 206 S. W. 870.

See also, *Iowa State Savings Bank v. City National Bank*, 183 Ia. 1347, L. R. A. 1918F, 169, 168 N. W. 148.

A telegram is sufficient even if it is telephoned to the telegraph company. *Selma Savings Bank v. Webster Coun-*

ty Bank, 182 Ky. 604, 2 A. L. R. 1136, 206 S. W. 870.

See §§ 2151 et seq. and 2312. Other branches of this subject are best considered in connection with the parol evidence rule.

⁶ *Pearson v. Bank*, 26 U. S. (1 Pet.) 89, 7 L. ed. 65; *Meyer v. Hibsher*, 47 N. Y. 265.

⁷ *Boykin v. Bank*, 72 Ala. 262.

⁸ *Farmers' Loan & Trust Co. v. Brown*, 182 Ia. 1044, 165 N. W. 70; *Linthicum v. Bagby*, 131 Md. 644, 102 Atl. 997; *Phillips v. Hensley*, 175 N. Car. 23, 94 S. E. 673; *Brown v. Thomas*, 120 Va. 763, 92 S. E. 977.

⁹ *Farmers' Loan & Trust Co. v. Brown*, 182 Ia. 1044, 165 N. W. 70; *Linthicum v. Bagby*, 131 Md. 644, 102 Atl. 997; *Phillips v. Hensley*, 175 N. Car. 23, 94 S. E. 673; *Brown v. Thomas*, 120 Va. 763, 92 S. E. 977.

¹⁰ *Oleon v. Rosenbloom*, 247 Pa. St. 250, L. R. A. 1915F, 968, 93 Atl. 473.

¹¹ *Oleon v. Rosenbloom*, 247 Pa. St. 250, L. R. A. 1915F, 968, 93 Atl. 473.

A written agreement which is glued to a bill of exchange is to be regarded as a part thereof,¹² and it can not be detached therefrom without the consent of the maker.¹³ A memorandum pinned to a check is not a part thereof, and the facts stated in such memorandum are not available as against one who takes such check in due course of business for value and without notice.¹⁴

The instrument which must be in writing, such as the negotiable instrument, is subject to most of the rules which govern the construction of the ordinary written contract,¹⁵ and such principles of construction may justify the courts as treating a contract as being in writing, and thus as being negotiable when, in the absence of such principles of construction, such contract would be incomplete as far as the writing was concerned, or it may render non-negotiable a contract which, but for such provisions, would be negotiable. In case of a conflict between the written and printed,¹⁶ or typewritten,¹⁷ provisions of the contract, the written provisions prevail as in case of other written contracts.¹⁸

If two written provisions are inconsistent,¹⁹ as where the amount in figures is larger than the amount in words,²⁰ extrinsic evidence is inadmissible to show that one of such provisions was intended by the parties.

Under other circumstances, the application of the general principles of construction may tend to render the written contract non-negotiable. While a reference in the instrument to a contract, under which the instrument in question is given, does not serve to render such instrument non-negotiable if it is made by way of a statement of the consideration,²¹ or by way of security,²² such reference may be made in such terms that the two instruments

¹² *Bothell v. Schweitzer*, 84 Neb. 271, 22 L. R. A. (N.S.) 263, 120 N. W. 1129.

¹³ *Bothell v. Schweitzer*, 84 Neb. 271, 22 L. R. A. (N.S.) 263, 120 N. W. 1129.

¹⁴ *Southern Sand & Material Co. v. People's Savings Bank & Trust Co.*, 101 Ark. 266, 142 S. W. 178.

¹⁵ See ch. LXIII.

¹⁶ *First National Bank v. Greenlee*, 102 Neb. 180, L. R. A. 1918D, 224, 166 N. W. 559.

¹⁷ This is true especially if it appears that the written figure is inserted as a correction of an error in

the typewritten figures. *Acme Coal Co. v. Northrup National Bank*, 23 Wyom. 66, L. R. A. 1915D, 1084, 146 Pac. 593.

¹⁸ See § 2043.

¹⁹ *Payne v. Commercial National Bank*, 177 Cal. 68, 169 Pac. 1007.

²⁰ *Payne v. Commercial National Bank*, 177 Cal. 68, 169 Pac. 1007.

²¹ See § 2324.

See also, *Dollar Saving & Trust Co. v. Crawford*, 69 W. Va. 109, 33 L. R. A. (N.S.) 587, 70 S. E. 1089.

²² See § 2325.

must be construed together;²³ and accordingly it may render the instrument in question non-negotiable.²⁴

§ 2306. Provision in mortgage as affecting note. A provision in a mortgage given to secure a note does not render the note non-negotiable if the note does not incorporate the provision of the mortgage.¹ The fact that a statute provides specifically that different contracts between the same parties relating to the same matters which are parts of one transaction are to be taken together, does not incorporate provisions of a mortgage into the promissory note which is secured thereby so as to render such promissory note non-negotiable,² since such provision relates only to the interpretation of the contracts.³ A provision in a mortgage, which provides that the mortgagor is to pay all taxes assessed against the note or against the mortgage, is held not to render the note non-negotiable, since such provision is not a part of the note.⁴ A provision in a mortgage for the payment of taxes,⁵ or assessments,⁶ or insurance,⁷ does not destroy the negotiability of the note secured thereby. If referred to in the note, and if by statute the mortgagee's interest is to be taxed separate from the mortgagor's, a clause in a mortgage requiring the mortgagor to pay all taxes on the realty destroys negotiability.⁸

²³ *Continental Bank & Trust Co. v. Times Publishing Co.*, 142 La. 209, L. R. A. 1918B, 632, 76 So. 612; *Myrick v. Purcell*, 95 Minn. 133, 5 Am. & Eng. Ann. Cas. 148, 103 N. W. 902; *Greenbrier Valley Bank v. Bair*, 71 W. Va. 684, 77 S. E. 274; *Bank v. Kurth*, 167 Wis. 43, 166 N. W. 658.

See § 2046.

²⁴ See § 2306.

¹ *Farmers' National Bank v. McCall*, 25 Okla. 600, 26 L. R. A. (N.S.) 217, 106 Pac. 866; *Westlake v. Cooper*, — Okla. —, L. R. A. 1918D, 522, 171 Pac. 859; *Page v. Ford*, 65 Or. 450, 45 L. R. A. (N.S.) 247, 131 Pac. 1013. So where such provision is contained in the mortgage. *Moore v. Burling*, 93 Wash. 217, 160 Pac. 420.

² *Farmers' National Bank v. McCall*, 25 Okla. 600, 26 L. R. A. (N.S.) 217, 106 Pac. 866.

³ *Farmers' National Bank v. McCall*, 25 Okla. 600, 26 L. R. A. (N.S.) 217, 106 Pac. 866.

⁴ *Page v. Ford*, 65 Or. 450, 45 L. R. A. (N.S.) 247, 131 Pac. 1013.

⁵ *Lundean v. Hamilton (Ia.)*, 159 N. W. 163; *Garnett v. Myers*, 65 Neb. 280, 91 N. W. 400; *Moore v. Burling*, 93 Wash. 217, 160 Pac. 420.

As where such provision is substantially what the law imposes. *Bradbury v. Kinney*, 63 Neb. 754, 89 N. W. 257. And see *Wilson v. Campbell*, 110 Mich. 580, 35 L. R. A. 544, 68 N. W. 278.

⁶ *Lundean v. Hamilton (Ia.)*, 159 N. W. 163.

⁷ *Lundean v. Hamilton (Ia.)*, 159 N. W. 163; *Moore v. Burling*, 93 Wash. 217, 160 Pac. 420.

⁸ *Brooke v. Struthers*, 110 Mich. 562, 35 L. R. A. 536, 68 N. W. 272.

§ 2307. Date. In the absence of specific statutory provisions it is not necessary that a negotiable instrument should be dated.¹ If a negotiable instrument is dated, the fact that it was dated either before or after the time at which it was in fact delivered, does not render such instrument invalid unless such false date was inserted fraudulently.² A post-dated check is negotiable.³

§ 2308. Signing—Necessity. The requisites of a valid execution of a contract which by law must be in writing, are in some respects like those of ordinary written contracts and in some respects quite different. A contract which is required by law to be in writing, such as a negotiable instrument, must be signed by the party to be held liable thereon.¹ Extrinsic evidence is inadmissible to show the assent to an instrument of this character of a party who has not signed his name thereto.² In equity, however, one who has agreed to sign a certain promissory note as a maker will be held liable thereon, although he has not affixed his signature.³ One who has promised to indorse a negotiable instrument has been held liable in spite of his failure to sign his name thereto.⁴ This, however, seems to be contrary to the weight of authority, and in an action at law, at least, one who has promised to indorse a negotiable instrument, can not be held liable thereon unless he signs his name.⁵ If any liability attaches in such a case, it is said to be a liability for breach of the contract to indorse and not a liability upon the instrument as an indorser.⁶ Conversely, the party who agrees to sign as an indorser and does not do so, is probably not entitled to the same diligence in making demand and in giving notice as an indorser.⁷

¹ *Hague v. French*, 3 B. & P. 173; *Gordon v. Lansing State Savings Bank*, 133 Mich. 143, 94 N. W. 741; *Vandever v. Ogburn*, 2 N. J. L. 63.

² *Bull v. O'Sullivan*, L. R. 6 Q. B. 209; *American Agricultural Chemical Co. v. Scrimger*, 130 Md. 389, 100 Atl. 774; *Symonds v. Riley*, 188 Mass. 470, 74 N. E. 926; *Triphonoff v. Sweeney*, 65 Or. 299, 130 Pac. 979.

³ *American Agricultural Chemical Co. v. Scrimger*, 130 Md. 389, 100 Atl. 774.

⁴ *England*. *McCall v. Taylor*, 19 C. B. N. S. 301.

⁵ *Alabama*. *May v. Miller*, 27 Ala. 515; *Louisville Banking Co. v. Gray*, 123 Ala. 251, 82 Am. St. Rep. 120, 26 So. 205.

⁶ *Kentucky*. *Tevis v. Young*, 58 Ky. (1 Met.) 197, 71 Am. Dec. 474.

⁷ *Nebraska*. *Lewis v. Bank*, 1 Neb. (Unoff.) 177, 95 N. W. 355.

⁸ *Washington*. *Seattle Shoe Co. v. Packard*, 43 Wash. 527, 117 Am. St. Rep. 1064, 86 Pac. 845.

⁹ See § 2312.

¹⁰ *Petty v. Gacking*, 97 Ark. 217, 33 L. R. A. (N.S.) 175, 133 S. W. 832.

¹¹ *Sachs v. Fuller*, 69 Ark. 270, 62 S. W. 902 (defendant avoided liability because of plaintiff's failure to make demand and to give notice).

¹² *French v. Turner*, 15 Ind. 59.

¹³ *Birdsell Mfg. Co. v. Brown*, 96 Mich. 213, 55 N. W. 801.

¹⁴ *Boardman v. Steele*, 13 Conn. 547.

§ 2309. Signing—Form. No special form of signature is required. On this point the law of the negotiable contract seems to be the same as that of the ordinary written contract.¹ It seems that a signature by mark,² or by initials,³ or by an abbreviation,⁴ or by a misspelling of his name,⁵ or by a stamp,⁶ or by printed signature in facsimile,⁷ or by figures which indicate the party who signs the instrument,⁸ or by a business name,⁹ are each sufficient if intended as signatures. The signature by a fictitious name, under which the signer did not do business, is not sufficient to impose upon such signer a liability arising out of the instrument.¹⁰ To attempt to hold him upon the instrument is analogous to attempting to add a party to a negotiable instrument by fictitious evidence.¹¹

§ 2310. Delivery. Execution includes delivery.¹ Delivery is essential to the validity of a negotiable instrument.²

Delivery requires the intent of the party,³ as well as the appropriate outward act.⁴ Surrender of the physical possession of a

¹ See §§ 1177 et seq.

² *Handyside v. Cameron*, 21 Ill. 588, 74 Am. Dec. 119; *Shank v. Butsch*, 28 Ind. 19; *Lyons v. Holmes*, 11 S. Car. 429, 32 Am. Rep. 493.

³ *Weston v. Myers*, 33 Ill. 424.

⁴ *Kemp v. McCormick*, 1 Mont. 420.

⁵ *Bank v. Sherer*, 108 Cal. 513, 41 Pac. 415.

⁶ *Cadillac State Bank v. Cadillac State & Heading Co.*, 129 Mich. 15, 88 N. W. 67.

⁷ *Pennington v. Baehr*, 48 Cal. 565; *Lexington v. Union National Bank*, 75 Miss. 1, 22 So. 291.

⁸ *Brown v. Butchers' & Drovers' Bank*, 6 Hill (N. Y.) 443, 41 Am. Dec. 755.

⁹ *Turner v. Potter*, 56 Ia. 251, 9 N. W. 208.

¹⁰ *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240.

¹¹ See § 2312.

¹ *United States v. Chase National Bank*, 241 Fed. 535; *Holmes Bros. v. McCall*, 114 Miss. 57, 74 So. 786.

² *United States v. Chase National Bank*, 241 Fed. 535.

Arkansas. Ard v. Bowie, 125 Ark. 169, 187 S. W. 1066.

Connecticut. Atwood v. Atwood, 86 Conn. 579, Ann. Cas. 1914B, 281, 86 Atl. 29.

Indiana. Hunter v. First National Bank, 172 Ind. 62, 87 N. E. 734.

Maine. Lally v. Terrell, 95 Me. 553, 85 Am. St. Rep. 433, 55 L. R. A. 730, 50 Atl. 896.

Mississippi. Holmes Bros. v. McCall, 114 Miss. 57, 74 So. 786.

Nebraska. Harnett v. Holdredge (Neb.), 97 N. W. 443; *Russell v. Close*, 83 Neb. 232, 119 N. W. 515.

North Dakota. Stockton v. Turner, 30 N. D. 641, 153 N. W. 275.

Wisconsin. Roberts v. McGrath, 38 Wis. 52. This rule is carried into the Negotiable Instruments Act. *Washington Finance Corporation v. Glass*, 74 Wash. 653, 46 L. R. A. (N.S.) 1043, 134 Pac. 480.

See §§ 1185 et seq.

³ *American Auto Co. v. Perkins*, 83 Conn. 520, 77 Atl. 954; *Mason v. Gardner*, 186 Mass. 515, 71 N. E. 952; *Swanke v. Herdeman*, 138 Wis. 654, 120 N. W. 414.

⁴ *Leigh v. Horsum*, 4 Me. 28.

note without the intent that such instrument shall take effect, does not amount to delivery.⁵ A note, the physical possession of which has been surrendered with the understanding that it is not to take effect until the happening of some other and further event, does not take effect until such event occurs.⁶ If a negotiable instrument is taken from the custody of the maker, without his assent, it has no validity even in the hands of a bona fide holder in the absence of negligence on the part of the maker or circumstances creating an estoppel.⁷

Constructive delivery, however, is recognized.⁸ Such delivery does not require physical transfer to the payee. Leaving a note with the father of the payee,⁹ or with the aunt of the payee,¹⁰ or with the sister of the payee,¹¹ may be a sufficient delivery. In some cases delivery has been held to exist even though the maker has always kept possession of the negotiable instrument.¹²

§ 2311. Definite parties—Payee. The parties to the contract must be clearly described therein.¹ The payee must be indicated clearly.² Thus a promise to an alternative payee is not negotiable.³ However, if the alternative payees are united in interest so that a payment to one is in legal effect a payment to the other, the instrument may be negotiable, as where it is payable to certain trustees

⁵In re Continental Engine Co., (Baird v. Smith), 234 Fed. 58, 148 C. C. A. 74; Union Inv. Co. v. Epley, 164 Wis. 438, 160 N. W. 175.

⁶In re Continental Engine Co. (Baird v. Smith), 234 Fed. 58, 148 C. C. A. 74; Union Inv. Co. v. Epley, 164 Wis. 438, 160 N. W. 175.

⁷Sheffer v. Fleischer, 158 Mich. 270, 122 N. W. 543.

See §§ 1297, 2349.

⁸Rule v. Carey (Ia.), 159 N. W. 699; School District v. Sheidley, 138 Mo. 672, 60 Am. St. Rep. 576, 37 L. R. A. 406, 40 S. W. 656; Rowan v. Chenoweth, 49 W. Va. 287, 87 Am. St. Rep. 796, 38 S. E. 544.

⁹Enneking v. Woebkenberg, (Wis.), 92 N. W. 932.

¹⁰Rowan v. Chenoweth, 49 W. Va. 287, 87 Am. St. Rep. 796, 38 S. E. 544.

¹¹Rule v. Carey (Ia.), 159 N. W. 699.

¹²Indiana Trust Co. v. Byram, 36 Ind. App. 6, 72 N. E. 670, 73 N. E. 1094; In re Reeve's Estate, 111 Ia. 260, 82 N. W. 912.

¹England. Bank of England v. Vagliano [1891], A. C. 107.

Kentucky. Tevis v. Young, 58 Ky. (1 Met.), 197, 71 Am. Dec. 474.

Minnesota. McIntosh v. Lytle, 26 Minn. 336, 37 Am. Rep. 410, 3 N. W. 983.

Oklahoma. Randolph v. Hudson, 12 Okla. 516, 74 Pac. 946.

Tennessee. Seay v. Bank, 35 Tenn. (3 Sneed), 558, 67 Am. Dec. 579.

²Bank of England v. Vagliano [1891], A. C. 107; Gordon v. Lansing State Savings Bank, 133 Mich. 143, 94 N. W. 741; Smith v. Willing, 123 Wis. 377, 68 L. R. A. 940, 101 N. W. 692.

³Carpenter v. Farnsworth, 106 Mass. 561, 8 Am. Rep. 360.

or their treasurer,⁴ or where, at common law, it was payable to a man or his wife.⁵ The payee may be indicated by the name which he has assumed, or which he has used in business.⁶ The payee may be pointed out or described without being named expressly.⁷ A note payable "to the estate of" A,⁸ or to the heirs of a designated person,⁹ to the administrators of a designated person,¹⁰ or to the "Royal Consulate of Italy,"¹¹ is negotiable. The addition of the word "trustee," to the name of the payee, does not make the payee uncertain.¹² A note payable to "bearer" is negotiable.¹³ A negotiable instrument having the name of the payee blank is treated as payable to bearer.¹⁴ A blank for the name of the payee may be filled by a bona fide holder with his own name,¹⁵ or the instrument may be enforced without filling the blank, as payable to the order of the person for whom it was delivered.¹⁶ If, however, the name of a specific payee has been inserted in a check and then crossed out, such check is non-negotiable.¹⁷ If a mistake in the name of the payee has been made, the true payee may show such mistake, and may show that he was the party intended.¹⁸

Contra, on the theory that "or" means "and" in such connection. *Quinby v. Merritt*, 30 Tenn. (11 Humph.) 439. So a note to "Chas. E. Whitesell, et al., or order" is non-negotiable. *Gordon v. Anderson*, 83 Ia 224, 32 Am. St. Rep. 302, 12 L. R. A. 483, 49 N. W. 86.

Under the Negotiable Instruments Act a promise may be made to a payee in the alternative. *Page v. Ford*, 65 Or. 450, 45 L. R. A. (N.S.) 247, 131 Pac. 1013 [citing, *Union Bank v. Spies*, 151 Ia. 178, 130 N. W. 928].

⁴ *Holmes v. Jacques*, L. R. 1 Q. B. 376.

⁵ *Young v. Ward*, 21 Ill. 223.

⁶ *Medway Cotton Manufacturing Co. v. Adams*, 10 Mass. 360.

⁷ *Scala v. Miners' & Merchants' Bank*, — Colo. —, 171 Pac. 752; *Shaw v. Smith*, 150 Mass. 166, 6 L. R. A. 348, 22 N. E. 887.

⁸ *Stern v. Eichberg*, 83 Ill. App. 442; *Shaw v. Smith*, 150 Mass. 166, 6 L. R. A. 348, 22 N. E. 887.

⁹ *Cox v. Beltzhoover*, 11 Mo. 142, 47 Am. Dec. 145.

¹⁰ *Adams v. King*, 16 Ill. 169, 61 Am. Dec. 64.

¹¹ *Scala v. Miners' & Merchants' Bank*, — Colo. —, 171 Pac. 752.

¹² *Central State Bank v. Spurlin*, 111 Ia. 187, 82 Am. St. Rep. 511, 49 N. W. 631, 82 N. W. 493; *Fox v. Trust Co.* (Tenn. Ch. App.), 35 L. R. A. 678, 37 S. W. 1102; *Dollar Saving & Trust Co. v. Crawford*, 69 W. Va. 109, 33 L. R. A. (N.S.) 587, 70 S. E. 1089.

¹³ *New v. Walker*, 108 Ind. 365, 58 Am. Rep. 40, 9 N. E. 386.

¹⁴ *Manhattan Savings Institution v. Bank*, 170 N. Y. 58, 88 Am. St. Rep. 640, 62 N. E. 1079, *Fretwell v. Carter*, 78 S. Car. 531, 59 S. E. 639.

¹⁵ *Manhattan Savings Institution v. Bank*, 170 N. Y. 58, 88 Am. St. Rep. 640, 62 N. E. 1079; *Cox v. Alexander*, 30 Or. 438, 46 Pac. 794.

¹⁶ *Rich v. Starbuck*, 51 Ind. 87.

¹⁷ *Gordon v. Lansing State Savings Bank*, 133 Mich. 143, 94 N. W. 741.

¹⁸ *Digan v. Mandel*, 167 Ind. 586, 119 Am. St. Rep. 515, 10 L. R. A. (N.S.) 785, 79 N. E. 899.

Under the Negotiable Instruments Law, an instrument which, to the knowledge of the maker, is made payable to a fictitious person, is in legal effect payable to bearer.¹⁹

§ 2312. Adding party to negotiable instrument by extrinsic evidence to impose liability. A contract may be signed by A with his own name, but entered into by him on behalf of his real principal, X, with the adversary party, B. If the contract is one which the law requires to be in writing, B can not use extrinsic evidence to show that X is the real principal and to hold him liable on the contract. The chief example under this rule is the negotiable instrument.¹ This is not because of the parol evidence rule, but be-

¹⁹ For a discussion of such instruments see, *Grand Lodge v. Emporia National Bank*, 101 Kan. 369, 166 Pac. 490; *Hill v. McCrow*, 88 Or. 299, 170 Pac. 306.

A business name is not the name of a fictitious person. *Hill v. McCrow*, 88 Or. 299, 170 Pac. 306.

If the maker does not know that the name of the payee is the name of a fictitious person the instrument is not payable to bearer. *Grand Lodge v. Emporia National Bank*, 101 Kan. 369, 166 Pac. 490.

¹ *United States. Cragin v. Lovell*, 109 U. S. 194, 27 L. ed. 903.

Alabama. *Merrell v. Witherby*, 120 Ala. 418, 74 Am. St. Rep. 39, 23 So. 994, 28 So. 974.

Arkansas. *Harnwell v. Arnold*, 128 Ark. 10, 193 S. W. 506.

Colorado. *Heaton v. Myers*, 4 Colo. 59.

Connecticut. *Pease v. Pease*, 35 Conn. 131, 95 Am. Dec. 225.

Georgia. *Burkhalter v. Perry*, 127 Ga. 438, 119 Am. St. Rep. 343, 56 S. E. 631; *Andrews Co. v. Bank*, 129 Ga. 53, 121 Am. St. Rep. 186, 58 S. E. 633; *Coaling Coal & C. Co. v. Howard*, 130 Ga. 807, 21 L. R. A. (N.S.) 1051, 61 S. E. 987.

Illinois. *Bickford v. Bank*, 42 Ill. 238, 89 Am. Dec. 436.

Iowa. *Wing v. Glick*, 56 Ia. 473, 41 Am. Rep. 118.

Kansas. *Kansas National Bank v. Bay*, 62 Kan. 692, 84 Am. St. Rep. 417, 54 L. R. A. 408, 64 Pac. 596; *New York Life Ins. Co. v. Martindale*, 75 Kan. 142, 121 Am. St. Rep. 362, 21 L. R. A. (N.S.) 1045, 88 Pac. 559.

Kentucky. *Trask v. Roberts*, 40 Ky. (1 B. Mon.) 201.

Louisiana. *Dayrics v. Lindsly*, 128 La. 259, 54 So. 791.

Massachusetts. *Stackpole v. Arnold*, 11 Mass. 27, 6 Am. Dec. 150; *Bedford Commercial Ins. Co. v. Covell*, 49 Mass. (8 Met.) 442; *Williams v. Robbins*, 82 Mass. (16 Gray) 77, 77 Am. Dec. 396.

Montana. *Young v. Bray*, 54 Mont. 415, 170 Pac. 1044.

Nebraska. *Webster v. Wray*, 19 Neb. 558, 56 Am. Rep. 754, 27 N. W. 644; *Lewis v. Bank*, 1 Neb. (Unoff.) 177, 55 N. W. 355.

Ohio. *Anderton v. Shoup*, 17 O. S. 125; *Bank v. Cook*, 38 O. S. 442.

Oregon. *Logan v. Parson*, 79 Or. 381, 155 Pac. 365.

Rhode Island. *Manufacturers', etc., Bank v. Follett*, 11 R. I. 92, 23 Am. Rep. 418.

South Carolina. *Tarver v. Garlington*, 27 S. Car. 107, 13 Am. St. Rep. 628, 2 S. E. 846.

cause such contracts must consist entirely of the writing, and parties can not be added by parol. Thus if a check is signed "A, agent," the real principal can not be held liable on the check.² The same rule applies to a note signed by "A, agent."³ The principal can not be held liable upon a draft which is drawn by his agent in the name of the agent,⁴ even if it is shown that the principal has been accustomed to honor similar drafts.⁵ A partner can not be held upon a note which is signed by his partner with his own name,⁶ at least if such individual name is not the name in which the firm does business. He can not be held liable as indorser upon an indorsement by his agent in his own name.⁷ One who has assumed and agreed to pay a note is not liable on the note itself.⁸

The fact that the principal received the benefit of the transaction does not render him liable on the negotiable instrument.⁹ The principal, if unknown when the note was given, may be held liable on the original debt;¹⁰ but if the principal is known, taking

Vermont. *Arnold v. Sprague*, 34 Vt. 402.

Washington. *Seattle Shoe Co. v. Packard*, 43 Wash. 527, 117 Am. St. Rep. 1064, 86 Pac. 845.

"It is well settled that any person taking a negotiable promissory note contracts with those only whose names are signed to it as parties, and can not, therefore, maintain an action upon the note against any other person." *Bartlett v. Tucker*, 104 Mass. 336, 339, 6 Am. Rep. 240 [quoted in *Kansas National Bank v. Bay*, 62 Kan. 692, 695, 84 Am. St. Rep. 417, 54 L. R. A. 408, 64 Pac. 596].

Contra, *Mechanics' Bank v. Bank*, 18 U. S. (5 Wheat.) 326, 5 L. ed. 100; *Hancock Bank v. Joy*, 41 Me. 568; *Sharpe v. Bellis*, 61 Pa. St. 69, 100 Am. Dec. 618.

² *Anderton v. Shoup*, 17 O. S. 125.

³ *Burkhalter v. Perry*, 127 Ga. 438, 119 Am. St. Rep. 343, 56 S. E. 631; *Shuey v. Adair*, 18 Wash. 188, 39 L. R. A. 473, 51 Pac. 388.

Contra, *Kenyon v. Williams*, 19 Ind. 44.

⁴ *Seattle Shoe Co. v. Packard*, 43 Wash. 527, 117 Am. St. Rep. 1064, 86 Pac. 845.

⁵ *Seattle Shoe Co. v. Packard*, 43 Wash. 527, 117 Am. St. Rep. 1064, 86 Pac. 845.

⁶ *Logan v. Parson*, 79 Or. 381, 155 Pac. 365.

⁷ *New York Life Ins. Co. v. Martindale*, 75 Kan. 142, 121 Am. St. Rep. 362, 21 L. R. A. (N.S.) 1045, 88 Pac. 559.

⁸ *Young v. Bray*, 54 Mont. 415, 170 Pac. 1044.

⁹ *Andrews Co. v. Bank*, 129 Ga. 53, 121 Am. St. Rep. 186, 58 S. E. 633.

¹⁰ *United States. Clark's Executors v. Van Riemsdyk*, 12 U. S. (9 Cranch) 304, 3 L. ed. 688.

Georgia. *Coaling Coal & Coke Co. v. Howard*, 130 Ga. 807, 21 L. R. A. (N.S.) 1051, 61 S. E. 987.

Illinois. *Chemical National Bank v. Bank*, 156 Ill. 149, 40 N. E. 328.

Massachusetts. *Lovell v. Williams*, 125 Mass. 439.

Ohio. *Harper v. Bank*, 54 O. S. 425, 44 N. E. 97.

such note is an election to hold the agent.¹¹ Holding the principal on such debt is in the nature of quasi-contract.¹²

Even in case of negotiable instruments, however, one who does business in the name of another or in a fictitious name and signs negotiable instruments by that name may be held liable thereon.¹³ If the maker, A, does his individual business in the name of a non-existent corporation and signs the note in the name of the corporation by A as president, the payee, B, who knows such facts, may hold A personally liable upon the note.¹⁴ Where A did business under the name "Pompton Iron Works," and signed notes by such name, he may be held liable thereon.¹⁵ However, where a note was signed "H. R. Sloan, by C. M. Bay, attorney in fact," and the payee knew that Bay had no authority to sign Sloan's name, it was held that Bay was not liable on the note even if he did business under Sloan's name.¹⁶

In the absence of estoppel, one who signs an assumed name to a contract required by law to be in writing is liable on the contract only when such assumed name is used by him as his trade name under which he does business.¹⁷ Otherwise his liability is in tort. If A signs a name not his own to a note, either a fictitious name or the name of a real person which he has no right to use, and does not hold such name out as his own, and it is not the name under which he does business, he can not be held on such note.¹⁸

If the instrument is executed in such a way as to show affirmatively that B is making the contract through his agent, A, extrinsic evidence that A was really acting for himself is inadmissible,¹⁹ as where A signs a non-negotiable contract "X, per A,"²⁰ or where A signs a promissory note "X, by A, attorney in fact."²¹

¹¹ *Merrell v. Witherby*, 120 Ala. 418, 74 Am. St. Rep. 39, 23 So. 994, 26 So. 974; *Bank v. Hooper*, 71 Mass. (5 Gray) 567, 66 Am. Dec. 390.

¹² See §§ 1473 et seq.

¹³ *Pease v. Pease*, 35 Conn. 131, 95 Am. Dec. 225; *Union Brewing Co. v. Interstate Bank & Trust Co.*, 240 Ill. 454, 38 N. E. 997; *Melledge v. Iron Co.*, 59 Mass. (5 Cush.) 158, 51 Am. Dec. 59; *Tarver v. Garlington*, 27 S. Car. 107, 13 Am. St. Rep. 628, 2 S. E. 846. See obiter in *Chandler v. Coe*, 54 N. H. 561.

¹⁴ *Union Brewing Co. v. Interstate Bank and Trust Co.*, 240 Ill. 454, 38 N. E. 997.

¹⁵ *Fuller v. Hooper*, 69 Mass. (3 Gray) 334.

¹⁶ *Kansas National Bank v. Bay*, 62 Kan. 692, 84 Am. St. Rep. 417, 54 L. R. A. 408, 64 Pac. 596.

¹⁷ *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240.

¹⁸ *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240.

¹⁹ *Heffron v. Pollard*, 73 Tex. 96, 15 Am. St. Rep. 764, 11 S. W. 165.

²⁰ *Heffron v. Pollard*, 73 Tex. 96, 15 Am. St. Rep. 764, 11 S. W. 165.

²¹ *Kansas National Bank v. Bay*, 62 Kan. 692, 84 Am. St. Rep. 417, 54 L. R. A. 408, 64 Pac. 596. To the same effect, see *Liebscher v. Kraus*, 74 Wis.

A warehouse receipt, even if made negotiable by statute,²² is not a negotiable instrument within the meaning of this rule.

A party can not be added to a negotiable contract by oral evidence, even where no liability is sought to be enforced against him. Thus in an action by indorsee against indorser on non-payment of the note, such evidence can not be used to show that one who signed as agent was in fact principal, and hence that as no demand had been made on him the indorser was discharged.²³

In a jurisdiction in which the liability of an endorser attaches to one who signs his name in blank upon the back of a note before such note is negotiated, extrinsic evidence is inadmissible to show that such endorser was a joint maker.²⁴ It has, however, been held that equity will hold if a party to a negotiable instrument is one who has promised to sign it, although he has not in fact done so.²⁵

§ 2313. Discharging party to negotiable instrument by extrinsic evidence. If a party to a negotiable instrument who has signed in such a way as to assume a personal liability, attempts to show that the oral understanding of the parties was that he was signing merely as agent on behalf of another and thus to relieve himself from liability on the instrument, such attempt violates two rules at once—the rule requiring a negotiable instrument to consist entirely of writing, and the parol evidence rule which forbids the contradiction of any complete written contract by a prior or contemporaneous oral contract.¹ Accordingly, such oral agreements are without effect and the party bound by the terms of the instrument can not relieve himself from liability thereon by this means.² This rule applies even though the agent thus executing the instrument adds the word “agent” or some word of equivalent import to his signature, as long as the form of the signature is such that the

387, 17 Am. St. Rep. 171, 5 L. R. A. 496, 43 N.W. 166.

²² *Anderson v. Flouring Mills*, 37 Or. 483, 82 Am. St. Rep. 771, 30 L. R. A. 235, 60 Pac. 839.

²³ *Reeve v. Bank*, 54 N. J. L. 208, 33 Am. St. Rep. 675, 16 L. R. A. 143, 23 Atl. 853.

²⁴ *Harnett v. Holdredge*, 73 Neb. 570, 119 Am. St. Rep. 905, 103 N. W. 277.

²⁵ *Petty v. Gacking*, 97 Ark. 217, 33 L. R. A. (N.S.) 175, 133 S. W. 832.

¹ See ch. LXIX and §§ 2305 et seq.

The extent to which the liability of sureties, indorsers, etc., may be modified by extrinsic evidence is discussed in §§ 2198 et seq.

² *United States. Nash v. Towne*, 72 U. S. (5 Wall.) 689, 18 L. ed. 527.

Illinois. Hypes v. Griffin, 89 Ill. 134, 31 Am. Rep. 71.

Iowa. Mathews v. Mattress Co., 87 Ia. 246 [sub nomine, *Mathews v. Mattress Co.*, 19 L. R. A. 676, 54 N. W. 225].

word thus added is regarded as a mere *descriptio personae* and does not affect the nature of the liability assumed.³ The conflict that exists as to the nature of personal liability arises out of a difference in judicial opinion as to what is a mere *descriptio personae* and what shows an intent not to assume personal liability.⁴ Even if the maker describes himself in the body of the negotiable instrument as an agent, but signs his individual name without the addition of any designation of agency, such contract is held in many jurisdictions to impose an individual liability upon the agent, and to be so free from ambiguity that oral evidence is inadmissible to discharge the agent.⁵ Thus a note whereby "We or either of us as directors" of a certain corporation promise to pay, signed by individual names, can not be shown to be the note of the corporation for the purpose of relieving the makers from liability.⁶ In some jurisdictions the addition of some word denoting agency to the names of the promisors in a negotiable instrument in the body of the instrument, and to their signatures, still leaves them liable individually and extrinsic evidence is inadmissible to relieve them from liability. Thus a note whereby "We, the Trustees," of a certain cemetery association promise to pay, signed by their individual names, with the addition of the word "trustee," imposes personal liability so clearly that oral evidence is inadmissible to disprove it.⁷ In some jurisdictions it is held that when the form of signature is ambiguous the real understanding of the parties may be shown for the purpose of determining the character of the liability assumed.⁸

Massachusetts. *Morell v. Coddington*, 86 Mass. (4 All.) 403.

Washington. *Van Tassel v. McGrail*, 93 Wash. 380, 160 Pac. 1053.

West Virginia. *Clark v. Talbott*, 72 W. Va. 46, 44 L. R. A. (N.S.) 731, 77 S. E. 523.

Wisconsin. *Liebscher v. Kraus*, 74 Wis. 387, 17 Am. St. Rep. 171, 5 L. R. A. 496, 43 N. W. 166.

³ See §§ 2205 et seq.

⁴ See ch. LXVI.

⁵ *Nash v. Towne*, 72 U. S. (5 Wall.) 689, 18 L. ed. 527; *Hypes v. Griffin*, 89 Ill. 135, 31 Am. Rep. 71.

⁶ *Titus v. Kyle*, 10 O. S. 444.

⁷ *Reiff v. Mulholland*, 65 O. S. 178, 62 N. E. 124. (In this case reformation had been sought in equity and refused. On trial at law oral evidence was admitted and judgment rendered for defendants. The Supreme Court reversed this judgment and entered judgment for plaintiff on the conceded facts.)

See also, *Vliet v. Simanton*, 63 N. J. L. 458, 43 Atl. 738.

⁸ *Kean v. Davis*, 21 N. J. L. 683; *Megowan v. Peterson*, 173 N. Y. 1, 65 N. E. 738; *Denman v. Brenneman*, 48 Okla. 566, L. R. A. 1915E, 1047, 149 Pac. 1105.

§ 2314. Promise or order. The contract must be either a promise to pay or an order commanding another to pay.¹ The former is a promissory note or bond; the latter a bill of exchange² or check. A promise by A to B to accept an order from C, with C's name indorsed thereon, is not a bill of exchange, the order not having been drawn.³ Accordingly a mere acknowledgment of a debt,⁴ such as an I. O. U.,⁵ or a due-bill,⁶ or a time check for labor,⁷ is held in some jurisdictions not to be negotiable.

The difficulty and cause of disagreement among the courts is to determine when such an instrument amounts to a promise to pay. If a receipt contains an express promise to repay it may be a promissory note, as a receipt containing the words, "Which we promise to replace * * * on demand."⁸ If a receipt provides for repayment, it is a promissory note, though it contains no express promise to pay.⁹ Thus the words "payable,"¹⁰ or "to be paid,"¹¹ or "on demand,"¹² make the instrument in which they are contained a note instead of a mere receipt. So a statement of

¹ Massachusetts. *Torpey v. Tebo*, 184 Mass. 307, 68 N. E. 223.

Montana. *First National Bank v. Barrett*, 52 Mont. 359, 157 Pac. 951.

Oklahoma. *Farmers' Loan & Trust Co. v. McCoy & Spivey Bros.*, 32 Okla. 277, 40 L. R. A. (N.S.) 177, 122 Pac. 125.

Vermont. *Hitchcock v. Cloutier*, 7 Vt. 22.

West Virginia. *Hubbard & Co. v. Morton*, 80 W. Va. 137, 92 S. E. 252.

² *Hubbard & Co. v. Morton* (W. Va.), 92 S. E. 252.

³ *Allen v. Leavens*, 26 Or. 164, 46 Am. St. Rep. 613, 26 L. R. A. 620, 37 Pac. 488.

⁴ Arkansas. *Morgan v. Center*, 133 Ark. 247, 202 S. W. 235.

Connecticut. *Currier v. Lockwood*, 40 Conn. 349, 16 Am. Rep. 40.

Massachusetts. *Gay v. Roake*, 151 Mass. 115, 21 Am. St. Rep. 434, 7 L. R. A. 392, 23 N. E. 835.

Pennsylvania. *Brentzer v. Wightman*, 7 W. & S. (Pa.) 264.

Washington. *National Market Co.*

v. Maryland Casualty Co., 100 Wash. 370, 174 Pac. 479.

⁵ *Gay v. Roake*, 151 Mass. 115, 21 Am. St. Rep. 434, 7 L. R. A. 392, 23 N. E. 835.

⁶ *Morgan v. Center*, 133 Ark. 247, 202 S. W. 235. Such instrument is actionable. *Merchants' National Bank v. Carmichael*, — Cal. —, 173 Pac. 999.

⁷ *National Market Co. v. Maryland Casualty Co.*, 100 Wash. 370, 174 Pac. 479.

⁸ *Moore v. Gano*, 12 Ohio 300.

⁹ *Johnson v. Blackmon*, — Ala. —, 78 So. 891; *Measmore v. Morrison*, 172 Pa. St. 300, 34 Atl. 45; *Easley v. East Tennessee National Bank*, 138 Tenn. 369, 198 S. W. 66.

¹⁰ *Johnson v. Blackmon*, — Ala. —, 78 So. 891; *Johnson School Township v. Bank*, 81 Ind. 515; *Kimball v. Huntington*, 10 Wend. (N. Y.) 675, 25 Am. Dec. 590; *Easley v. East Tennessee National Bank*, 138 Tenn. 369, 198 S. W. 66.

¹¹ *Ubsdell v. Cunningham*, 22 Mo. 124.

¹² *Cummings v. Gassett*, 19 Vt. 308.

time at which the debt is due,¹³ as "due * * * on demand,"¹⁴ may import a promise. Some authorities, however, go farther and treat all due-bills as promissory notes, on the theory that they contain an implied promise to pay.¹⁵ An acknowledgment of a debt evidenced by a lost note and a renewal of such note is in effect a promise to pay such debt, and may itself be negotiable.¹⁶

§ 2315. For money only. The contract must be one for the payment of money only.¹ Accordingly, a promise to pay in work,² as a railroad ticket,³ or in property other than money,⁴ even if such other property is itself negotiable, as bills of exchange,⁵ checks,⁶ notes,⁷ or United States bonds,⁸ is not negotiable. But a promise to pay in "current funds" has been held to mean current money, and hence to be negotiable;⁹ and so of "current funds of

¹³ *Cowan v. Halleck*, 9 Colo. 572, 13 Pac. 700.

¹⁴ *Smith v. Allen*, 5 Day (Conn.) 337. Contra, *Brown v. Gilman*, 13 Mass. 158.

¹⁵ *Illinois*. *Stewart v. Smith*, 28 Ill. 397.

Indiana. *Long v. Straus*, 107 Ind. 94, 57 Am. Rep. 87, 6 N. E. 123, 7 N. E. 763.

South Dakota. *Schmitz v. Hawkeye Gold Mining Co.*, 8 S. D. 544, 67 N. W. 618.

Tennessee. *Cummings v. Freeman*, 21 Tenn. (2 Humph.) 143.

Wisconsin. *Bacon v. Bicknell*, 17 Wis. 523.

¹⁶ *Woodbridge v. Drought*, 118 Ga. 671, 45 S. E. 266.

¹ *Brooks v. Greil Bros. Co.*, 192 Ala. 235, 68 So. 874; *Hibbs v. Brown*, 190 N. Y. 167, 82 N. E. 1108.

See also, *Pratt v. Higginson*, 230 Mass. 256, 1 A. L. R. 714, 119 N. E. 661.

² *McClellan v. Coffin*, 93 Ind. 456; *Leonard v. Carter*, 16 Wis. 607.

³ *Frank v. Ingalls*, 41 O. S. 560.

⁴ *Alabama*. *Brooks v. Greil Bros. Co.*, 192 Ala. 235, 68 So. 874.

Kentucky. *May v. Lansdown*, 29

Ky. (6 J. J. Mar.) 165; *Pond Creek Coal Co. v. Riley Lester & Bros.*, 171 Ky. 811, 188 S. W. 907.

Massachusetts. *Gushee v. Eddy*, 77 Mass. (11 Gray) 502, 71 Am. Dec. 728.

Ohio. *Rhodes v. Lindly*, 3 Ohio 51, 17 Am. Dec. 580.

Oregon. *Hyland v. Blodgett*, 9 Or. 166, 42 Am. Rep. 799.

Vermont. *Roberts v. Smith*, 58 Vt. 492, 56 Am. Rep. 567, 4 Atl. 709.

Wisconsin. *Corbitt v. Stonemetz*, 15 Wis. 170.

⁵ *First National Bank v. Slette*, 67 Minn. 425, 64 Am. St. Rep. 429, 69 N. W. 1148.

⁶ *National Bank of Farmersville v. Bank*, 84 Tex. 40, 19 S. W. 334.

⁷ *Williams v. Sims*, 22 Ala. 512.

⁸ *Easton v. Hyde*, 13 Minn. 90.

⁹ *United States*. *Bull v. Bank*, 123 U. S. 105, 31 L. ed. 97.

Illinois. *Telford v. Patton*, 144 Ill. 611, 33 N. E. 1119.

Indiana. *Millikan v. Security Trust Co.*, — Ind. —, 118 N. E. 568.

Maine. *Hatch v. Bank*, 94 Me. 348, 80 Am. St. Rep. 401, 47 Atl. 908.

Nebraska. *Kirkwood v. Bank*, 40 Neb. 484, 42 Am. St. Rep. 683, 24 L. R. A. 444, 58 N. W. 1016.

the state of Ohio,"¹⁰ or "currency."¹¹ A note payable in notes of a specific bank,¹² or in bank-notes generally,¹³ is not negotiable. A promise to pay foreign money is negotiable.¹⁴

A provision in a bond of a corporation for payment in money or in stock at the option of the holder does not render it non-negotiable.¹⁵

Covenants in a written contract which provide for the doing of some act other than making a payment or securing or enforcing such payment will render the contract non-negotiable.¹⁶

§ 2316. For a sum certain. The promise or order must be for a sum certain. If the amount to be paid can not be determined from the face of the contract itself, the contract is not negotiable.¹ This rule is not affected by the Negotiable Instruments Law.² A

Ohio. Citizens' National Bank v. Brown, 45 O. S. 39, 4 Am. St. Rep. 526, 11 N. E. 799.

Contra, Johnson v. Henderson, 76 N. Car. 227; Texas, etc. Co. v. Carroll, 63 Tex. 48.

¹⁰ White v. Richmond, 16 Ohio 5. So Ehle v. Bank, 24 N. Y. 548.

Contra, Chambers v. George, 5 Litt (Ky.) 335.

¹¹ Millikan v. Security Trust Co., — Ind. —, 118 N. E. 568; Howe v. Hartness, 11 O. S. 449, 78 Am. Dec. 312.

¹² Irvine v. Lowry, 39 U. S. (14 Pet.) 293, 10 L. ed. 462; Shamokin Bank v. Street, 16 O. S. 1.

¹³ Kirkpatrick v. McCullough, 22 Tenn. (3 Humph.) 171, 39 Am. Dec. 158.

Contra, if payable in "current Ohio bank-notes." Swetland v. Creigh, 15 Ohio 118.

¹⁴ Canada currency. Black v. Ward, 27 Mich. 191, 15 Am. Rep. 162. Mexican dollars. Hogue v. Williamson, 85 Tex. 553, 34 Am. St. Rep. 823, 20 L. R. A. 481, 22 S. W. 580.

Contra, Canada money. Thompson v. Sloan, 23 Wend. (N. Y.) 71, 35 Am. Dec. 546.

¹⁵ Pratt v. Higginson, 230 Mass. 256, 1 A. L. R. 714, 119 N. E. 661.

¹⁶ Smith v. Myers, 207 Ill. 126, 69 N. E. 858; Cornish v. Woolverton, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4; Thorp v. Mindeman, 123 Wis. 149, 107 Am. St. Rep. 1003, 68 L. R. A. 146, 101 N. W. 417. This rule has been adopted by the Negotiable Instruments Law. Kimpton v. Studebaker Bros. Co., 14 Ida. 552, 125 Am. St. Rep. 185, 14 Am. & Eng. Ann. Cas. 1126, 94 Pac. 1039; Bright v. Offield, 81 Wash. 442, 143 Pac. 159.

¹ Payne v. Commercial National Bank, 177 Cal. 68, L. R. A. 1918C, 328, 169 Pac. 1007; Farmers' Loan & Trust Co. v. McCoy & Spivey Bros., 32 Okla. 277, 40 L. R. A. (N.S.) 177, 122 Pac. 125; Chestnut v. Chestnut, 104 Va. 539, 2 L. R. A. (N.S.) 879, 52 S. E. 348; Coolidge v. Saltmarsh, 96 Wash. 541, 165 Pac. 508.

"An instrument for a specified sum of money, and also for the payment of something else the value of which is not ascertainable, but depends upon extrinsic evidence, is not a note." Lowe v. Bliss, 24 Ill. 168, 170, 76 Am. Dec. 742.

² First National Bank v. Watson, 56 Okla. 495, 155 Pac. 1152.

note expressing the amount in figures in one corner, the amount being omitted in the body of the note, is for a sum certain.³ If the body of the instrument contains one number in figures and a smaller number written by words, extrinsic evidence is not admissible at law to show that the larger number was intended.⁴ If a figure indicating interest is written above a different typewritten figure also indicating interest, and a ring is made around the latter with a pen, the figure written in by hand controls, and the contract is not uncertain,⁵ since, even under a statute providing that written provisions prevail over printed provisions, the typewritten figures are to be treated as if they were printed.⁶ A note for "eight hundred and sixty-eight," the word dollars being omitted, is made certain by the figures \$868.⁷ A promise to pay whatever amount might be collected,⁸ or to pay a certain sum of money and whatever premiums might be due upon a certain policy,⁹ or a promise to pay a "bill of two hundred sixty-five 50-100 dollars,"¹⁰ are none of them for a sum certain. The fact that the amount is left blank does not render the instrument non-negotiable if authority is given to fill up such blank and such authority is exercised in a proper way.¹¹

§ 2317. Provision for payment of exchange. A contract to pay a certain amount "with exchange" is non-negotiable by the weight of authority.¹ The reason generally given for this rule is that it is impossible to determine in advance what the rate of

³ *Witty v. Ins. Co.*, 123 Ind. 411, 18 Am. St. Rep. 327, 8 L. R. A. 365, 24 N. E. 141.

Contra, *Vinson v. Palmer*, 45 Fla. 630, 34 So. 276; *Chestnut v. Chestnut*, 104 Va. 539, 2 L. R. A. (N.S.) 879, 52 S. E. 348.

⁴ *Payne v. Commercial National Bank*, 177 Cal. 68, L. R. A. 1918C, 328, 169 Pac. 1007.

⁵ *Acme Coal Co. v. Northrup National Bank*, 23 Wyom. 66, L. R. A. 1915D, 1084, 146 Pac. 593.

⁶ *Acme Coal Co. v. Northrup National Bank*, 23 Wyom. 66, L. R. A. 1915D, 1084, 146 Pac. 593.

⁷ *McCoy v. Gilmore*, 7 Ohio (1st Part) 268.

⁸ *Legro v. Staples*, 16 Me. 252.

⁹ *Palmer v. Ward*, 72 Mass. (6 Gray) 340.

¹⁰ *Bradt v. Krank*, 164 N. Y. 515, 79 Am. St. Rep. 662, 58 N. E. 657.

¹¹ Under the Negotiable Instruments Law. *Brown v. Thomas*, 120 Va. 763, 92 S. E. 977.

¹ *United States. Windsor Savings Bank v. McMahon*, 38 Fed. 283, 3 L. R. A. 192.

Illinois. Lowe v. Bliss, 24 Ill. 168, 76 Am. Dec. 742.

Indiana. Nicely v. Bank, 15 Ind. App. 563, 57 Am. St. Rep. 245, 44 N. E. 572.

Iowa. Culbertson v. Nelson, 93 Ia. 187, 57 Am. St. Rep. 266, 27 L. R. A. 222, 61 N. W. 854.

exchange will be, and that the amount due at maturity can not therefore be determined. But if such provision is merely inserted to make it clear that the promisor is to bear the expense of having the money transmitted to the place of payment, it does not impose any greater burden upon the promisor than the same note would have done had this provision been omitted.²

Exchange is "a mere incident, not affecting the amount of the debt itself."³ If such clause makes the note non-negotiable, then every note payable at a certain place should on the same principle be non-negotiable. Accordingly some courts hold that such a clause does not destroy negotiability.⁴

§ 2318. Provision for payment of taxes. A promise to pay a certain sum and all taxes assessed against the realty mortgaged to secure such debt,¹ or to pay interest and taxes on the note itself,² is not negotiable. A provision in a note to the effect that the maker will pay the taxes assessed upon the note or upon the mortgage which secures it, renders such note non-negotiable,³ even though no such tax is in fact assessed.⁴

§ 2319. Provision for payment before maturity. A clause giving the payee bank the right to appropriate to the payment of the note, before or after maturity, the amount on deposit by the makers or either of them, does not make the amount due uncertain.¹ But a clause giving the holder power to sell certain collateral security before maturity and apply the proceeds to the note

North Dakota. Flagg v. School District, 4 N. D. 30, 25 L. R. A. 363, 58 N. W. 499.

² Bullock v. Taylor, 30 Mich. 137, 33 Am. Rep. 356.

³ Haslach v. Wolf, 66 Neb. 600, 103 Am. St. Rep. 736, 60 L. R. A. 434, 92 N. W. 574.

⁴ **Kansas.** Clark v. Skeen, 61 Kan. 526, 78 Am. St. Rep. 337, 49 L. R. A. 190, 60 Pac. 327.

Michigan. Smith v. Kendall, 9 Mich. 241, 80 Am. Dec. 83.

Minnesota. Hastings v. Thompson, 54 Minn. 184, 40 Am. St. Rep. 315, 21 L. R. A. 178, 55 N. W. 968.

Nebraska. Haslach v. Wolf, 66 Neb.

600, 103 Am. St. Rep. 736, 60 L. R. A. 434, 92 N. W. 574.

Wisconsin. Morgan v. Edwards, 53 Wis. 599, 40 Am. Rep. 781, 11 N. W. 21.

¹ Walker v. Thompson, 108 Mich. 686, 66 N. W. 584; Coolidge v. Saltmarsh, 96 Wash. 541, 165 Pac. 508.

² Smith v. Myers, 207 Ill. 126, 69 N. E. 858 [affirming, 107 Ill. App. 410].

³ Coolidge v. Saltmarsh, 96 Wash. 541, 165 Pac. 508.

⁴ Coolidge v. Saltmarsh, 96 Wash. 541, 165 Pac. 508.

¹ Louisville Banking Co. v. Gray, 123 Ala. 251, 82 Am. St. Rep. 120, 26 So. 205 [citing, Hodges v. Shuler, 22 N. Y. 114].

has been held to make the amount uncertain.² So provision for the payment of uncertain sums at uncertain times before maturity, leaving uncertain the amount due at maturity, destroys negotiability,³ since it leaves the amount to be paid at maturity uncertain.

§ 2320. Provision for discount. If an instrument for the payment of money contains a provision to the effect that a discount will be given in case such instrument is paid before maturity, or in case it is paid promptly, the weight of authority seems to be in favor of the view that such provision renders the instrument non-negotiable, since it is impossible to tell what amount will discharge such instrument.¹ It will be seen from the cases cited in support of this proposition the rule has been applied where the discount agreed upon was for a fixed sum or a fixed percentage, so that the amount to be paid could be determined exactly at the time that the payment was made or tendered. No reason has been suggested for treating a provision for a discount differently from a provision for an increased rate of interest after maturity or a provision for a reduction in the rate of interest in case of payment at maturity; and such provisions are generally held not to prevent the instrument from being negotiable.² There is, accordingly, some authority for holding that if the discount is for a definite sum, such provision does not render the instrument non-negotiable,³ although such a provision would render the instrument non-negotiable if the amount of the discount were not fixed by the terms of the contract.

² *Smith v. Marland*, 59 Ia. 645, 13 N. W. 852.

³ *Roblee v. Bank*, 69 Neb. 180, 95 N. W. 61.

¹ *Way v. Smith*, 111 Mass. 523.

So of a provision, "This note to be discounted at 12 per cent., if paid before maturity." *National Bank v. Feeney*, 9 S. D. 550, 46 L. R. A. 732, 70 N. W. 874 [affirmed on rehearing, 11 S. D. 109, 75 N. W. 896; affirmed on second rehearing, 12 S. D. 156, 76 Am. St. Rep. 594, 80 N. W. 186].

So of a provision for a discount of

six per cent. if paid within fifteen days. *Farmers' Loan & Trust Co. v. McCoy & Spivey Bros.*, 32 Okla. 277, 40 L. R. A. (N.S.) 177, 122 Pac. 125; *First National Bank v. Watson*, 56 Okla. 495, 155 Pac. 1152.

So of a provision for a discount of six per cent. if paid at maturity. *Lambert v. Harrison*, — Okla. —, 171 Pac. 45.

² See § 2321.

³ *Loring v. Anderson*, 95 Minn. 101, 103 N. W. 722.

§ 2321. Provision for modification of rate of interest in case of default. Contracts for the payment of money with interest frequently contain provisions to the effect that if the instrument is not paid at maturity it shall bear a higher rate after maturity than before maturity; and they frequently contain provisions to the effect that in case of default a higher rate of interest from date until maturity shall be paid than has been agreed upon in case the instrument is paid at maturity. Whether such provisions affect the negotiability of the instrument is a question upon which there has been a division of authority. On the one hand, such a contract provides a means for determining the amount which is actually due at any one time and such amount can be ascertained with certainty. On the other hand, under such provisions it is not possible to tell, when the contract is made, what amount will be due upon it when action is brought, since it is impossible to tell in advance whether it will be paid at maturity or not. For this reason it has been urged that the amount is not certain and that the contract is therefore not negotiable. The same objection, however, might be urged to any negotiable instrument which is to bear interest after maturity. It is never possible to tell whether a negotiable instrument will be discharged at maturity, and accordingly it is impossible to tell for what amount judgment will ultimately be rendered upon a note which bears interest after maturity.

A provision that the instrument shall bear a higher rate after maturity if it is not paid at maturity, is held in many jurisdictions not to make the contract non-negotiable.¹ A provision for increasing the rate of interest in the event of certain specified defaults is held to be void and hence not to destroy negotiability.²

¹ **United States.** *De Hass v. Dibert*, 70 Fed. 227, 30 L. R. A. 189.

Kansas. *Clark v. Skeen*, 61 Kan. 526, 78 Am. St. Rep. 337, 49 L. R. A. 190, 60 Pac. 327.

Massachusetts. *Towne v. Rice*, 122 Mass. 67.

North Dakota. *Hollinshead v. Stuart*, 8 N. D. 35, 42 L. R. A. 659, 77 N. W. 89.

Oklahoma. *Citizens' Savings Bank v. Landis*, 37 Okla. 530, 132 Pac. 1101 [which was approved in *Charles City Security Trust & Savings Bank v.*

Gleichmann, 50 Okla. 441, L. R. A. 1915F, 1203, 150 Pac. 908, which latter case overruled *Bracken v. Fidelity Trust Co.*, 42 Okla. 118, L. R. A. 1915B, 1216, 141 Pac. 6, and *Randolph v. Hudson*, 12 Okla. 516, 74 Pac. 946]; *Union National Bank v. Mayfield*, — Okla. —, 174 Pac. 1034.

South Dakota. *Merrill v. Hurley*, 6 S. D. 592, 55 Am. St. Rep. 859, 62 N. W. 958.

² *Kendall v. Selby*, 66 Neb. 60, 103 Am. St. Rep. 697, 92 N. W. 178.

In some jurisdictions, a provision that default at maturity should increase the rate from the date of the instrument has been held not to make it non-negotiable.³ A provision for a specified rate of interest and for a reduction in such rate of interest in case the note is paid at maturity,⁴ or, which is in effect the same thing, a provision for a certain rate of interest from date and for a specified rebate in case such instrument is paid at maturity,⁵ or a provision that interest shall run from a certain period after the date of the note if it is paid at maturity, but that it shall run from date if not paid at maturity,⁶ is held in many jurisdictions not to affect the negotiable character of the instrument. In other jurisdictions a provision for a higher rate of interest after maturity has been held to make the instrument non-negotiable on the theory that it is not certain whether such condition ever will be fulfilled.⁷ A provision for a specified rate of interest and for the reduction in such rate of interest in case the note is paid at maturity,⁸

³ *Crump v. Berdan*, 97 Mich. 293, 37 Am. St. Rep. 345, 56 N. W. 559; *Smith v. Crane*, 33 Minn. 144, 53 Am. Rep. 20, 22 N. W. 633; *Hope v. Barker*, 112 Mo. 338, 34 Am. St. Rep. 387, 20 S. W. 567; *Charles City Security Trust & Savings Bank v. Gleichmann*, 50 Okla. 441, L. R. A. 1915F, 1203, 150 Pac. 908 [following, *Citizens' Savings Bank v. Landis*, 37 Okla. 530, 132 Pac. 1101; overruling, *Bracken v. Fidelity Trust Co.*, 42 Okla. 118, L. R. A. 1915B, 1216, 141 Pac. 6, and *Randolph v. Hudson*, 12 Okla. 516, 74 Pac. 946, and assuming that the same principle applies to provisions for increasing rate of interest for the period before maturity in case of ultimate default as to provisions for increasing the rate after maturity]; *Union National Bank v. Mayfield*, — Okla. —, 2 A. L. R. 135, 174 Pac. 1034.

⁴ *Parker v. Plymell*, 23 Kan. 402; *Farmers' Loan & Trust Co. v. Planck*, 98 Neb. 225, L. R. A. 1915E, 564, 152 N. W. 390; *Union National Bank v. Mayfield*, — Okla. —, 174 Pac. 1034; *Barker v. Sartori*, 66 Wash. 260, 119 Pac. 611.

"Clearly these words do not destroy the negotiability of the paper. They do not leave uncertain either the fact,

the time, or the amount of payment. Indeed, up to and including the maturity of the notes, they are entirely without force. They become operative only after the notes are dishonored and have ceased to be negotiable, and then there is no uncertainty in the manner or extent of their operation. They create, as it were, a penalty for non-payment at maturity, and a penalty the amount of which is definite, certain, and fixed." *Parker v. Plymell*, 23 Kan. 402 [quoted in, *Union National Bank v. Mayfield*, — Okla. —, 174 Pac. 1034].

⁵ *Farmers' Loan & Trust Co. v. Planck*, 98 Neb. 225, L. R. A. 1915E, 564, 152 N. W. 390; *Security Trust & Savings Bank v. Gleichmann*, 50 Okla. 441, L. R. A. 1915F, 1203, 150 Pac. 908.

⁶ *Security Trust & Savings Bank v. Gleichmann*, 50 Okla. 441, L. R. A. 1915F, 1203, 150 Pac. 908.

⁷ *Cornish v. Woolverton*, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4.

⁸ *Union National Bank v. Mayfield*, — Okla. —, 169 Pac. 626 [following, *Randolph v. Hudson*, 12 Okla. 516, 74 Pac. 946, and *First National Bank v. Watson* (Okla.), 155 Pac. 1152, and overruling *Security Trust & Savings*

or in case it is paid before maturity,⁹ renders the instrument non-negotiable in some jurisdictions.¹⁰ A provision for interest upon unpaid interest at a higher rate than the interest upon the principal, does not render the instrument non-negotiable.¹¹

§ 2322. Provision for payment of attorney fees and costs of collection. A promise to pay attorney's fees,¹ either a certain per cent. of the amount of the note,² or to pay reasonable attorney's fees,³ does not make the instrument non-negotiable. One reason for this is that such provisions do not operate unless the note is dishonored, when it ceases to be negotiable.⁴ Another reason suggested in other jurisdictions is that such clause is void.⁵

In other jurisdictions a promise to pay attorney's fees destroys negotiability,⁶ since the amount due when action is brought upon

Bank v. Gleichmann, 50 Okla. 441, L. R. A. 1915F, 1203, 150 Pac. 908].

⁹ *Story v. Lamb*, 52 Mich. 525, 18 N. W. 248.

¹⁰ *Hegeler v. Comstock*, 1 S. D. 138, 8 L. R. A. 393, 45 N. W. 331.

¹¹ *Cherry v. Sprague*, 187 Mass. 113, 105 Am. St. Rep. 381, 67 L. R. A. 33, 72 N. E. 456.

¹ *California*. *Glenn v. Rice*, 174 Cal. 269, 162 Pac. 1020.

Iowa. *Lundean v. Hamilton* (Ia.), 159 N. W. 163.

Kentucky. *Gaar v. Banking Co.*, 74 Ky. (11 Bush), 180, 21 Am. Rep. 209.

Massachusetts. *Cherry v. Sprague*, 187 Mass. 113, 105 Am. St. Rep. 381, 67 L. R. A. 33, 72 N. E. 456.

Mississippi. *Clifton v. Bank*, 75 Miss. 929, 23 So. 394.

Montana. *Bank v. Fuqua*, 11 Mont. 285, 28 Am. St. Rep. 461, 14 L. R. A. 588, 28 Pac. 291.

Nebraska. *Stark v. Olsen*, 44 Neb. 646, 63 N. W. 37.

Oklahoma. *Potts v. Crudup*, 48 Okla. 124, L. R. A. 1916B, 672, 150 Pac. 170.

This is true under the Negotiable Instruments Law. *Lundean v. Hamilton* (Ia.), 159 N. W. 163; *Potts v. Crudup*, 48 Okla. 124, L. R. A. 1916B, 672, 150 Pac. 170.

The Negotiable Instruments Law does not make such provisions legal if

the general policy of that jurisdiction renders them illegal. *Raleigh County Bank v. Poteet*, — W. Va. —, L. R. A. 1915B, 928, 82 S. E. 332.

² *Montgomery First National Bank v. Slaughter*, 98 Ala. 602, 39 Am. St. Rep. 88, 14 So. 545; *Dorsey v. Wolff*, 142 Ill. 589, 34 Am. St. Rep. 99, 18 L. R. A. 428, 32 N. E. 495; *Shenandoah National Bank v. Marsh*, 89 Ia. 273, 48 Am. St. Rep. 381, 56 N. W. 458.

³ *Oppenheimer v. Bank*, 97 Tenn. 19, 56 Am. St. Rep. 778, 33 L. R. A. 767, 36 S. W. 705.

⁴ *Farmers' National Bank v. Mfg. Co.*, 52 Fed. 191, 17 L. R. A. 595; *Hunter v. Clarke*, 184 Ill. 158, 75 Am. St. Rep. 160, 56 N. E. 297; *Cherry v. Sprague*, 187 Mass. 113, 105 Am. St. Rep. 381, 67 L. R. A. 33, 72 N. E. 456; *Salisbury v. Stewart*, 15 Utah 308, 62 Am. St. Rep. 934, 49 Pac. 777.

⁵ *Maynard v. Mier*, 85 Ind. 317; *Witherspoon v. Musselman*, 77 Ky. (14 Bush) 214, 29 Am. Rep. 404; *Chandler v. Kennedy*, 8 S. D. 56, 65 N. W. 439. See also, *Raleigh County Bank v. Poteet*, 74 W. Va. 511, L. R. A. 1915B, 928, 82 S. E. 332.

So where by statute such clause is void unless defendant files a plea in action on note. *Jones v. Crawford*, 107 Ga. 318, 45 L. R. A. 105, 33 S. E. 51.

⁶ *Maine*. *Roads v. Webb*, 91 Me. 406, 64 Am. St. Rep. 246, 40 Atl. 128.

the note is rendered uncertain. Statutes providing that a negotiable instrument must not contain any other contract, make such notes non-negotiable,⁷ whether such contract provides for a fixed per cent.,⁸ as an attorney's fee, or merely such sum as the court should hold to be reasonable.⁹

A contract to pay costs of collection does not destroy negotiability, since if it adds any legal liability it is for attorney's fees only.¹⁰

§ 2323. Unconditional payment. In order to be negotiable it is generally said that the instrument must provide only for unconditional payment. If some event which may or may not happen is a condition precedent to the payment, the contract is not negotiable.¹ Thus payment out of a particular fund,² when certain

Michigan. *Altman v. Rittershofer*, 68 Mich. 287, 13 Am. St. Rep. 341, 36 N. W. 74.

Oklahoma. *Clevenger v. Lewis*, 20 Okla. 837, 16 L. R. A. (N.S.) 410, 95 Pac. 230.

South Carolina. *Sylvester Bleckley Co. v. Alewine*, 48 S. Car. 308, 37 L. R. A. 86, 26 S. E. 609.

South Dakota. *Baird v. Vines*, 18 S. D. 52, 99 N. W. 89.

⁷ *Adams v. Seaman*, 82 Cal. 636, 7 L. R. A. 224, 23 Pac. 53; *Findlay v. Pott*, 131 Cal. 385, 63 Pac. 694; *Meyer v. Weber*, 133 Cal. 681, 65 Pac. 1110. (Statute now contains an express provision in favor of attorney fees. Civil Code of Cal. § 3088. See *Glenn v. Rice*, 174 Cal. 269, 162 Pac. 1020.) *Stadler v. Bank*, 22 Mont. 190, 74 Am. St. Rep. 582, 56 Pac. 111. (Contrary rule before statute. *Bank v. Fuqua*, 11 Mont. 285, 28 Am. St. Rep. 461, 11 L. R. A. 588, 28 Pac. 201); *Salisbury v. Stewart*, 15 Utah 308, 62 Am. St. Rep. 934, 49 Pac. 777; *Lippincott v. Rich*, 22 Utah 196, 61 Pac. 526.)

⁸ *First National Bank v. Babcock*, 94 Cal. 96, 28 Am. St. Rep. 94, 28 L. R. A. 94, 29 Pac. 415.

⁹ *Kendall v. Parker*, 103 Cal. 319, 42 Am. St. Rep. 117, 37 Pac. 401.

¹⁰ *Nicely v. Bank*, 15 Ind. App. 563, 57 Am. St. Rep. 245, 44 N. E. 572.

Where held to mean attorney's fees. *Montgomery v. Crossthwait*, 90 Ala. 553, 24 Am. St. Rep. 832, 12 L. R. A. 140, 8 So. 498.

Contra, of a provision for the payment of "other costs" in addition to attorney's fees. *Johnson v. Schar*, 9 S. D. 536, 70 N. W. 838, *Baird v. Vines*, 18 S. D. 52, 99 N. W. 89.

¹ **California.** *Wetzel v. Cale*, 175 Cal. 208, 165 Pac. 692.

Connecticut. *National Savings Bank v. Cable*, 73 Conn. 568, 48 Atl. 428.

Illinois. *White v. Smith*, 77 Ill. 351, 20 Am. Rep. 251.

Louisiana. *Continental Bank & Trust Co. v. Times Publishing Co.*, 142 La. 209, L. R. A. 1918B, 632, 76 So. 612.

Massachusetts. *Jackman v. Bowker*, 61 Mass. (4 Met.) 235.

New Mexico. *Joseph v. Catron*, 13 N. M. 202, 1 L. R. A. (N.S.) 1120, 81 Pac. 439.

New York. *Shaver v. Telegraph Co.*, 57 N. Y. 450.

Pennsylvania. *Iron City National Bank v. McCord*, 139 Pa. St. 52, 23 Am. St. Rep. 166, 11 L. R. A. 559, 21 Atl. 143.

Wisconsin. *Bank v. Kurth*, 167 Wis. 43, 166 N. W. 658.

² **Alabama.** *People's Bank v. Moore*, — Ala. —, 78 So. 789.

work is done;³ if the maker enjoyed the use of certain premises under his lease;⁴ or six months after date, "if elected county commissioner";⁵ or if the payee satisfies a certain mortgage;⁶ or in case a given contract is not performed;⁷ or when Congress shall confirm a certain land grant;⁸ or in case the earnings of the promisor exceed the cost of necessary repairs,⁹ is in each case conditional and the instrument is non-negotiable.

A provision for payment on return of the instrument properly indorsed, requires nothing more than the law imposes and does not destroy negotiability.¹⁰ A memorandum on the face of a check, "to be retained," does not make such check conditional with reference to the drawee; and accordingly such words do not keep it from being negotiable.¹¹ A provision that interest on a debt

Arkansas. Rector v. Strauss, 134 Ark. 347, 203 S. W. 1024.

Connecticut. National Savings Bank v. Cable, 73 Conn. 568, 48 Atl. 428.

Nebraska. Hoagland v. Erck, 11 Neb. 580, 10 N. W. 498.

New Hampshire. Harriman v. Sanborn, 43 N. H. 128.

New York. Munger v. Shannon, 61 N. Y. 251.

Wisconsin. Woodward v. Smith, 104 Wis. 365, 80 N. W. 440; Bank v. Kurth, 167 Wis. 43, 166 N. W. 658.

Wyoming. Thompson v. Mercantile Co., 10 Wyo. 86, 66 Pac. 595.

So of a contract to pay out of the first money received from the sale of certain realty. Rector v. Strauss, 134 Ark. 347, 203 S. W. 1024.

If the instrument imposes a general liability, a direction as to the fund out of which the drawer is to be reimbursed does not destroy negotiability. People's Bank v. Moore, — Ala. —, 78 So. 789.

If an instrument imposes a general liability upon a bank, the fact that it is charged against its savings account does not render the contract non-negotiable. White v. Wadhams, — Mich. —, 170 N. W. 60.

³ Chicago, etc., Bank v. Trust Co., 190 Ill. 404, 83 Am. St. Rep. 138, 60

N. E. 586; Chandler v. Carey, 64 Mich. 237, 8 Am. St. Rep. 814, 31 N. W. 309; Fletcher v. Thompson, 55 N. H. 308; Home Bank v. Drumgoole, 109 N. Y. 63, 15 N. E. 747.

⁴ Jennings v. Bank, 13 Colo. 417, 16 Am. St. Rep. 210, 22 Pac. 777.

⁵ Specht v. Beindorf, 56 Neb. 553, 42 L. R. A. 429, 76 N. W. 1059. (This is also illegal. See § 889.)

⁶ Hayes v. Gwin, 19 Ind. 19.

⁷ Costello v. Crowell, 127 Mass. 293, 34 Am. Rep. 367.

⁸ Joseph v. Catron, 13 N. M. 202, 1 L. R. A. (N.S.) 1120, 81 Pac. 439.

⁹ Bank v. Kurth, 167 Wis. 43, 166 N. W. 658.

¹⁰ United States. Miller v. Austen, 54 U. S. (13 How.) 218, 14 L. ed. 119.

Indiana. Drake v. Markle, 21 Ind. 433, 83 Am. Dec. 358.

Maine. Hatch v. Bank, 94 Me. 348, 80 Am. St. Rep. 401, 47 Atl. 908.

Nebraska. Kirkwood v. Bank, 40 Neb. 484, 42 Am. St. Rep. 683, 24 L. R. A. 444, 58 N. W. 1016.

New York. Frank v. Wessels, 64 N. Y. 155.

Contra, Hubbard v. Mosely, 77 Mass. (11 Gray), 170, 71 Am. Dec. 698.

¹¹ Robert & Co. v. Marsh [1915], 1 K. B. 42.

due on demand shall be paid only if demand is not made within a certain time, does not make the contract non-negotiable.¹²

A provision in an instrument which makes its payment conditional upon the performance of another contract, or subject to the terms of such contract, prevents it from being negotiable.¹³

§ 2324. Statement of consideration or transaction. The recital of a consideration does not operate as notice to the indorsee of failure of consideration, or as notice of other defense which might arise thereon against the payee, and, accordingly, it does not make the payment of such instrument conditional upon performance. Accordingly, such a provision does not destroy negotiability.¹ A provision to the effect that an instrument is "as per contract,"² or "on account of contract,"³ does not render it non-negotiable. The fact that the word "cotton" is printed upon a draft does not amount to such a reference to the plaintiff's bills of lading which are attached to the draft that it makes the draft

¹² *White v. Wadhams*, — Mich. —, 170 N. W. 60. Certificate of deposit. *Hatch v. Bank*, 94 Me. 348, 80 Am. St. Rep. 401, 47 Atl. 908.

As where the deposit was to bear interest if left six months, no interest after six months. *Kirkwood v. Bank*, 40 Neb. 484, 42 Am. St. Rep. 683, 24 L. R. A. 444, 58 N. W. 1016.

So where the certificate of deposit was to bear interest at a certain rate if left six months, and interest was to cease after one year unless renewed. *White v. Wadhams*, — Mich. —, 170 N. W. 60.

¹³ *Klots Throwing Co. v. Manufacturers' Commercial Co.*, 179 Fed. 813, 103 C. C. A. 305, 30 L. R. A. (N.S.) 40.

¹ *Alabama*. *People's Bank v. Moore*, — Ala. —, 78 So. 789.

Illinois. *Siegel v. Bank*, 131 Ill. 569, 19 Am. St. Rep. 51, 7 L. R. A. 537, 23 N. E. 417.

Indiana. *Clanin v. Machine Co.*, 118 Ind. 372, 3 L. R. A. 863, 21 N. E. 35.

Kansas. *First National Bank v. Lightner*, 74 Kan. 736, 8 L. R. A. (N.S.) 231, 88 Pac. 59.

Louisiana. *Continental Bank & Trust Co. v. Times Publishing Co.*, 142 La. 209, L. R. A. 1918B, 632, 76 So. 612 (obiter).

Minnesota. *Snelling State Bank v. Clasen*, 132 Minn. 404, 157 N. W. 643.

New York. *Springs v. Hanover National Bank*, 209 N. Y. 224, 52 L. R. A. (N.S.) 241, 103 N. E. 156.

South Dakota. *Coleman v. Valentin*, 39 S. D. 323, 164 N. W. 67.

Tennessee. *Ferris v. Tavel*, 87 Tenn. 386, 3 L. R. A. 414, 11 S. W. 93.

Washington. *Peninsula National Bank v. Pederson Const. Co.*, 91 Wash. 621, 158 Pac. 246.

West Virginia. *Dollar Savings & Trust Co. v. Crawford*, 69 W. Va. 109, 33 L. R. A. (N.S.) 587, 70 S. E. 1089.

² *Continental Bank & Trust Co. v. Times Pub. Co.*, 142 La. 209, L. R. A. 1918B, 632, 76 So. 612; *Snelling State Bank v. Clasen*, 132 Minn. 404, 157 N. W. 643.

³ *First National Bank v. Lightner*, 74 Kan. 736, 118 Am. St. Rep. 353, 8 L. R. A. (N.S.) 231, 88 Pac. 59.

conditional on the fact that such bills of lading are genuine.⁴ By the terms of the Negotiable Instruments Law, the negotiable character of an instrument is not affected by the fact that it contains a statement of the transaction which gives rise to the instrument on the one hand,⁵ or by the fact that it does not specify the value given or that any value has been given.⁶ A provision which not merely recites the consideration, but makes the payment of the instrument subject to the performance thereof, prevents it from being negotiable, since such payment is thus made conditional.⁷

§ 2325. Provision concerning security, demand, etc. There are a number of provisions which are intended to facilitate the payment and collection of the instrument, such as powers of attorney to confess judgment, provisions for collateral security, and the like; and the question is frequently presented whether the presence of such provisions in a written contract destroys its negotiability.

A provision which is not intended to affect the amount which will eventually be due, but which is intended solely to affect the security for such amount, does not render the instrument non-negotiable.¹

In most jurisdictions an instrument is not rendered non-negotiable by the fact that it is secured by mortgage or other similar security.² In California, however, it has been held that such an instrument is non-negotiable.³ Where an instrument is not rendered non-negotiable by the fact that it is secured collaterally, a reference to collateral security,⁴ such as a mortgage,⁵ does not

⁴ *Springs v. Hanover National Bank*, 209 N. Y. 224, 52 L. R. A. (N.S.) 241, 103 N. E. 156.

⁵ Section 3 of the Negotiable Instruments Law.

See also, *Continental Bank & Trust Co. v. Times Publishing Co.*, 142 Ia. 209, L. R. A. 1918B, 632, 76 So. 612; *Welch v. Owenby*, — Okla. —, 175 Pa. 746; *Coleman v. Valentin*, 39 S. D. 323, 164 N. W. 67.

⁶ Section 6 of the Negotiable Instruments Law.

⁷ *Klets Throwing Co. v. Manufacturers' Commercial Co.*, 179 Fed. 813, 103 C. C. A. 305, 30 L. R. A. (N.S.) 40.

¹ *Lundean v. Hamilton* (Ia.), 159 N. W. 163.

² *Dumas v. People's Bank*, 146 Ala. 226, 40 So. 964; *Cox v. Cayan*, 117 Mich. 599, 72 Am. St. Rep. 585; *Croft v. Buhster*, 9 Wis. 503.

³ *National Hardwood Co. v. Sherwood*, 165 Cal. 1, 130 Pac. 881.

⁴ *Zollman v. Jackson Trust & Savings Bank*, 238 Ill. 290, 32 L. R. A. (N.S.) 858, 87 N. E. 297; *Roblee v. Bank*, 69 Neb. 180, 95 N. W. 61 [citing, *Fleckner v. Bank*, 21 U. S. (8 Wheat.) 338, 5 L. ed. 631; *Knippel v. Chase*, 7 Ia. 145; *Towne v. Rice*, 122 Mass. 67; *Blumenthal v. Jassoy*, 29 Minn. 177, 12 N. W. 517].

⁵ *Zollman v. Jackson Trust & Savings Bank*, 238 Ill. 290, 32 L. R. A. (N.S.) 858, 87 N. E. 297.

destroy negotiability. A provision that the mortgagor is to pay for the cost of furnishing an abstract of title does not render a note which is given for the mortgage debt non-negotiable.⁶ A provision which reserves a lien does not render the instrument non-negotiable.⁷

A provision in a note that title to the property for which it is given shall revert in the vendor if the note is not paid at maturity, destroys its negotiability.⁸ A provision to the effect that the title to the article for which the instrument is given shall not pass until such instrument is paid, is said not to render such instrument non-negotiable.⁹ On the other hand, such a provision has been held to render such contract non-negotiable,¹⁰ unless the effect of the original transaction was to pass title and the effect of such provision reserving title is to reserve it merely for security.¹¹

A power of attorney to confess judgment is held in some jurisdictions to destroy negotiability;¹² in others not to do so.¹³ The negotiability of the instrument has been preserved by holding the power of attorney invalid.¹⁴ The Negotiable Instruments Law provides in express terms that a power of attorney to confess judgment if the note is unpaid at maturity, does not render it non-negotiable.¹⁵ Even under such express statutory provision, however, a power to confess judgment at any time after its date, whether it is due or not, makes the date of its maturity in effect uncertain, and for that reason destroys negotiability.¹⁶

Contra, *Cornish v. Woolverton*, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4.

⁶ *Lundean v. Hamilton* (Ia.), 159 N. W. 163.

⁷ *Dollar Savings & Trust Co. v. Crawford*, 69 W. Va. 109, 33 L. R. A. (N.S.) 587, 70 S. E. 1089.

⁸ *Wright v. Taver*, 73 Mich. 403, 3 L. R. A. 50, 41 N. W. 517.

⁹ *First National Bank v. Alexander*, 161 Ala. 580, 50 So. 45; *Welch v. Owenby*, — Okla. —, 175 Pac. 746.

¹⁰ *Worden Grocery Co. v. Blanding*, 161 Mich. 254, 20 Am. & Eng. Ann. Cas. 1332, 126 N. W. 212; *Fleming v. Sherwood*, 24 N. D. 144, 43 L. R. A. (N.S.) 945, 139 N. W. 101.

¹¹ *Choate v. Stevens*, 116 Mich. 28, 43 L. R. A. 277, 74 N. W. 289.

¹² *Richards v. Barlow*, 140 Mass. 218, 6 N. E. 68; *Conrad Seipp Brewing Co. v. McKittrick*, 86 Mich. 191, 48 N. W. 1086; *Sweeney v. Thickstun*, 77 Pa. St. 131.

¹³ *Tolman v. Janson*, 106 Ia. 455, 76 N. W. 732; *Gilmore v. First*, 56 Kan. 626, 44 Pac. 603; *Osborn v. Hawley*, 19 Ohio 130.

¹⁴ *Tolman v. Janson*, 106 Ia. 455, 76 N. W. 732.

¹⁵ Section 5 of the Negotiable Instruments Law.

¹⁶ *First National Bank v. Russell*, 124 Tenn. 618, Ann. Cas. 1913A, 203, 139 S. W. 734; *Wisconsin Yearly Meeting, etc., v. Babler*, 115 Wis. 289, 91 N. W. 678.

A provision in an instrument by which parties who are entitled to demand, notice, and the like, waive such demand and notice, does not render such instrument non-negotiable.¹⁷

§ 2326. Time of payment—Event bound to happen. Closely connected with the rule that payment must be unconditional, is the rule that a certain time of payment must be fixed. This does not mean that the exact date of payment is ascertainable from the contract itself. An instrument payable on some event which is bound to come to pass is negotiable, even if the exact date can not be determined in advance.¹ If property has been conveyed to A, reserving a life estate to B, A's promise to pay a specified sum of money a certain time after he acquires possession of such property is negotiable.² A post-dated check which is payable at its date is negotiable.³ An instrument which is due in a reasonable time is negotiable.⁴ A promise to pay "as soon as I can," is payable within a reasonable time and is negotiable.⁵ An instrument payable on demand,⁶ or a certain time after demand,⁷ or at the death of a given person,⁸ is negotiable. If no time of payment is given in the note, it is in legal effect payable on demand and is negotiable.⁹

¹⁷ First National Bank v. Baldwin, 100 Neb. 25, 158 N. W. 371; First National Bank v. Buttery, 17 N. D. 326, 16 L. R. A. (N.S.) 878, 116 N. W. 341; Iowa State Savings Bank v. Wignall, 53 Okla. 641, 157 Pac. 725.

¹ Illinois. McClenathan v. Davia, 243 Ill. 87, 27 L. R. A. (N.S.) 1017, 90 N. E. 265.

Iowa. Cedar Rapids National Bank v. Weber, 180 Ia. 966, L. R. A. 1918A, 432, 164 N. W. 233.

Michigan. White v. Wadhams, — Mich. —, 170 N. W. 60.

New Mexico. Joseph v. Catron, 13 N. M. 202, 1 L. R. A. (N.S.) 1120, 81 Pac. 439; First National Bank v. Stover, 21 N. M. 453, L. R. A. 1916D, 1280, 155 Pac. 905.

Washington. Puget Sound State Bank v. Washington Paving Co., 94 Wash. 504, 162 Pac. 870.

² McClenathan v. Davis, 243 Ill. 87, 27 L. R. A. (N.S.) 1017, 90 N. E. 265.

³ American Agricultural Chemical Co. v. Scrimger, 130 Md. 389, 100 Atl. 774.

⁴ Benton v. Benton, 78 Kan. 366, 27 L. R. A. (N.S.) 300, 97 Pac. 378.

⁵ Benton v. Benton, 78 Kan. 366, 27 L. R. A. (N.S.) 300, 97 Pac. 378.

⁶ White v. Smith, 77 Ill. 351, 20 Am. Rep. 251.

⁷ White v. Wadhams, — Mich. —, 170 N. W. 60.

⁸ United States. Crider v. Shelby, 95 Fed. 212.

Connecticut. Bristol v. Warner, 19 Conn. 7.

Illinois. Beatty v. College, 177 Ill. 280, 69 Am. St. Rep. 242, 42 L. R. A. 797, 52 N. E. 432.

Indiana. Price v. Jones, 105 Ind. 543, 55 Am. Rep. 230, 5 N. E. 683.

New York. Carnwright v. Gray, 127 N. Y. 92, 24 Am. St. Rep. 424, 12 L. R. A. 845, 27 N. E. 835.

⁹ Swatts v. Bowen, 141 Ind. 322, 40 N. E. 1057; Palmer v. Palmer, 36 Mich. 487, 24 Am. Rep. 605; Jones v. Brown, 11 O. S. 601.

§ 2327. Event not bound to happen. An instrument which is payable at the happening of an event which is not morally bound to occur, is not negotiable.¹ The provision for payment in such a case is really conditioned upon the happening of such event.² A note payable when a certain suit is settled,³ or an estate is settled,⁴ or when a canal is completed,⁵ is non-negotiable.

If the note is payable, at the option of the holder, on demand, or on the happening of other events which may not happen,⁶ such as the settlement of an estate,⁷ it is said to be non-negotiable.

§ 2328. Acceleration of maturity at option of holder. An instrument may, by its terms, be payable at a fixed time, but a provision may be made for accelerating the payment of such instrument either at the option of the holder, or at the option of the maker, or in case of default in paying an installment of the principal or interest. Whether such provisions for acceleration for the time of payment prevent such a contract from being negotiable is a question upon which there has been a conflict of authority. A provision to the effect that the holder of an instrument may accelerate its maturity at his option, has been held to render such instrument non-negotiable.¹ A provision to the effect that the holder may accelerate the maturity of an instrument if he deems himself insecure,² or in case the maker refuses to furnish additional security on demand,³ has been held to render the instrument non-negotiable. Such an instrument can not be upheld as a demand note.⁴ Under the Negotiable Instruments Law, a provision to the

¹ Joseph v. Catron, 13 N. M. 202, 1 L. R. A. (N.S.) 1120, 81 Pac. 439.

² Joseph v. Catron, 13 N. M. 202, 1 L. R. A. (N.S.) 1120, 81 Pac. 439.

³ Burgess v. Fairbanks, 83 Cal. 215, 17 Am. St. Rep. 230, 23 Pac. 292; Shelton v. Bruce, 15 Tenn. (9 Yerg.) 24.

⁴ Husband v. Epling, 81 Ill. 172, 25 Am. Rep. 273; McQuesten v. Spalding, 231 Mass. 301, 120 N. E. 850.

⁵ Weidler v. Kauffman, 14 Ohio 455.

⁶ McQuesten v. Spalding, 231 Mass. 301, 120 N. E. 850.

⁷ McQuesten v. Spalding, 231 Mass. 301, 120 N. E. 850.

¹ California. Wetzel v. Cale, 175 Cal. 208, 165 Pac. 692.

Kansas. Holliday State Bank v. Hoffman, 85 Kan. 71, 35 L. R. A. (N.S.) 390, Ann. Cas. 1912D, 1, 116 Pac. 239.

Oregon. Reynolds v. Vint, 73 Or. 528, 144 Pac. 526.

Washington. Puget Sound State Bank v. Washington Paving Co., 94 Wash. 504, 162 Pac. 870.

Wisconsin. Continental National Bank v. McGeoch, 73 Wis. 332, 41 N. W. 409.

See, Acceleration Provisions in Time Paper, by Zechariah Chafee, Jr., 32 Harvard Law Review, 747.

² Kimpton v. Studebaker Bros. Co., 14 Ida. 552, 125 Am. St. Rep. 185, 14 Am. & Eng. Ann. Cas. 1126, 94 Pac. 1039; Puget Sound State Bank v. Washington Paving Co., 94 Wash. 504, 162 Pac. 870.

³ Holliday State Bank v. Hoffman, 85 Kan. 71, 35 L. R. A. (N.S.) 390, Ann. Cas. 1912D, 1, 116 Pac. 239 (attempting to apply Missouri law).

⁴ Puget Sound State Bank v. Washington Paving Co., 94 Wash. 504, 162 Pac. 870.

effect that the holder may accelerate maturity in case he deems himself insecure, does not render the contract non-negotiable.⁶ Under this statute, a provision to the effect that maturity may be accelerated if the collateral depreciates in value and additional collateral is not furnished, does not render the instrument non-negotiable;⁶ nor does a provision giving to the holder the right to call for additional security and making the instrument payable at once on failure to furnish such security.⁷ Even under the Negotiable Instruments Law, a provision for declaring a debt mature when the holder deems himself insecure, has been held to render the contract non-negotiable, on the theory that since the contract was non-negotiable the Negotiable Instruments Law did not apply thereto.⁸

§ 2329. Acceleration of maturity at option of debtor. A provision which authorizes the maker of the instrument to declare it to be due and payable within a certain specified time, does not make such instrument non-negotiable.¹ A note due on or before a certain date,² or within a certain period,³ or in a certain time, the

⁶ *Empire National Bank v. High Grade Oil Refining Co.*, 260 Pa. St. 255, 103 Atl. 602.

⁶ *Kobey v. Hoffman*, 229 Fed. 486, 143 C. C. A. 554. [Decided under Missouri law, and refusing to follow *Holiday State Bank v. Hoffman*, 85 Kan. 71, 35 L. R. A. (N.S.) 390, Ann. Cas. 1912D 1, 116 Pac. 239, which had held these same notes to be non-negotiable; the Federal court refusing to follow a Kansas decision as to the law of Missouri].

See also, *Kennedy v. Broderick*, 216 Fed. 137, L. R. A. 1915B, 472.

⁷ *Empire National Bank v. High Grade Oil Refining Co.*, 260 Pa. St. 255, 103 Atl. 602.

A provision to the effect that if the collateral security depreciates in value the maker will deliver additional security or the note shall mature at once, does not render the note non-negotiable, at least if it is written beside the maker's signature thereto and is not found in the body of the note. *Kennedy v. Broderick*, 216 Fed. 137, L. R. A. 1915B, 472.

⁸ *Western Farquhar Machinery Co. v. Burnett*, 82 Or. 174, 161 Pac. 384.

¹ *Fisher v. O'Hanlon*, 93 Neb. 529, L. R. A. 1918C, 727, 141 N. W. 157.

² *Illinois. Hunter v. Clarke*, 184 Ill. 158, 75 Am. St. Rep. 160, 56 N. E. 297.

Missouri. First National Bank v. Skeen, 101 Mo. 683, 11 L. R. A. 748, 14 S. W. 732.

Nebraska. Fisher v. O'Hanlon, 93 Neb. 529, L. R. A. 1918C, 727, 141 N. W. 157.

Ohio. Jordan v. Tate, 19 O. S. 536.

Pennsylvania. Albertson v. Laughlin, 173 Pa. St. 525, 51 Am. St. Rep. 777, 34 Atl. 216.

So a clause making a note due in four years payable on sale or removal of timber on the land for which such note was given, before the end of such time does not destroy negotiability. *Joergenson v. Joergenson*, 28 Wash. 477, 92 Am. St. Rep. 888, 68 Pac. 913.

See to the same effect, *Charlton v. Reed*, 61 Ia. 166, 47 Am. Rep. 808, 16 N. W. 64; *Walker v. Woolen*, 54 Ind. 164, 23 Am. Rep. 639.

Contra, *First National Bank of Port Huron v. Carson*, 60 Mich. 432, 27 N. W. 589.

³ *Leader v. Plante*, 95 Me. 339, 85 Am. St. Rep. 415, 50 Atl. 54.

maker to have the option of paying in a shorter period,⁴ or to have the option of paying any part of the debt that he might wish, at any time before maturity,⁵ is negotiable. In all these cases the time of payment, though not ascertainable when the instrument is given, is bound to arrive eventually.

Some authorities, however, treat contracts for the payment of money on or before a certain date as non-negotiable.⁶ A provision for permitting partial payments up to a certain amount and for rebating interest from the date of such payment, seems to be regarded as making the instrument non-negotiable.⁷

§ 2330. Acceleration in case of default. A provision to the effect that payment should be accelerated on default either in payment of interest, or in payment of an installment of the principal, has been held in many jurisdictions not to render the contract non-negotiable.¹ A note was held not to be rendered non-negotiable by the fact that the mortgage contained a clause under which the note might become payable within sixty days after the mortgagor permitted the taxes to become delinquent or permitted the property to be sold for taxes or failed to pay interest.²

In other jurisdictions it has been held, before the enactment of the Negotiable Instruments Law, that such provision rendered the

⁴ *American National Bank v. Paper Co.*, 19 R. I. 149, 61 Am. St. Rep. 746, 29 L. R. A. 103, 32 Atl. 305.

⁵ *Fisher v. O'Hanlon*, 93 Neb. 529, L. R. A. 1918C, 727, 141 N. W. 157.

⁶ *Mahoney v. Fitzpatrick*, 133 Mass. 151, 43 Am. Rep. 502.

⁷ *Bell v. Riggs*, 34 Okla. 834, 41 L. R. A. (N.S.) 1111, 127 Pac. 427; *Lambert v. Harrison*, — Okla. —, 171 Pac. 45.

¹ *United States. Chicago R. Equipment Co. v. Merchants' Bank*, 136 U. S. 268, 34 L. ed. 349; *De Hass v. Dibert*, 70 Fed. 227, 30 L. R. A. 189.

Illinois. Hunter v. Clarke, 184 Ill. 158, 75 Am. St. Rep. 160, 56 N. E. 297.

Kansas. Clark v. Skeen, 61 Kan. 526, 78 Am. St. Rep. 337, 49 L. R. A. 190, 60 Pac. 327.

Michigan. Markey v. Corey, 108 Mich. 184, 62 Am. St. Rep. 698, 36 L. R. A. 117, 66 N. W. 493.

New Jersey. Mackintosh v. Gibbs, 81 N. J. L. 577, Ann. Cas. 1912D, 163, 80 Atl. 554.

North Dakota. Hollinshead v. Stuart, 8 N. D. 35, 42 L. R. A. 659, 77 N. W. 89.

Oregon. United States National Bank v. Floss, 38 Or. 68, 84 Am. St. Rep. 752, 62 Pac. 751.

South Dakota. Merrill v. Hurley, 6 S. D. 592, 55 Am. St. Rep. 859, 62 N. W. 958.

Wisconsin. Thorp v. Mindeman, 123 Wis. 149, 107 Am. St. Rep. 1003, 68 L. R. A. 146, 101 N. W. 417.

So with a contract that if the mortgagor does not pay insurance premiums, the mortgagee may declare the debt due. *Consterdine v. Moore*, 65 Neb. 291, 91 N. W. 399.

² *Lundean v. Hamilton (Ia.)*, 159 N. W. 163.

instrument non-negotiable.³ Where the Negotiable Instruments Law is not in effect, such a provision has been held to render the instrument non-negotiable.⁴ This rule, however, does not apply to an instrument by the terms of which the principal is due before the first installment of interest is due.⁵ A clause in a mortgage, referred to in a note, making the note due on failure to pay taxes and assessments for thirty days after they were due, was held to make the note non-negotiable.⁶ A similar clause giving the holder of the note the option of declaring it due on default in paying taxes and assessments, does not destroy negotiability.⁷ A clause in a mortgage, not referred to in the note, giving the mortgagee the option of declaring the whole debt due on any default, was held not to affect the note, and hence to leave it negotiable.⁸ A provision making a note due at once on default in interest can not affect negotiability if, by the terms of the instrument, the principal is due before such interest period.⁹

Under the Negotiable Instruments Law, a provision for accelerating the maturity of a series of notes in case of the default in payment of any one of such series, or in case of default in interest, does not render the instrument non-negotiable.¹⁰ Under the Negotiable Instruments Law, however, a provision to the effect that the payee may accelerate maturity of the entire indebtedness for default in the payment of any installment thereof, has been held to render the contract non-negotiable, and the Negotiable Instruments Law has been held not to apply, on the theory that it applies only to negotiable instruments.¹¹

³ Bell v. Riggs, 34 Okla. 834, 41 L. R. A. (N.S.) 1111, 127 Pac. 427.

⁴ Meyer v. Weber, 133 Cal. 681, 65 Pac. 1110; Wetzel v. Cale, 175 Cal. 208, 165 Pac. 692.

⁵ Glenn v. Rice, 174 Cal. 269, 162 Pac. 1020.

⁶ Brooke v. Struthers, 110 Mich. 562, 35 L. R. A. 536, 68 N. W. 272.

⁷ Lundean v. Hamilton (Ia.), 159 N. W. 163; Wilson v. Campbell, 110 Mich. 580, 35 L. R. A. 544, 68 N. W. 278.

⁸ White v. Miller, 52 Minn. 367, 19 L. R. A. 673, 54 N. W. 736; Westlake v. Cooper, — Okla. —, L. R. A. 1918D, 522, 171 Pac. 859.

⁹ Glenn v. Rice, 174 Cal. 269, 162 Pac. 1020.

¹⁰ Taylor v. American National Bank, 63 Fla. 631, Ann. Cas. 1914A, 309, 57 So. 678; Lundean v. Hamilton, (Ia.), 159 N. W. 163; White v. Hatcher, 135 Tenn. 609, 188 S. W. 61; Thorp v. Mindeman, 123 Wis. 149, 107 Am. St. Rep. 1003, 68 L. R. A. 146, 101 N. W. 417.

¹¹ Western Farquhar Machinery Co. v. Burnett, 82 Or. 174, 161 Pac. 384 [following, Reynolds v. Vint, 73 Or. 528, 144 Pac. 526].

§ 2331. Provision for extension of time. A clause providing for an extension of time for a definite period at the option of the maker does not make the contract non-negotiable.¹ A provision in a note, by which the sureties agree to be bound in case the principal and the holder agree upon an extension of time, does not render such note non-negotiable.² A provision to the effect that the sureties, indorsers and guarantors waive presentment for payment and consent to extensions of time, was held to render the instrument non-negotiable under the Negotiable Instruments Law.³ A provision to the effect that the holder may extend payment if he deems proper, if the note is not paid at maturity,⁴ or that the makers or either of them may extend the note from time to time, and that on such extension the liability of all parties shall be the same as if no extension had been made,⁵ does not render the instrument non-negotiable. A provision to the effect that the maker and indorser each makes the other his agent, for the purpose of extending the time of payment, makes the instrument non-negotiable.⁶ A provision to the effect that in case the crop on a certain piece of land shall be worth less than a certain amount, the instrument shall be extended for two years,⁷ or that payment shall be extended

¹ *Anniston Loan and Trust Co. v. Stickney*, 108 Ala. 146, 31 L. R. A. 234, 19 So. 63; *National Bank v. Dickinson*, 102 Kan. 564, 171 Pac. 636; *First National Bank v. Baldwin*, 100 Neb. 25, 158 N. W. 371.

See also under the Negotiable Instrument Law, *First National Bank v. Stover*, 21 N. M. 453, L. R. A. 1916D, 1280, 155 Pac. 905.

² *California*. *Navajo County Bank v. Dolson*, 163 Cal. 485, 41 L. R. A. (N.S.) 787, 126 Pac. 153.

Illinois. *Stitzel v. Miller*, 250 Ill. 72, Ann. Cas. 1912B, 412, 34 L. R. A. (N.S.) 1004, 95 N. E. 53.

Kansas. *National Bank v. Dickinson*, 102 Kan. 564, 171 Pac. 636 (decided under the Negotiable Instruments Law, on the theory that there was nothing in the note to indicate that any one was a surety, and that the clause by which the sureties consented to an extension of time was, therefore, meaningless and inoperative to make the contract non-negotiable).

New Mexico. *First National Bank of Stover*, 21 N. M. 453, L. R. A. 1916D, 1280, 155 Pac. 905.

North Dakota. *First National Bank v. Buttery*, 17 N. D. 326, 16 L. R. A. (N.S.) 878, 17 Am. & Eng. Ann. Cas. 52, 116 N. W. 341.

Tennessee. *Bank v. White*, 136 Tenn. 634, 191 S. W. 332.

³ *Cedar Rapids National Bank v. Weber*, 180 Ia. 966, L. R. A. 1918A, 432, 164 N. W. 233 [refusing to follow, *First National Bank v. Stover*, 21 N. M. 453, L. R. A. 1916D, 1280, 155 Pac. 905].

⁴ *Stitzel v. Miller*, 250 Ill. 72, 34 L. R. A. (N.S.) 1004, 95 N. E. 53.

⁵ *Navajo County Bank v. Dolson*, 163 Cal. 485, 41 L. R. A. (N.S.) 787, 126 Pac. 153.

⁶ *Rossville State Bank v. Heslet*, 84 Kan. 315, 33 L. R. A. (N.S.) 738, 113 Pac. 1052.

⁷ *State Bank v. Bilstad (Ia.)*, 49 L. R. A. (N.S.) 132, 136 N. W. 204.

for one year if the crop from a certain piece of land is less than a certain amount,⁵ does not render such contract non-negotiable, since such time of payment is bound to arrive.

A provision making the right to renewal contingent on some specific event has been held to make the contract non-negotiable.⁹

A general provision for renewal, not for a specific time,¹⁰ such as a provision for an extension of time "from time to time,"¹¹ or a clause giving a majority of bondholders the right to waive default in payment,¹² makes the time of payment uncertain and destroys negotiability.

§ 2332. Place of payment. In the absence of specific statutory provisions, an instrument otherwise negotiable was not rendered non-negotiable by the fact that it did not fix the place at which it was payable.¹ In some states, by special statutory provision, it was necessary that an instrument, to be negotiable, should show on its face the place at which it was payable;² and under some statutes, in order to be negotiable, it must be payable at a bank.³

⁵ *State Bank v. Bilstad* (Ia.), 136 N. W. 204 [overruling on this point, *State National Bank v. Carter*, 144 Ia. 715, 123 N. W. 237].

⁹ *Miller v. Poage*, 56 Ia. 96, 41 Am. Rep. 82, 8 N. W. 799.

Contra, *Capron v. Capron*, 44 Vt. 410.

¹⁰ *Indiana*. *Oyler v. McMurray*, 7 Ind. App. 645, 34 N. E. 1004; *Merchants', etc., Bank v. Frazee*, 9 Ind. App. 161, 53 Am. St. Rep. 341, 36 N. E. 378; *Rosenthal v. Rambo*, 28 Ind. App. 265, 62 N. E. 637; *Matchett v. Machine Works*, 29 Ind. App. 207, 94 Am. St. Rep. 272, 64 N. E. 229; *Glidden v. Henry*, 104 Ind. 278, 54 Am. Rep. 316, 1 N. E. 369.

Iowa. *Woodbury v. Roberts*, 59 Ia. 348, 44 Am. Rep. 685, 13 N. W. 312; *Cedar Rapids National Bank v. Weber*, 180 Ia. 966, L. R. A. 1918A, 432, 164 N. W. 233; *Quinn v. Bane*, 182 Ia. 843, 164 N. W. 788; *Manhard v. First National Bank*, — Ia. —, 165 N. W. 185.

Kansas. *Rossville State Bank v. Heslet*, 84 Kan. 315, 33 L. R. A. (N.S.) 738, 113 Pac. 1052.

Michigan. *Second National Bank v. Wheeler*, 75 Mich. 546, 42 N. W. 963.

Pennsylvania. *Citizens' National Bank v. Piolet*, 126 Pa. St. 194, 12 Am. St. Rep. 860, 4 L. R. A. 190, 17 Atl. 603.

Contra, *Witty v. Ins. Co.*, 123 Ind. 411, 18 Am. St. Rep. 327, 8 L. R. A. 365, 24 N. E. 141.

¹¹ *Quinn v. Bane*, 182 Ia. 843, 164 N. W. 788; *Manhard v. First National Bank*, — Ia. —, 165 N. W. 185.

¹² *McClelland v. R. R.*, 110 N. Y. 469, 6 Am. St. Rep. 397, 1 L. R. A. 299, 18 N. E. 237.

¹ *Kendall v. Galvin*, 15 Me. 131, 32 Am. Dec. 141; *Woodworth v. Bank of America*, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239.

² *Oates v. First National Bank*, 100 U. S. 239, 25 L. ed. 580 (decided under Alabama statute); *Holloway v. Darden*, 168 Ala. 256, 53 S. W. 187.

³ *Ray v. Baker*, 165 Ind. 74, 74 N. E. 619; *Millikan v. Security Trust Co.* — Ind. —, 118 N. E. 568; *Louisville Banking Co. v. Buchanan*, 107 Ky. 125, 52 S. W. 967; *Corbin v. Planters'*

Where the Negotiable Instruments Law is in force, the provisions of such statutes which define the elements of a negotiable instrument, are intended to be exclusive in their operation and to produce uniformity; and accordingly they repeal local statutes which required as an additional element of negotiability that such instrument should be made payable at a bank.⁴ The Negotiable Instruments Law further provides specifically that the negotiable character of an instrument is not affected by the fact that it does not specify the place where it is payable.⁵

A provision by which a definite place of payment is fixed,⁶ as at a certain bank,⁷ does not render the instrument non-negotiable.

§ 2333. Words of negotiability. A negotiable contract must contain words of negotiability.¹ The customary words of negotiability are "or order," or "or bearer,"² but other words, such

National Bank, 87 Va. 661, 24 Am. St. Rep. 673, 13 S. E. 98.

See also, *Morehead v. Parkersburg National Bank*, 5 W. Va. 74, 13 Am. Rep. 636.

The term "bank" includes a trust company. *Millikan v. Security Trust Co.*, — Ind. —, 118 N. E. 568. A provision that the note is payable "at" a trust company without using the phrase "in the office of" such trust company does not prevent it from being negotiable. *Millikan v. Security Trust Co.* — Ind. —, 118 N. E. 568.

⁴ *Williams v. Paintsville National Bank*, 143 Ky. 781, 137 S. W. 535; *Gahren v. Parkersburg National Bank*, 157 Ky. 266, 162 S. W. 1135.

⁵ Section 6 of the Negotiable Instruments Law.

⁶ *Peninsula National Bank v. Pederson Const. Co.*, 91 Wash. 621, 158 Pac. 246.

⁷ *Stadler v. First National Bank*, 22 Mont. 190, 74 Am. St. Rep. 582, 56 Pac. 111; *Peninsula National Bank v. Pederson Const. Co.*, 91 Wash. 621, 158 Pac. 246.

¹ *Kentucky. Wettlaufer v. Baxter*, 137 Ky. 362, 26 L. R. A. (N.S.) 804, 125 S. W. 741.

Mississippi. Sivley v. Williamson, 112 Miss. 276, 72 So. 1008.

Nebraska. First National Bank v. Greenlee, 102 Neb. 180, L. R. A. 1918D, 224, 166 N. W. 559.

North Carolina. Newland v. Moore, 173 N. Car. 728, 92 S. E. 367.

North Dakota. Aamoth v. Hunter, 33 N. D. 582, 157 N. W. 299.

Tennessee. Dobbins v. Carroll, 137 Tenn. 133, 192 S. W. 166; *Weems v. Nebblett*, 139 Tenn. 655, 202 S. W. 930. The Negotiable Instruments Act requires words of negotiability. *Wettlaufer v. Baxter*, 137 Ky. 362, 26 L. R. A. (N.S.) 804, 125 S. W. 741; *Dobbins v. Carroll*, 137 Tenn. 133, 192 S. W. 166.

² *Georgia. Chandler v. Smith*, 147 Ga. 637, 95 S. E. 223.

Kentucky. Wettlaufer v. Baxter, 137 Ky. 362, 26 L. R. A. (N.S.) 804, 125 S. W. 741.

Mississippi. Sivley v. Williamson, 112 Miss. 276, 72 So. 1008.

North Carolina. Newland v. Moore, 173 N. Car. 728, 92 S. E. 367.

North Dakota. Aamoth v. Hunter, 33 N. D. 582, 157 N. W. 299.

as "or assigns,"³ which show a similar intent, have been held to be sufficient. A phrase to the effect that a given deposit is "payable to the order of himself," referring to the depositor, does not render the contract non-negotiable.⁴

In the absence of statute, a provision to the effect that the instrument is not transferable, prevents it from being negotiable.⁵ A phrase, "payable to the order of A only," renders the instrument non-negotiable, since the word "only," being in writing, prevailed over the printed words, "the order of."⁶ A phrase, "pay to the bearer, A," renders the contract non-negotiable.⁷

§ 2334. Recital of consideration unnecessary. It is customary for a negotiable instrument containing a recital of a consideration, as by the use of the words, "for value received." This, however, is not essential.¹ Thus a check is negotiable without the words, "value received," though by statute such words are necessary in a note.² So a recital of any valuable consideration is sufficient.³ If a check is given for a debt which is barred by the Statute of Limitations, it need not recite the consideration.⁴

§ 2335. Examples of negotiable instruments—Money. Money possesses the quality of negotiability to the highest degree.¹ Even if money is stolen it can not be recovered from one who has taken

³ *Murphy v. Improvement Co.*, 97 Fed. 723.

⁴ *Chandler v. Smith*, 147 Ga. 637, 95 S. E. 223.

⁵ *Pond Creek Coal Co. v. Riley Lester & Bros.*, 171 Ky. 811, 188 S. W. 907.

⁶ *First National Bank v. Greenlee*, 102 Neb. 180, L. R. A. 1918D, 224, 166 N. W. 559.

⁷ *Warren v. Scott*, 32 Ia. 22.

¹ *Connecticut. Bristol v. Warner*, 19 Conn. 7.

Illinois. Archer v. Claffin, 31 Ill. 306

Massachusetts. Dean v. Carruth, 108 Mass. 242.

Montana. Clarke v. Marlow, 20 Mont. 249, 50 Pac. 713

South Carolina. Hubbell v. Fogartie, 3 Rich. L. (S. Car.) 413, 45 Am. Dec. 775.

² *Famous Shoe Co. v. Crosswhite*, 124 Mo. 34, 46 Am. St. Rep. 424, 26 L. R. A. 568, 27 S. W. 397.

³ *Garrigus v. Missionary Society*, 3 Ind. App. 91, 50 Am. St. Rep. 262, 28 N. E. 1009 (a note "to advance the cause of missions and to induce others to contribute").

⁴ *Baxter v. Brandenburg*, 137 Minn. 259, 163 N. W. 516.

¹ *England. Miller v. Race*, 1 Burr. 452.

Arkansas. Oklahoma State Bank v. Bank, 120 Ark. 369, 179 S. W. 509.

Iowa. Smith v. Crawford County State Bank, 99 Ia. 282, 61 N. W. 378, 68 N. W. 690.

Kansas. Kimmel v. Bean, 68 Kan. 598, 104 Am. St. Rep. 415, 64 L. R. A. 785, 75 Pac. 1118; *Benjamin v. Welda State Bank*, 98 Kan. 361, L. R. A. 1917A, 704, 158 Pac. 65.

it for value in good faith,² even if it is taken in payment of a pre-existing debt.³ While it is sometimes said that this is because it is impracticable to distinguish one piece of money from another, it was seen long ago that this was not the true reason, but that this result was reached from the fact that money was eminently negotiable.⁴ In like manner, money which is improperly converted and

Louisiana. *First National Bank v. Gilbert*, 123 La. 845, 25 L. R. A. (N.S.) 631, 49 So. 593.

New York. *Stephens v. Board of Education*, 79 N. Y. 183, 35 Am. Rep. 511. "The rule has been settled, by a long line of cases, that money obtained by fraud or felony cannot be followed by the true owner into the hands of one who has received it bona fide and for a valuable consideration in due course of business. * * * It is said that the case is to be governed by the doctrine, established in this state, that an antecedent debt is not such a consideration as will cut off the equities of third parties in respect of negotiable securities obtained by fraud. But no case has been referred to where this doctrine has been applied to money received in good faith in payment of a debt. It is absolutely necessary for practical business transactions that the payee of money in due course of business shall not be put upon inquiry at his peril as to the title of the payor. Money has no earmark. The purchaser of a chattel or a chose in action may, by inquiry, in most cases, ascertain the right of the person from whom he takes the title. But it is generally impracticable to trace the source from which the possessor of money has derived it. It would introduce great confusion into commercial dealings if the creditor who receives money in payment of a debt is subject to the risk of accounting therefor to a third person who may be able to show that the debtor obtained it from him by felony or fraud. The law wisely, from considerations of public policy and con-

venience, and to give security and certainty to business transactions, adjudges that the possession of money vests the title in the holder as to third persons dealing with him and receiving it in due course of business, and in good faith, upon a valid consideration. If the consideration is good as between the parties, it is good as to all the world." *Stephens v. Board of Education*, 79 N. Y. 183, 35 Am. Rep. 511 [quoted in *Kimmel v. Bean*, 68 Kan. 598, 104 Am. St. Rep. 415, 64 L. R. A. 785, 75 Pac. 1118, and also in *Benjamin v. Welda State Bank*, 98 Kan. 361, L. R. A. 1917A, 704, 158 Pac. 65].

²**England.** *Miller v. Race*, 1 Burr, 452.

Arkansas. *Oklahoma State Bank v. Bank*, 120 Ark. 369, 179 S. W. 509.

Kansas. *Kimmel v. Bean*, 68 Kan. 598, 104 Am. St. Rep. 415, 64 L. R. A. 785, 75 Pac. 1118; *Benjamin v. Welda State Bank*, 98 Kan. 361, L. R. A. 1917A, 704, 158 Pac. 65.

Louisiana. *First National Bank v. Gilbert*, 123 La. 845, 25 L. R. A. (N.S.) 631, 49 So. 593.

New York. *Stephens v. Board of Education*, 79 N. Y. 183, 35 Am. Rep. 511.

³**Benjamin v. Welda State Bank**, 98 Kan. 361, L. R. A. 1917A, 704, 158 Pac. 65.

⁴"'Tis a pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench and mistake their meaning. It has been quaintly said 'that the reason why money cannot be followed is because it has no earmark,'

is paid in satisfaction of a prior debt to one who takes without notice, is not impressed with a trust.⁵

§ 2336. Bills and notes. Bills of exchange have always been held to be negotiable;¹ and cashiers' checks, being a form of bill, are also negotiable.²

Whether promissory notes were negotiable at common law is a difficult question. The English merchants undoubtedly treated them as negotiable, but Lord Holt held that they were not, and denounced the theory that they were negotiable as due to the "obstinacy and opinionativeness of merchants who were endeavoring to set the law of Lombard Street above the law of Westminster Hall."³ Parliament settled the question by statute⁴ in favor of their negotiability. Was this statute declaratory or remedial? We have authorities either way, some holding that Lord Holt was wrong, that promissory notes were negotiable at common law and that the Statute of Anne was declaratory,⁵ while others agree with Lord Holt.⁶ The question is of practical importance in jurisdictions in the United States, in which the Statute of Anne is not in force and no similar statute has been adopted. Between statutes and judicial decisions it is now thoroughly settled in the United States

but this is not true. The true reason is, upon account of the currency of it, it cannot be recovered after it has passed in currency. So in case of money stolen, the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and bona fide consideration; but before money has passed in currency, an action may be brought for the money itself." *Miller v. Race*, 1 Burr. 452.

⁵ *Smith v. Crawford County State Bank*, 99 Ia. 282, 61 N. W. 378, 68 N. W. 690.

¹ *Jarvis v. Wilson*, 46 Conn. 90, 33 Am. Rep. 18; *Chenoweth v. Chamberlain*, 45 Ky. (6 B. Mon.) 60, 43 Am. Dec. 145; *Carter v. Bank*, 26 Tenn. (7 Humph.) 548, 46 Am. Dec. 89.

² *Henry v. Allen*, 151 N. Y. 1, 36 L. R. A. 658, 45 N. E. 355; *Drinkall v. Bank*, 11 N. D. 10, 95 Am. St. Rep. 693, 57 L. R. A. 341, 88 N. W. 724.

Such a check differs from an ordinary bank check in that it cannot be countermanded at will. *Drinkall v. Bank*, 11 N. D. 10, 95 Am. St. Rep. 693, 57 L. R. A. 341, 88 N. W. 724.

³ *Clerke v. Martin*, 2 Ld. Raym. 757, 1 Salk. 129, 363.

⁴ 3 and 4 Anne, c. 9.

⁵ *Goodwin v. Roberts*, L. R. 10. Exch. 337; *Dunn v. Adams*, 1 Ala. 527, 35 Am. Dec. 42; *Irvin v. Maury*, 1 Mo. 194.

⁶ *First National Bank v. Hunt*, 25 Mo. App. 172; *Davis v. Miller*, 55 Va. (14 Gratt.) 1. "Promissory notes are quasi-mercantile, but are not in this country, as they are in England since the Statute of Anne, negotiable precisely as bills of exchange." *Taylor v. Craig*, 25 Ky. (2 J. J. Mar.) 449, 460 [quoted in *Smith v. Moberly*, 49 Ky. (10 B. Mon.) 266, 52 Am. Dec. 543].

that promissory notes are negotiable,¹ if all of the requisite elements are present.²

§ 2337. Checks, certificates of deposit, and savings bank-books.

At modern law, checks payable to bearer or to order,¹ even if post-dated,² and certificates of deposit, at least if containing a promise to pay,³ are negotiable.

¹ **United States.** *Murphy v. Improvement Co.*, 97 Fed. 723.

Alabama. *Louisville Banking Co. v. Gray*, 123 Ala. 251, 82 Am. St. Rep. 120, 26 So. 205.

Illinois. *Siegel v. Bank*, 131 Ill. 569, 19 Am. St. Rep. 51, 7 L. R. A. 537, 23 N. E. 417.

Indiana. *Clanin v. Machine Co.*, 118 Ind. 372, 3 L. R. A. 863, 21 N. E. 35.

Maine. *Hatch v. Bank*, 94 Me. 348, 80 Am. St. Rep. 401, 47 Atl. 908.

Michigan. *Choate v. Stevens*, 116 Mich. 28, 43 L. R. A. 277, 74 N. W. 239.

Missouri. *Famous Shoe Co. v. Crosswhite*, 124 Mo. 34, 46 Am. St. Rep. 424, 26 L. R. A. 568, 27 S. W. 397.

Montana. *First National Bank v. Barrett*, 52 Mont. 359, 157 Pac. 951.

Nebraska. *Kirkwood v. Bank*, 40 Neb. 484, 42 Am. St. Rep. 683, 24 L. R. A. 444, 58 N. W. 1016.

New York. *Chase National Bank v. Faurot*, 149 N. Y. 532, 35 L. R. A. 605, 44 N. E. 164.

North Dakota. *Hollinshead v. Stuart*, 8 N. D. 35, 42 L. R. A. 659, 77 N. W. 89.

Pennsylvania. *Albertson v. Laughlin*, 173 Pa. St. 525, 51 Am. St. Rep. 777, 34 Atl. 216.

Rhode Island. *American National Bank v. Paper Co.*, 19 R. I. 149, 61 Am. St. Rep. 746, 29 L. R. A. 103, 32 Atl. 305.

South Carolina. *McLaughlin v. Brady*, 63 S. Car. 433, 90 Am. St. Rep. 681, 41 S. E. 523.

South Dakota. *Merrill v. Hurley*, 6 S. D. 592, 55 Am. St. Rep. 859, 62 N. W. 958.

Tennessee. *Ferriss v. Tavel*, 87 Tenn. 386, 3 L. R. A. 414, 11 S. W. 93.

² **Colley v. Summers-Parrott Hardware Co., 119 Va. 439, 89 S. E. 906.**

³ **United States.** *Bull v. Bank*, 123 U. S. 105, 31 L. ed. 97.

Indiana. *Johnson v. Harrison*, 177 Ind. 240, 39 L. R. A. (N.S.) 1207, 97 N. E. 930.

Iowa. *Leach v. Hill*, 106 Ia. 171, 76 N. W. 667.

Kentucky. *Humphries v. Bicknell*, 12 Ky. (2 Litt.) 296, 13 Am. Dec. 268.

Massachusetts. *Shepard, etc., Co., v. Eldridge*, 171 Mass. 516, 68 Am. St. Rep. 446, 41 L. R. A. 617, 51 N. E. 9.

Nebraska. *Swenson Brothers Co. v. Commercial State Bank*, 98 Neb. 702, L. R. A. 1917F, 1096, 154 N. W. 233.

New Hampshire. *Barnet v. Smith*, 30 N. H. 256, 64 Am. Dec. 290.

² **American Agricultural Chemical Co. v. Scrimger, 130 Md. 389, 100 Atl. 774; *Triphonoff v. Sweeney*, 65 Or. 299, 130 Pac. 979.**

³ **United States.** *Miller v. Austen*, 54 U. S. (13 How.) 218, 14 L. ed. 119; *Bank v. Trust Co.*, 105 Fed. 491; *National City Bank v. Titlow*, 233 Fed. 838.

Georgia. *Chandler v. Smith*, 147 Ga. 637, 95 S. E. 223.

Illinois. *Kavanagh v. Bank*, 239 Ill. 404, 88 N. E. 171.

Ohio. *Citizens' National Bank v. Brown*, 45 O. S. 39, 4 Am. St. Rep. 526, 11 N. E. 799.

Wisconsin. *Curran v. Witter*, 68 Wis. 16, 60 Am. Rep. 827, 31 N. W. 705.

Deposits in a savings bank are usually made under contract that they are payable only on production of the pass-book in which such deposit is entered. This differs from similar provisions with reference to the return of certificates of deposit, in that the entries in the pass-book are mere receipts or memoranda of the money deposited. Accordingly, such pass-books are not negotiable.⁴

§ 2338. Contracts under seal. The law of negotiable instruments is derived from the law-merchant. The seal is derived from the common law. Accordingly, at common law a sealed instrument could not be negotiable.¹ Thus if two guarantors sign, and A adds a seal while B does not, the note is negotiable as to B, but not as to A.² This rule, however, is no longer in force in many jurisdictions.³ The Negotiable Instruments Law provides specifically that the negotiable character of an instrument is not affected by the fact that it bears a seal.⁴

A corporate seal does not destroy negotiability, since it is merely the common-law form whereby the corporation indicates its assent. To hold that it destroyed negotiability would be to hold that a corporation could not issue negotiable paper.⁵ "The attaching of

⁴ **Connecticut.** *McCaskill v. Bank*, 60 Conn. 300, 25 Am. St. Rep. 323, 13 L. R. A. 737, 22 Atl. 568.

Maine. *White v. Cushing*, 88 Me. 339, 51 Am. St. Rep. 402, 32 L. R. A. 590, 34 Atl. 164.

Massachusetts. *Pierce v. Bank*, 129 Mass. 425, 37 Am. Rep. 371.

New York. *Kummel v. Bank*, 127 N. Y. 488, 13 L. R. A. 786, 28 N. E. 398.

Pennsylvania. *Iron City National Bank v. McCord*, 139 Pa. St. 52, 23 Am. St. Rep. 166, 11 L. R. A. 559, 21 Atl. 143.

¹ *Conine v. Ry.*, 3 Houst. (Del.) 288, 89 Am. Dec. 230; *Brown v. Jordhal*, 32 Minn. 135, 50 Am. Rep. 560, 19 N. W. 650; *Osborn v. Kistler*, 35 O. S. 99; *McLaughlin v. Braddy*, 63 S. Car. 433, 90 Am. St. Rep. 681, 41 S. E. 523; *Stevenson v. Bethea*, 68 S. Car. 246, 47 S. E. 71.

² *McLaughlin v. Braddy*, 63 S. Car. 433, 90 Am. St. Rep. 681, 41 S. E. 523.

³ *Williams v. Peninsular Grocery Co.*, — Fla. —, 75 So. 517; *Porter v. McCollum*, 15 Ga. 528.

⁴ Section 6 of the Negotiable Instruments Law.

⁵ **United States.** *Mercer County v. Hackett*, 68 U. S. (1 Wall.) 83, 17 L. ed. 548; *Chicago, etc., Co. v. Bank*, 136 U. S. 268, 34 L. ed. 349; *Kneeland v. Lawrence*, 140 U. S. 209, 35 L. ed. 492.

Alabama. *Reid v. Bank*, 70 Ala. 199.

Florida. *Williams v. Peninsular Grocery Co.*, — Fla. —, 75 So. 517.

New York. *Chase National Bank v. Faurot*, 149 N. Y. 532, 35 L. R. A. 605, 44 N. E. 164.

Ohio. *Pittsburgh, etc., Ry. v. Lynde*, 55 O. S. 23; 44 N. E. 596.

Rhode Island. *American National Bank v. Paper Co.*, 19 R. I. 149, 61 Am. St. Rep. 746, 29 L. R. A. 103, 32 Atl. 305.

South Dakota. *Landauer v. Improvement Co.*, 10 S. D. 205, 72 N. W. 467.

a corporate seal bears a strong analogy to the signature of a natural person and is its substantial equivalent."⁶ A seal which may be treated as surplusage does not destroy negotiability.⁷ Some authorities, however, hold that a corporation seal makes the instrument a specialty and destroys negotiability.⁸

A seal is not necessary to the validity of a negotiable instrument.⁹

§ 2339. Bonds, warrants, etc. At modern law, bonds payable to bearer or to order,¹ and coupons on bonds,² are negotiable.

Warrants drawn by public officials are negotiable if payable absolutely and consisting of an order or a promise.³ If payable conditionally, as where drawn on some particular fund,⁴ or if given

⁶ *Pittsburgh, etc., Ry. v. Lynde*, 55 O. S. 23, 49, 44 N. E. 596.

See also, *Williams v. Peninsular Grocery Co.*, — Fla. —, 75 So. 517.

⁷ *Stevens v. Ball Club*, 142 Pa. St. 52, 11 L. R. A. 860, 21 Atl. 797; *Mackay v. Church*, 15 R. I. 121, 2 Am. St. Rep. 881, 23 Atl. 108.

⁸ *Coe v. Ry.*, 8 Fed. 534; *Frevall v. Fitch*, 5 Whart. (Pa.) 325, 34 Am. Dec. 558.

⁹ *Aycock Supply Co. v. Windley*, 176 N. Car. 18, 96 S. E. 664.

¹ *United States. Clark v. Iowa City*, 87 U. S. (20 Wall.) 583, 22 L. ed. 427; *Waite v. Santa Cruz*, 184 U. S. 302, 46 L. ed. 552; *Fairfield v. School District*, 116 Fed. 838 [reversing, 111 Fed. 453]; *Central, etc., Co. v. Trust Co.*, 114 Fed. 263; *Quinlan v. Green County*, 157 Fed. 33, 84 C. C. A. 537, 19 L. R. A. (N.S.) 849.

Connecticut. Parsons v. Utica Cement Mfg. Co., 82 Conn. 333, 135 Am. St. Rep. 278, 73 Atl. 785.

Michigan. Adrian v. Whitney Central National Bank, 180 Mich. 171, Ann. Cas. 1916A, 600, 146 N. W. 654.

Mississippi. Beiser v. Supervisor's District, 114 Miss. 842, 75 So. 594.

New York. Hibbs v. Brown, 190 N. Y. 167, 82 N. E. 1108.

Pennsylvania. Cochran v. Fox Chase Bank, 209 Pa. St. 34, 103 Am. St. Rep. 976, 58 Atl. 117.

Massachusetts. See also, Pratt v. Higginson, 230 Mass. 256, 1 A. L. R. 714, 119 N. E. 661.

For the negotiability of debentures, see *The Law Merchant and Transferable Debentures*, by F. A. Bosanquet, 15 *Law Quarterly Review*, 130; *The Negotiability of Debentures to Bearer and the Growth of the Law Merchant*, by Francis Beaufort Palmer, 15 *Law Quarterly Review*, 245, and *The Evolution of the Debenture*, by G. A. MacDonald, 23 *Law Quarterly Review*, 195.

² *Hartman v. Greenhow*, 102 U. S. 672, 26 L. ed. 271; *Trustees v. Lewis*, 34 Fla. 424, 43 Am. St. Rep. 209, 26 L. R. A. 743, 16 So. 325.

³ Negotiable when drawn on any money in the treasury not otherwise appropriated. *Blaisdell v. School District*, 72 Vt. 63, 47 Atl. 173. Negotiable as far as concerns title. *Fidelity Trust Co. v. Palmer*, 22 Wash. 473, 79 Am. St. Rep. 953, 61 Pac. 158.

⁴ *National Bank v. Herold*, 74 Cal. 603, 5 Am. St. Rep. 476, 16 Pac. 507.

simply as a voucher of the amount due,⁵ though prima facie valid,⁶ they are not negotiable.⁷ They can not be reissued after they have been paid and retired.⁸

A postoffice money order is issued by the United States Government in its public capacity, and is subject in its use to many restrictions not commonly found in negotiable instruments.⁹ It is therefore not negotiable.¹⁰

§ 2340. Mortgages. A mortgage was a common-law form of security, and it was not controlled by the principles of the law-merchant. There is, accordingly, a conflict of authority as to whether a mortgage given to secure a negotiable note is itself negotiable, some jurisdictions holding that the mortgage is merely an incident of the debt and that before the maturity of the note the assignment of the note in such form as to preserve its negotiability, carries with it the mortgage as a negotiable instrument, as free from defenses as the note;¹ others that such assignment of the

⁵ City warrants. *Hammond v. Evans*, 23 Ind. App. 501, 55 N. E. 784.

County warrants. *Atchison, etc., R. v. Kearney Co.*, 58 Kan. 19, 48 Pac. 583; *First National Bank v. Gates*, 66 Kan. 505, 97 Am. St. 383 [sub nomine, *Vawter v. Gates*, 72 Pac. 207].

Township warrants. *Gilman v. Gilby Township*, 8 N. D. 627, 73 Am. St. Rep. 791, 80 N. W. 889.

⁶ *Pacific Paving Co. v. Mowbray*, 127 Cal. 1, 59 Pac. 205.

⁷ *Shakspear v. Smith*, 77 Cal. 638, 11 Am. St. Rep. 327, 20 Pac. 294; *Goose River National Bank v. School Township*, 1 N. D. 26, 28 Am. St. Rep. 605, 44 N. W. 1002; *Township of Snyder v. Boviard*, 122 Pa. St. 442, 9 Am. St. Rep. 118, 15 Atl. 910; *Hubbell v. Custer City*, 15 S. D. 55, 87 N. W. 520.

⁸ *Pugh v. More*, 44 La. Ann. 209, 10 So. 710; *Morrow v. Surber*, 97 Mo. 155, 11 S. W. 48; *Richardson v. Marshall County*, 100 Tenn. 346, 45 S. W. 440; *Branch v. Commissioners*, 80 Va. 427, 56 Am. Rep. 596; *Bardsley v. Sternberg*, 17 Wash. 243, 49 Pac. 499 [reversed in part on rehearing, 18 Wash.

612, 52 Pac. 251, 524; distinguishing, *Blake v. Johnson County*, 18 Kan. 266].

⁹ *Bolognesi v. United States*, 189 Fed. 335, 111 C. C. A. 67, 36 L. R. A. (N.S.) 143.

¹⁰ *Bolognesi v. United States*, 189 Fed. 335, 111 C. C. A. 67, 36 L. R. A. (N.S.) 143.

¹ *United States. Carpenter v. Longan*, 83 U. S. (16 Wall.) 271, 21 L. ed. 314; *O'Rourke v. Wahl*, 109 Fed. 276, 48 C. C. A. 360.

Indiana. Gabbert v. Schwartz, 69 Ind. 450.

Iowa. Preston v. Case, 42 Ia. 549.

Massachusetts. Bon v. Graves, 216 Mass. 440, 103 N. E. 1023.

Michigan. Wilson v. Campbell, 110 Mich. 580, 35 L. R. A. 544, 68 N. W. 278; *Cox v. Cayan*, 117 Mich. 599, 72 Am. St. Rep. 585, 76 N. W. 96.

Missouri. Borgess Investment Co. v. Vette, 142 Mo. 560, 64 Am. St. Rep. 567, 44 S. W. 754.

North Dakota. Christianson v. Warehouse Association, 5 N. D. 438, 32 L. R. A. 730, 67 N. W. 300; *First National Bank v. Flath*, 10 N. D. 281, 86 N. W. 867.

note carries the mortgage with it, but as a non-negotiable instrument, subject to all defenses.²

§ 2341. Symbols of property—Bills of lading and warehouse receipts. Bills of lading¹ and warehouse receipts² call for property other than money. They are accordingly not negotiable in the full sense of the word. Bills of lading are symbols of the property therein described, and their transfer operates as a transfer of transferrer's interest in such property.³ Thus one who discounts a draft to which a bill of lading is attached as security, holds the property described in such bill as collateral security. The carrier is liable to the holder of the bill of lading if he delivers the goods without the bill.⁴ The transfer of a bill of lading defeats the consignor's right of stoppage in transitu.⁵ The transferee of a bill of lading has a priority over an attaching creditor.⁶ To that extent

Tennessee. *Nashville Trust Co. v. Smythe*, 94 Tenn. 513, 45 Am. St. Rep. 748, 27 L. R. A. 663, 29 S. W. 903.

Washington. *American Savings & Trust Co. v. Helgesen*, 64 Wash. 54, 116 Pac. 837.

Wisconsin. *Mack v. Prang*, 104 Wis. 1, 76 Am. St. Rep. 848, 45 L. R. A. 407, 79 N. W. 770.

² **Georgia.** *Foster v. McGuire*, 96 Ga. 447, 23 S. E. 398.

Illinois. *Mullanphy Savings Bank v. Schott*, 135 Ill. 655, 25 Am. St. Rep. 401, 26 N. E. 640; *Chicago, etc., Co., v. Aff*, 183 Ill. 91, 55 N. E. 659; *Bouton v. Cameron*, 205 Ill. 50, 68 N. E. 800.

Louisiana. *Pertuit v. Damare*, 50 La. Ann. 893, 24 So. 681.

Minnesota. *Paulsen v. Koon*, 85 Minn. 240, 88 N. W. 760.

New Jersey. *Tate v. Trust Co.*, 63 N. J. Eq. 559, 52 Atl. 313 (but here the assignee took as security for pre-existing debts and was held not to take for value).

Ohio. *Bailey v. Smith*, 14 O. S. 396, 84 Am. Dec. 385.

Pennsylvania. *Bank v. Roessler*, 186 Pa. St. 431, 40 Atl. 963.

¹ *National Bank v. Baltimore, etc.*, R. R., 99 Md. 661, 105 Am. St. Rep.

321, 59 Atl. 134; *National Bank v. R. R.*, 44 Minn. 224, 20 Am. St. Rep. 566, 9 L. R. A. 263, 46 N. W. 342, 560.

² *Anderson v. Flouring Mills*, 37 Or. 483, 82 Am. St. Rep. 771, 50 L. R. A. 238, 60 Pac. 839.

See, *Dock Warrants, Warehouse-Keepers' Certificates, etc.*, by A. T. Carter, 8 Law Quarterly Review, 301.

³ **Kentucky.** *Douglas v. Bank*, 86 Ky. 176, 9 Am. St. Rep. 276, 5 S. W. 420.

Massachusetts. *Brown v. Floersheim Mercantile Co.*, 206 Mass. 373, 92 N. E. 494.

Missouri. *Midland National Bank v. R. R.*, 132 Mo. 492, 53 Am. St. Rep. 505, 33 S. W. 521.

Ohio. *Emery v. Bank*, 25 O. S. 360, 18 Am. Rep. 299.

West Virginia. *Neill v. Produce Co.*, 41 W. Va. 37, 23 S. E. 702.

⁴ *Union Pacific R. R. v. Johnson*, 45 Neb. 57, 50 Am. St. Rep. 540, 63 N. W. 144; *First National Bank v. Ry.*, 28 Wash. 439, 68 Pac. 965.

⁵ Even of a duplicate bill of lading. *Missouri Pacific R. R. v. Heidenheimer*, 82 Tex. 195, 27 Am. St. Rep. 861, 17 S. W. 608.

⁶ *American National Bank v. Henderson*, 123 Ala. 612, 82 Am. St. Rep.

they have a qualified or quasi-negotiability. There is a wide difference, however, between such qualified negotiability and full negotiability. The transferee of such a bill of lading acquires no better interest than that of his transferrer. The carrier may show as against a bona fide holder that he did not receive the goods mentioned in the bill of lading.⁷ Even if by statute a carrier is liable for damages resulting to any person from issuing a bill of lading without receiving the goods, it may be shown that the bill was issued by an authorized agent to a fictitious payee, and indorsed by the agent with the payee's name.⁸ If a bill of lading is stolen a subsequent bona fide transferee acquires no title thereunder. Thus where the original bill was attached to a draft and sent to A for collection, and when A presented it to B for acceptance, B accepted the draft, secretly detached the original bill, substituted the duplicate received by him from the consignor, left the duplicate and accepted draft with A, and sold the original bill to X, X had no title as against A.⁹ Delivery to one having possession of a bill of lading not indorsed to him except by forged indorsement, does not relieve the carrier.¹⁰ So if a bill of lading is obtained from the owner by fraud, a subsequent bona fide holder has no title as against the real owner.¹¹ So where a bill of lading of goods consigned to the vendor was not endorsed, a duplicate bill having been sent to the vendee for his convenience only, and the consignor holding the original, the carrier is not protected by delivery to the vendee.¹² Delivery to the consignee protects the carrier, though the consignor took the bill of lading in his own name and retained it.¹³ The rules generally applicable to assign-

147, 26 So. 498; *Ayers, etc., Co. v. Dorsey*, 101 Ia. 141, 63 Am. St. Rep. 376, 70 N. W. 111; *Shaffer v. Rhynders*, 116 Ia. 472, 89 N. W. 1099; *Scharff v. Meyer*, 133 Mo. 428, 54 Am. St. Rep. 672, 34 S. W. 858.

⁷ *Brown v. Coal Co.*, L. R. 10 C. P. 562; *Friedlander v. Ry.*, 130 U. S. 416, 32 L. ed. 991; *National Bank v. R. R.* 44 Minn. 224, 20 Am. St. Rep. 566, 9 L. R. A. 263, 46 N. W. 342, 560.

Contra, on the theory of estoppel, *Wichita Savings Bank v. Ry.*, 20 Kan. 519; *Sioux City, etc., Ry. v. Bank*, 10 Neb. 556, 35 Am. Rep. 488, 7 N. W. 311; *Batavia Bank v. R. R.*, 106 N. Y. 195, 60 Am. Rep. 440, 12 N. E. 433.

⁸ *Jasper Trust Co. v. R. R.*, 99 Ala. 416, 42 Am. St. Rep. 75, 14 So. 546.

⁹ *Shaw v. R. R.*, 101 U. S. 557, 25 L. ed. 892. (Even under a statute making bills of lading negotiable.)

¹⁰ *Cavallaro v. R. R.*, 110 Cal. 348, 52 Am. St. Rep. 94, 42 Pac. 918.

¹¹ *Decan v. Shipper*, 35 Pa. St. 239, 78 Am. Dec. 334.

¹² *Weyand v. Ry.*, 75 Ia. 573, 9 Am. St. Rep. 504, 1 L. R. A. 650, 39 N. W. 899.

¹³ *Nebraska Meals Mills v. R. R.*, 64 Ark. 169, 62 Am. St. Rep. 183, 41 S. W. 810.

ment of contracts and transfers of property apply to bills of lading. Accordingly, if the owner invests another with all the external appearance of ownership, he is not allowed to defeat rights acquired in reliance on such external appearance. This is referable, however, to principles of estoppel and has nothing to do with negotiability. A warehouseman is liable on receipts issued by an authorized agent, in the hands of a bona fide holder, though the goods were never delivered.¹⁴ The warehouse receipt is a symbol of property, and its transfer operates as a transfer of the goods.¹⁵ A warehouseman may redeliver the identical goods received and called for by receipt, even if of no actual value, and thus end his liability.¹⁶ A storage receipt for pig-iron issued by a furnace company not engaged in the warehouse business, was held not negotiable, and delivery of the receipt did not amount to a pledge.¹⁷ Even under a statute making a warehouse receipt negotiable, the owner of property whose agent has deposited it in a warehouse, taking a receipt therefor in his own name, may recover the property as against the bona fide assignee of such agent.¹⁸ The owner of an unindorsed warehouse receipt may recover the goods from the warehouseman, though the receipt provides for the delivery of the goods on the return of the receipt properly indorsed.¹⁹

The common-law quasi-negotiability of bills of lading may be still further limited by the specific agreement of the parties.²⁰

§ 2342. Stock certificates. A certificate of stock possesses a qualified negotiability in that its transfer passes the title to the stock, free from latent equities between prior vendor and vendee.¹

¹⁴ *Hanover National Bank v. Trust*, 148 N. Y. 612, 51 Am. St. Rep. 721, 43 N. E. 72.

¹⁵ *Taney v. Penn National Bank*, 232 U. S. 174, 58 L. ed. 558 [affirming, 187 Fed. 689]; *Damman v. Implement Co.*, 30 N. D. 15, 151 N. W. 985; *Wilkes v. Ferris*, 5 Johns. (N.Y.) 335, 4 Am. Dec. 364.

¹⁶ *Dean v. Driggs*, 137 N. Y. 274, 33 Am. St. Rep. 721, 19 L. R. A. 302, 33 N. E. 326.

¹⁷ *Geilfuss v. Corrigan*, 95 Wis. 651, 60 Am. St. Rep. 143, 37 L. R. A. 167, 70 N. W. 306.

¹⁸ *Commercial Bank v. Hurt*, 99 Ala.

130, 42 Am. St. Rep. 38, 19 L. R. A. 701, 12 So. 568.

¹⁹ *Shingleur-Johnson Co. v. Warehouse Co.*, 78 Miss. 875, 84 Am. St. Rep. 655, 29 So. 770.

²⁰ *National Bank v. Baltimore, etc.*, R. R., 99 Md. 661, 105 Am. St. Rep. 321, 59 Atl. 134.

¹ *Supply Ditch Co. v. Elliot*, 10 Colo. 327, 3 Am. St. Rep. 586, 15 Pac. 691; *Bank v. Bank*, 120 Ga. 575, 102 Am. St. Rep. 115, 48 S. E. 226; *Campbell v. Zylonite Co.*, 122 N. Y. 455, 11 L. R. A. 596, 25 N. E. 853; *First National Bank v. Holland*, 99 Va. 495, 55 L. R. A. 155, 39 S. E. 126.

Thus if A assigns a stock certificate in blank and delivers it to B, as his agent, to enable B to raise money for A, a bona fide assignee from B has priority over A.² So the rights of a bona fide purchaser of a certificate purporting to be paid up, prevail over the rights of creditors of the corporation.³ So a corporation is liable on stock certificates fraudulently issued by an authorized officer, if in the hands of bona fide holders.⁴ It is not negotiable in the fullest meaning of the word.⁵ If the certificate has been lost after being indorsed in blank, without the fault of the owner;⁶ or if it is surrendered to the corporation for cancellation, and is fraudulently reissued by an officer without cancellation;⁷ or is surrendered to the company to secure a debt of A, the owner, is thought to be lost so that a new certificate is issued and sold to B, and A, who is an officer of the company, subsequently finds the lost certificate and pledges it for value to X;⁸ or is assigned by the guardian of the minor owner,⁹ the real owner may assert his right thereto against the holder of the stock certificate. So if the holder of a certificate not purporting on its face to be paid up takes subject to the rights of the corporation, the corporation must issue a new certificate to the assignee.¹⁰

² *Brittain v. Bank*, 124 Cal. 282, 71 Am. St. Rep. 58, 57 Pac. 84.

³ *Wallace v. Mfg. Co.*, 70 Minn. 321, 68 Am. St. Rep. 530, 73 N. W. 189.

⁴ *Cincinnati, etc., R. R. v. Bank*, 56 O. S. 351, 43 L. R. A. 777, 47 N. E. 249.

⁵ *United States. Moores v. Bank*, 111 U. S. 156, 28 L. ed. 385; *Bangor, etc., Co. v. Robinson*, 52 Fed. 520.

California. Barstow v. Mining Co., 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349; *Swim v. Wilson*, 90 Cal. 126, 25 Am. St. Rep. 110, 13 L. R. A. 605, 27 Pac. 33.

Massachusetts. Farrington v. R. R., 150 Mass. 406, 15 Am. St. Rep. 222, 23 N. E. 109; *O'Herron v. Gray*, 168 Mass. 573, 60 Am. St. Rep. 411, 40 L. R. A. 498, 47 N. E. 429.

New York. Anderson v. Nicholas, 28 N. Y. 400.

Ohio. Farmers' Bank v. Lock Co., 66 O. S. 367, 90 Am. St. Rep. 586, 58 L. R. A. 620, 64 N. E. 518.

Pennsylvania. Biddle v. Bayard, 13 Pa. St. 150. It has been said that while the usages of business "have given them some of the elements of negotiability," the courts "have with great uniformity held that stock certificates were not negotiable instruments within the broad meaning of that phrase." *Knox v. American Co.*, 148 N. Y. 441, 51 Am. St. Rep. 700, 31 L. R. A. 779, 42 N. E. 988.

⁶ *East Birmingham Land Co. v. Dennis*, 85 Ala. 565, 7 Am. St. Rep. 73, 2 L. R. A. 836, 5 So. 317.

⁷ *Knox v. American Co.*, 148 N. Y. 441, 51 Am. St. Rep. 700, 31 L. R. A. 779, 42 N. E. 988.

⁸ *Farmers' Bank v. Lock Co.*, 66 O. S. 367, 90 Am. St. Rep. 586, 58 L. R. A. 620, 64 N. E. 518.

⁹ *O'Herron v. Gray*, 168 Mass. 573, 60 Am. St. Rep. 411, 40 L. R. A. 498, 47 N. E. 429.

¹⁰ *Craig v. Water Co.*, 113 Cal. 7, 54 Am. St. Rep. 316, 35 L. R. A. 306, 45 Pac. 10.

III

NATURE AND EFFECT OF NEGOTIABILITY

§ 2343. Nature of negotiability. Negotiable contracts were an exception to the common-law rule that contract rights could not be assigned.¹ If a negotiable contract were assigned in a proper manner, the holder could maintain an action at law thereon in his own name. It "may be transferred and assigned from the payee to any other man, contrary to the general rule of the common law that no chose in action is assignable, which assignment is the life of paper credit."² This right to sue in his own name implied that the party sued was prevented from making defenses which he would have been allowed to make against the party who had transferred the contract.³ At common law, therefore, there was no need to distinguish between contracts which were assignable generally and negotiable contracts. All contracts which were assignable generally were also negotiable, and all negotiable contracts were also assignable. At modern law contracts are as a general rule assignable, so that the assignee may sue thereon in his own name.⁴ At modern law, some different test must therefore be found for negotiability, to distinguish it from mere assignability. This test is found in the fact that the transferee of a legal title of a negotiable contract takes it free from many defenses which might have been made against his transferee.⁵

A justification for the theory of negotiability and for the rule that an instrument in the hands of a bona fide holder may be free from defenses which can be interposed as against the original party, has been said to be the rule that as between two innocent persons the loss must fall upon the one who caused it.⁶ This reason, however, is insufficient. If applied to its fullest extent, it would include contracts which were assignable but non-negotiable, and it would enable an innocent assignee to enforce against a promisor a contract which was subject to defenses in the hands of the original promisee. In spite of the fact that in such cases the original promisor has been more at fault than the innocent assignee, the loss in such cases falls upon the innocent assignee.⁷

¹ See § 2236.

² II Black Com. 468.

³ What these defenses were will be discussed hereafter. See §§ 2348 et seq.

⁴ See §§ 2241 et seq.

⁵ See § 2347.

⁶ *Fisk Rubber Co. v. Pinkey*, 100 Wash. 220, 170 Pac. 581.

See, *Negotiability and Estoppel*, by John S. Ewart, 16 *Law Quarterly Review*, 135.

⁷ See §§ 2269 et seq.

It has also been said that those who execute and deliver negotiable instruments are to be charged with a higher degree of care than those who purchase such instruments.⁸ This, however, is rather a consequence of the quality of negotiability than an explanation of such quality. The real justification of the theory of negotiability is that for business purposes it is very important to give to certain instruments qualities which make them as much like money as is possible.

A negotiable instrument was for many purposes treated as the contract itself, rather than as the evidence thereof. Payment to the original holder, who has not the note in his possession, is not operative as against a bona fide holder who took for value and before maturity, although the maker has no notice of such transfer.⁹

The meaning of negotiability here given is that of negotiability in its fullest sense. A limited meaning of negotiability also exists. In many jurisdictions the statutes have made instruments, like bills of lading and warehouse receipts, "negotiable." The courts have generally held that such a statute does not give such instrument negotiability in the full and complete sense of the word, but rather a quality differing from assignability only in the fact that the transfer of the instrument operates as a symbolical transfer of the property called for thereby,¹⁰ and that notice of the

⁸ *Colona v. Parksley National Bank*, 120 Va. 812, 92 S. E. 979.

⁹ *Miles v. Dodson*, 102 Ark. 422, 50 L. R. A. (N.S.) 83, 144 S. W. 908; *Calhoun v. Sharkey*, 120 Ark. 616, 180 S. W. 216; *Fowle v. Outcalt*, 64 Kan. 352, 67 Pac. 889; *Loizeaux v. Fremder*, 123 Wis. 193, 101 N. W. 423.

¹⁰ *Alabama. Commercial Bank v. Hurt*, 99 Ala. 130, 42 Am. St. Rep. 38, 19 L. R. A. 701, 12 So. 568.

California. Cavallaro v. R. R., 110 Cal. 348, 52 Am. St. Rep. 94, 42 Pac. 918.

Georgia. Zellner v. Mobley, 84 Ga. 746, 20 Am. St. Rep. 390, 11 S. E. 402.

Kentucky. Douglas v. Bank, 86 Ky. 176, 9 Am. St. Rep. 276, 5 S. W. 420.

Minnesota. National Bank v. R. R., 44 Minn. 224, 20 Am. St. Rep. 566, 9 L. R. A. 263, 46 N. W. 342, 560.

Oregon. Anderson v. Mills, 37 Or. 483, 82 Am. St. Rep. 771, 50 L. R. A. 235, 60 Pac. 839.

Wisconsin. Geilfuss v. Corrigan, 95 Wis. 651, 60 Am. St. Rep. 143, 37 L. R. A. 167, 70 N. W. 306. "What is negotiability? It is a technical term derived from the usage of merchants and bankers, in transferring, primarily bills of exchange, and, afterwards, promissory notes. At common law no contract was assignable, so as to give to an assignee a right to enforce it by suit in his own name. To this rule bills of exchange and promissory notes, payable to order or bearer, have been admitted exceptions, made such by the adoption of the law merchant. They may be transferred by indorsement and delivery, and such a transfer is called negotiation. It is a mercantile business

transfer of such instrument need not be given to the party issuing it.¹¹

In this connection negotiability will be discussed only in so far as concerns the liability of the promisor to the promisee and those claiming under him. There are many other results that flow from negotiability. Among these are the liability of the indorser to the indorsee, the necessity of demand, notice and protest, and the liability of sureties and guarantors. These subjects belong to a discussion of negotiable instruments, and will not be treated of in this work.

§ 2344. Effect of negotiability on rights of parties—When in hands of original party. Except in the cases in which the payee is himself a bona fide holder,¹ the fact of negotiability is for most purposes immaterial as between the immediate parties to a negotiable contract. Any defense may be set up against the adversary party that could have been made in a non-negotiable contract,² such as mistake,³ fraud,⁴ duress,⁵ want of consideration;⁶ the fact that one maker signed as surety under a contract for the applica-

transaction, and the capability of being thus transferred, so as to give to the indorsee a right to sue on the contract in his own name, is what constitutes negotiability. The term 'negotiable' expresses, at least primarily, this mode and effect of a transfer. In regard to bills and notes, certain other consequences generally, though not always, follow. * * * (Discussing the rights of a bona fide holder.) But none of these consequences are necessary attendants or constituents of negotiability or negotiation. That may exist without them." *Shaw v. R. R.*, 101 U. S. 557, 562.

¹¹ See § 2341.

¹ See § 2364.

² *Long v. Mason*, 273 Mo. 266, 200 S. W. 1062; *State Bank v. Forsyth*, 41 Mont. 249, 28 L. R. A. (N.S.) 501, 108 Pac. 914; *Smith v. Dotterweich*, 200 N. Y. 299, 33 L. R. A. (N.S.) 892, 93 N. E. 985; *Summers v. Alexander*, 30 Okla. 198, 38 L. R. A. (N.S.) 787, 120 Pac. 601.

³ *Beland v. Brewing Association*, 157 Mo. 593, 58 S. W. 1.

⁴ *Fay v. Fay*, 121 Mass. 561.

⁵ *Peckham v. Van Bergen*, 10 N. D. 43, 84 N. W. 566.

⁶ *Illinois Grove v. Jeager*, 60 Ill. 249; *Shaw v. Camp*, 160 Ill. 425, 43 N. E. 608; *Lang v. Dietz*, 191 Ill. 161, 60 N. E. 841.

Massachusetts. Parish v. Stone, 31 Mass. (14 Pick.) 198, 25 Am. Dec. 378.

Michigan. Graham v. Alexander, 123 Mich. 168, 81 N. W. 1084; *McBryan v. Elevator Co.*, 130 Mich. 111, 89 N. W. 683.

Montana. State Bank v. Forsyth, 41 Mont. 249, 28 L. R. A. (N.S.) 501, 108 Pac. 914 (obiter).

New Jersey. Voorhees v. Combs, 33 N. J. L. 494.

North Dakota. Andrews v. Schmidt, 10 N. D. 1, 84 N. W. 568.

Ohio. Hamor v. Moore, 8 O. S. 239; *Starr v. Starr*, 9 O. S. 74.

tion of certain collateral to the obligation before personal liability should be enforced against himself;⁷ illegality,⁸ as where the instrument is given to defraud creditors;⁹ or for illegal sales of intoxicating liquor;¹⁰ or for sales, in violation of statute, of articles which are not registered or inspected;¹¹ or for services of an unlicensed broker;¹² for the rent of a building for purposes of prostitution;¹³ to stifle criminal prosecution;¹⁴ or to aid rebellion;¹⁵ or for breach of an express condition,¹⁶ or failure of consideration.¹⁷ While the technical bona fide holder is one who takes from one of the original parties to the contract, mediately or immediately, the original payee who advances money in ignorance of defenses, may be given the same protection as a bona fide holder,¹⁸ as where he does not know that the signature of a surety is conditioned on obtaining the signature of another who did not in fact sign.¹⁹

§ 2345. When in hands of transferee not a bona fide holder.

If a negotiable instrument has been transferred to one who is not a bona fide holder for value, his rights are those, and only those, of the person who transferred the instrument to him.¹ Any defense

⁷ *Hatfield v. Jakway*, 102 Neb. 831, 170 N. W. 181.

⁸ *Florence Cotton Oil Co. v. Anglin*, 105 Ark. 672, 43 L. R. A. (N.S.) 1109, 152 S. W. 295.

⁹ *McTighe v. McKee*, 70 Ark. 293, 67 S. W. 754.

¹⁰ *Adams v. Hackett*, 27 N. H. 289, 59 Am. Dec. 376.

¹¹ *Florence Cotton Oil Co. v. Anglin*, 105 Ark. 672, 43 L. R. A. (N.S.) 1109, 152 S. W. 295.

¹² *Douthart v. Congdon*, 197 Ill. 349, 64 N. E. 348.

¹³ *Mitchell v. Campbell*, 111 Miss. 806, 72 So. 231.

¹⁴ *Friend v. Miller*, 52 Kan. 139, 39 Am. St. Rep. 340, 34 Pac. 397; *Haynes v. Rudd*, 102 N. Y. 372, 55 Am. Rep. 815, 7 N. E. 287.

¹⁵ *Hanauer v. Doane*, 79 U. S. (12 Wall.) 342, 20 L. ed. 439; *Ruddell v. Lauders*, 25 Ark. 238, 94 Am. Dec. 717.

¹⁶ *Pease v. Globe Realty Co.*, 141 Ia. 482, 42 L. R. A. (N.S.) 6, 119 N. W. 975.

¹⁷ *Georgia. Means v. Subers*, 115 Ga. 371, 41 S. E. 633.

Iowa. Cooper v. King, 73 Ia. 136, 34 N. W. 781.

Massachusetts. Dickinson v. Hall, 31 Mass. (14 Pick.) 217, 25 Am. Dec. 390.

New York. Smith v. Dotterweich, 200 N. Y. 299, 33 L. R. A. (N.S.) 892, 93 N. E. 985.

Oklahoma. Nettograph Machine Co. v. Brown, 28 Okla. 436, 34 L. R. A. (N.S.) 737, 114 Pac. 1102; *Summers v. Alexander*, 30 Okla. 198, 38 L. R. A. (N.S.) 787, 120 Pac. 601.

¹⁸ *Provident, etc., Co. v. Mercer County*, 170 U. S. 593, 42 L. ed. 1156; *O'Keefe v. Bank*, 49 Kan. 347, 33 Am. St. Rep. 370, 30 Pac. 473.

¹⁹ *Lookout Bank v. Aull*, 93 Tenn. 645, 42 Am. St. Rep. 934, 27 S. W. 1014.

¹ *Colorado. Carlson v. Rensink*, — Colo. —, 3 A. L. R. 72, 173 Pac. 542.

Kansas. First National Bank v. Lyons Exchange Bank, 100 Kan. 194, 164 Pac. 137.

Michigan. Hulett v. Marine Savings Bank, 143 Mich. 219, 4 L. R. A. (N.S.) 1042, 106 N. W. 879.

Minnesota. Farmers' State Bank v. McGrath, 141 Minn. 281, 170 N. W. 209.

which could have been made against his transferor, can be made against the transferee.² Thus the maker may, as against an assignee who is not a bona fide holder, interpose the defense of want of power of the agent issuing the instrument,³ or of the partner issuing it;⁴ that the contract was under the circumstances ultra

Montana. Buhler v. Loftus, 53 Mont. 546, 165 Pac. 601.

New York. Schlesinger v. Lehmaier, 191 N. Y. 69, 123 Am. St. Rep. 591, 16 L. R. A. (N.S.) 626, 83 N. E. 657.

North Carolina. Sykes v. Everett, 167 N. Car. 600, 4 A. L. R. 751, 83 S. E. 585.

Wisconsin. Gulbranson-Dickinson Co. v. Hopkins, — Wis. —, 175 N. W. 93.

Wyoming. Capitol Hill State Bank v. Rawlins National Bank, 24 Wyom. 423, 160 Pac. 1171.

If a note and mortgage are assigned as a part of one transaction, the holder has knowledge that the note is a mortgage note; and if such instrument is not fully negotiable in that jurisdiction, he acquires no greater right than that of his assignor. Buhler v. Loftus, 53 Mont. 546, 165 Pac. 601.

² **United States.** Bassick v. Aetna Explosives Co., 246 Fed. 974.

Arizona. Lentz v. Landers, — Ariz. —, 185 Pac. 821.

California. Hays v. Plummer, 126 Cal. 107, 77 Am. St. Rep. 153, 58 Pac. 447.

Colorado. Denver Suburban Homes & Water Co. v. Fugate, — Colo. —, 168 Pac. 33; Carlson v. Rensink, — Colo. —, 3 A. L. R. 72, 173 Pac. 542.

Illinois. Mullanphy Savings Bank v. Schott, 135 Ill. 655, 25 Am. St. Rep. 401, 26 N. E. 640.

Louisiana. Pavey v. Stauffer, 45 La. Ann. 353, 19 L. R. A. 716, 12 So. 512.

Maine. Smith v. Bibber, 82 Me. 34, 17 Am. St. Rep. 464, 19 Atl. 80

Massachusetts. J. C. Brill Co. v. Norton & T. Street R. Co., 189 Mass. 431, 2 L. R. A. (N.S.) 525, 75 N. E. 1060.

Minnesota. Farmers' State Bank v. McGrath, 141 Minn. 281, 170 N. W. 209.

Mississippi. First National Bank v. Strauss, 66 Miss. 479, 14 Am. St. Rep. 579, 6 So. 232.

Missouri. Bacon v. Reichardt, — Mo. —, 208 S. W. 24.

Nebraska. Sackett v. Montgomery, 57 Neb. 424, 73 Am. St. Rep. 522, 77 N. W. 1083; Benton v. Sikyta, 84 Neb. 808, 24 L. R. A. (N.S.) 1057, 122 N. W. 61; Marshall v. Kirschbraun, 100 Neb. 876, L. R. A. 1917E, 788, 161 N. W. 577.

New Mexico. Hill v. Hart, 23 N. M. 226, 167 Pac. 710.

North Carolina. Sykes v. Everett, 167 N. Car. 600, 4 A. L. R. 751, 83 S. E. 585.

Oklahoma. State v. Sapulpa, — Okla. —, 160 Pac. 489.

Utah. Manson v. Harris, — Utah —, 170 Pac. 970.

³ **United States.** Lamson v. Beard, 94 Fed. 30, 45 L. R. A. 822.

Montana. Helena National Bank v. Telegraph Co., 20 Mont. 379, 64 Am. St. Rep. 628, 51 Pac. 829.

New York. Gerard v. McCormick, 130 N. Y. 261, 14 L. R. A. 234, 29 N. E. 115.

South Carolina. Greenville v. Ormand, 51 S. Car. 58, 64 Am. St. Rep. 663, 39 L. R. A. 847, 28 S. E. 50.

Utah. Gregg v. Groesbeck, 11 Utah 310, 32 L. R. A. 266, 40 Pac. 202.

Wisconsin. Gulbranson-Dickinson Co. v. Hopkins, — Wis. —, 175 N. W. 93.

⁴ **Brown v. Pettit**, 178 Pa. St. 17, 56 Am. St. Rep. 742, 34 L. R. A. 723, 35 Atl. 865.

vires;⁵ that the instrument was induced by fraud,⁶ especially fraud in the execution,⁷ or by duress;⁸ that the instrument was to be held in escrow;⁹ that the maker has the right of set-off;¹⁰ breach of condition releasing a party thereto as that the maker had contracted for a specified application of the proceeds of the note;¹¹ illegality,¹² as that the instrument is usurious;¹³ that the instrument was without consideration;¹⁴ or that the consideration for which the instrument was given has failed;¹⁵ or that the instrument has been paid;¹⁶ breach of warranty;¹⁷ or that the maker

⁵ *Bassick v. Aetna Explosives Co.*, 246 Fed. 974; *Luden v. Enterprise Lumber Co.*, 146 Ga. 284, L. R. A. 1917C, 485, 91 S. E. 102; *J. C. Brill Co. v. Norton & T. Street R. Co.*, 189 Mass. 431, 2 L. R. A. (N.S.) 525, 75 N. E. 1090; *National Park Bank v. Warehouse Co.*, 116 N. Y. 281, 5 L. R. A. 673, 22 N. E. 567.

⁶ *Alabama. Lockwood v. Tate*, 96 Ala. 353, 11 So. 406.

Arizona. Lentz v. Landers, — Ariz. —, 185 Pac. 821.

Colorado. Carlson v. Rensink, — Colo. —, 3 A. L. R. 72, 173 Pac. 542.

Kentucky. Sparr v. Fulton National Bank, 179 Ky. 755, 201 S. W. 310.

Maryland. Griffith v. Shipley, 74 Md. 591, 14 L. R. A. 405, 22 Atl. 1107.

Minnesota. National Citizens' Bank v. Ertz, 83 Minn. 12, 85 Am. St. Rep. 438, 53 L. R. A. 174, 85 N. W. 821.

New York. Goshen National Bank v. Bingham, 118 N. Y. 349, 16 Am. St. Rep. 765, 7 L. R. A. 595, 23 N. E. 180; *Canajoharie National Bank v. Diefendorf*, 123 N. Y. 191, 10 L. R. A. 676, 25 N. E. 402.

South Carolina. Hickson v. Early, 62 S. Car. 42, 39 S. E. 782.

⁷ *Hulett v. Marine Savings Bank*, 143 Mich. 219, 4 L. R. A. (N.S.) 1042, 106 N. W. 879.

⁸ *Shirk v. Neible*, 156 Ind. 66, 83 Am. St. Rep. 150, 59 N. E. 281; *Galusha v. Sherman*, 105 Wis. 263, 47 L. R. A. 417, 81 N. W. 495.

⁹ *De Garmo v. Kay*, — Utah —, 173 Pac. 129.

The maker may show that it was delivered under a contract to bequeath

it to a certain beneficiary. *Newton v. Newton*, 46 Minn. 33, 48 N. W. 450.

¹⁰ *Colton v. Loan Association*, 90 Md. 85, 78 Am. St. Rep. 431, 46 L. R. A. 388, 45 Atl. 23; *Gould v. Svendsgaard*, 141 Minn. 437, 170 N. W. 595; *Curlee v. Ruland*, 56 Okla. 329, 155 Pac. 1182.

¹¹ *Greever v. Bank*, 99 Va. 547, 39 S. E. 159.

¹² *Maine Mile-Track Association v. Hammond*, 127 Mich. 690, 87 N. W. 135; *Manson v. Harris*, — Utah —, 170 Pac. 970.

¹³ *Tucker v. Fouts*, — Fla. —, L. R. A. 1917F, 916, 76 So. 130; *Schlesinger v. Lehmaier*, 191 N. Y. 69, 123 Am. St. Rep. 591, 16 L. R. A. (N.S.) 626, 83 N. E. 657.

¹⁴ *Morris v. Banking Co.*, 109 Ga. 12, 46 L. R. A. 506, 34 S. E. 378; *Henneberry v. Morse*, 56 Ill. 394; *Peterson v. Johnson*, 22 Wis. 21, 94 Am. Dec. 581.

¹⁵ *Russ Lumber Co. v. Water Co.*, 120 Cal. 521, 65 Am. St. Rep. 186, 52 Pac. 995; *Hays v. Plummer*, 126 Cal. 107, 77 Am. St. Rep. 153, 58 Pac. 447; *Eichberg v. Board of Education*, 165 Ky. 814, 178 S. W. 1075; *Sparr v. Fulton National Bank*, 179 Ky. 755, 201 S. W. 310; *Battery Park Bank v. Loughran*, 126 N. Car. 814, 36 S. E. 281; *Parker v. Horton*, — N. Car. —, 96 S. E. 904; *Gulbranson-Dickinson Co. v. Hopkins*, — Wis. —, 175 N. W. 93.

¹⁶ *Fairfield County National Bank v. Hammer*, 89 Conn. 592, L. R. A. 1918E, 163, 95 Atl. 31; *Bank v. Pennsylvania & Kentucky Fire Brick Co.*, 175 Ky. 192, L. R. A. 1918E, 165, 194 S. W. 110.

¹⁷ *Baker State Bank v. Grant*, 54 Mont. 7, 166 Pac. 27.

is an accommodation party, and that the real creditor has had sufficient funds on deposit with the holder, subject to the payment of such debt.¹⁸ As between the promisor and an assignee who is not a bona fide holder for value, it follows that the question of negotiability is immaterial for the purpose of affecting the defenses which the promisor may make.

One who is not a bona fide holder may be protected as against certain defenses on the theory of estoppel.¹⁹ A payee, B, who has intrusted C with apparent indicia of title, can not assert his true title to the note as against D, a bona fide holder, to whom C has transferred such note.²⁰ Conduct which does not mislead the holder does not amount to estoppel.²¹ If C has bought a number of notes from B, with notice of defects which A may interpose, A's payment of one of such notes does not prevent him from setting up such defense as against another note.²²

§ 2346. When in hands of bona fide holder—General principles. The chief peculiarity of a negotiable contract, therefore, is its effect in the hands of a bona fide holder, who may enforce the negotiable instrument free from all defenses which could have been made against the original payee,¹ except those which are discussed

¹⁸ *Fruitticher Electric Co. v. Birmingham Trust & Savings Co.*, — Ala. —, 79 So. 248.

¹⁹ *Gardner v. Beacon Trust Co.*, 190 Mass. 27, 2 L. R. A. (N.S.) 767, 76 N. E. 455.

²⁰ *Gardner v. Beacon Trust Co.*, 190 Mass. 27, 2 L. R. A. (N.S.) 767, 76 N. E. 455.

²¹ *Eichberg v. Board of Education*, 165 Ky. 814, 178 S. W. 1075.

²² *Eichberg v. Board of Education*, 165 Ky. 814, 178 S. W. 1075.

¹ *Alabama*. *Jefferson County Savings Bank v. Compton*, 192 Ala. 16, 68 So. 261; *Vogler v. Manson*, — Ala. —, 76 So. 117; *Jones v. Bell*, — Ala. —, 77 So. 998; *Davies v. Simpson*, — Ala. —, 79 So. 48.

Arizona. *Hurley v. Wilky*, 18 Ariz. 45, 156 Pac. 83 [order reversed on rehearing, *Hurley v. Wilky*, 18 Ariz. 270, 158 Pac. 639]; *Phoenix Safety Investment Co. v. Michaels*, — Ariz. —, 176 Pac. 587.

Arkansas. *Conqueror Trust Co. v. Reves Drug Co.*, 118 Ark. 222, 176 S.

W. 119; *Hamilton National Bank v. Emigh*, 127 Ark. 545, 192 S. W. 913; *Manley Carriage Co. v. Fowler*, 128 Ark. 299, 194 S. W. 708.

Colorado. *Burnham Loan & Investment Co. v. Sethman*, — Colo. —, 171 Pac. 884.

District of Columbia. *Thompson v. Franklin National Bank*, 45 D. C. App. 218.

Florida. *Commercial National Bank v. Jordan*, 71 Fla. 566, 71 So. 760.

Georgia. *Jenkins v. Jones*, 108 Ga. 556, 34 S. E. 149; *Linderman v. Atkins*, 143 Ga. 366, 85 S. E. 101; *J. Furman Evans Co. v. Bryson*, 146 Ga. 278, 91 S. E. 71; *Chandler v. Smith*, 147 Ga. 637, 95 S. E. 223.

Idaho. *Southwest National Bank v. Lindsley*, 29 Ida. 343, 158 Pac. 1082.

Illinois. *Zollman v. Jackson Trust & Savings Bank*, 238 Ill. 290, 32 L. R. A. (N.S.) 858, 87 N. E. 297.

Iowa. *Voss v. Chamberlain*, 139 Ia. 569, 19 L. R. A. (N.S.) 106, 117 N. W. 269; *Waukeet Savings Bank v. Jones*, 179 Ia. 261, 159 N. W. 691;

subsequently.² This rule has been carried into the Negotiable Instruments Law, which provides: "A holder in due course holds the instrument free from any defect of title of prior parties, and

State v. Wegener, 180 Ia. 102, 162 N. W. 1040; **Gray v. Bricker**, 182 Ia. 816, 166 N. W. 284.

Kansas. **Stevens v. Keegan**, 103 Kan. 79, 172 Pac. 1025.

Kentucky. **Gaertner v. Kraft**, 164 Ky. 712, 176 S. W. 207; **First National Bank v. Utterback**, 177 Ky. 76, L. R. A. 1918B, 838, 197 S. W. 534.

Louisiana. **McCowen v. Barnett**, 136 La. 994, 68 So. 102.

Maine. **Gregory v. Pike**, 94 Me. 27, 46 Atl. 793.

Massachusetts. **Whitman v. Fournier**, — Mass. —, 125 N. E. 303.

Michigan. **First National Bank v. Shaw**, 149 Mich. 362, 13 L. R. A. (N.S.) 426, 112 N. W. 904.

Minnesota. **Finseth v. Scherer**, 138 Minn. 355, 165 N. W. 124.

Mississippi. **Huddleston v. McMillan**, 112 Miss. 168, 72 So. 892.

Missouri. **Bacon v. Theiss**, — Mo. —, 208 S. W. 254.

New Jersey. **Mechanics' Bank v. Chardavoyne**, 69 N. J. L. 256, 55 Atl. 1080; **State v. Scarlett**, 91 N. J. L. 200, 2 A. L. R. 83, 102 Atl. 160.

New York. **Havana Central Railroad Co. v. Knickerbocker Trust Co.**, 198 N. Y. 422, L. R. A. 1915B, 720, 92 N. E. 12.

New Mexico. **First National Bank v. Stover**, 21 N. M. 453, L. R. A. 1916D, 1280, 155 Pac. 905.

Oklahoma. **Morrison v. Bank**, 9 Okla. 697, 60 Pac. 273; **McPherrin v. Tittle**, 36 Okla. 510, 44 L. R. A. (N.S.) 395, 129 Pac. 721; **Hodgins v. Northwestern Finance Co.**, 46 Okla. 95, 148 Pac. 717; **Security Trust & Savings Bank v. Gleichmann**, 50 Okla. 441, L. R. A. 1915F, 1203, 150 Pac. 908; **Deming Investment Co. v. Shannon**, — Okla. —, 162 Pac. 471; **Critser v. Steele**, — Okla. —, 162 Pac. 795; **Conqueror Trust Co. v. Simmon**, — Okla. —, 162 Pac. 1098; **Westlake v. Cooper**,

— Okla. —, L. R. A. 1918D, 522, 171 Pac. 859; **State v. Emery**, — Okla. —, 174 Pac. 770; **Union National Bank v. Mayfield**, — Okla. —, 2 A. L. R. 135, 174 Pac. 1034.

Oregon. **Everding v. Toft**, 82 Or. 1, 150 Pac. 757, 160 Pac. 1160; **Clarinda Trust & Savings Bank v. Doty**, 83 Or. 214, 163 Pac. 418.

Pennsylvania. **Ross v. Eyre**, 260 Pa. St. 393, 103 Atl. 894.

South Carolina. **Edens v. Gibson**, 100 S. Car. 353, 84 S. E. 1005; **Iowa City State Bank v. Hoefer**, 101 S. Car. 207, 85 S. E. 406; **Farmers' & Mechanics' Bank v. Whitehead**, 105 S. Car. 100, 89 S. E. 657.

South Dakota. **Coleman v. Valentin**, 39 S. D. 323, 164 N. W. 67.

Texas. **Brannin v. Richardson**, 108 Tex. 112, 185 S. W. 562.

Utah. **Rosenblum v. Gomoll**, — Utah. —, 173 Pac. 243.

Vermont. **City Savings & Trust Co. v. Peck**, — Vt. —, 103 Atl. 1020.

Virginia. **Ratcliffe v. Costello**, 117 Va. 583, 85 S. E. 469.

Washington. **Fisk Rubber Co. v. Pinkey**, 100 Wash. 220, 170 Pac. 581.

West Virginia. **Hurlburt v. Straub**, 54 W. Va. 303, 46 S. E. 163; **Rusmisaell v. White Oak Stave Co.**, 80 W. Va. 400, 92 S. E. 672; **Mason v. Shaffer**, 82 W. Va. 632, 96 S. E. 1023.

Wisconsin. **Arnd v. Sjoblom**, 131 Wis. 642, 10 L. R. A. (N.S.) 842, 111 N. W. 666.

Wyoming. **Acme Coal Co. v. Northrup National Bank**, 23 Wyom. 66, L. R. A. 1915D, 1084, 146 Pac. 593.

A broker who has sold stolen negotiable bonds is not liable to the holder if he acted in good faith. **Pratt v. Higginson**, 230 Mass. 256, 1 A. L. R. 714, 119 N. E. 661; **Dean v. Vice**, — Mass. —, 124 N. E. 673.

² See §§ 1296-1299.

free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."³

§ 2347. Defenses not available against bona fide holder. Fraud in the inducement,¹ constructive fraud,² duress,³ ultra vires, where the contract might under some facts be within the power of the corporation, but under the facts of the particular case is not;⁴

³ Section 57 of the Negotiable Instruments Law.

¹ **United States.** *Swift v. Tyson*, 41 U. S. (16 Pet.) 1, 10 L. ed. 865; *Chilton v. Gratton*, 82 Fed. 873.

Arizona. *Phoenix Safety Investment Co. v. Michaels*, — Ariz. —, 176 Pac. 587.

Arkansas. *Conqueror Trust Co. v. Reves Drug Co.*, 118 Ark. 222, 176 S. W. 119.

Connecticut. *Rowland v. Fowler*, 47 Conn. 347.

District of Columbia. *Thompson v. Franklin National Bank*, 45 D. C. App. 218.

Georgia. *Walters v. Palmer*, 110 Ga. 776, 36 S. E. 79.

Illinois. *Taft v. Myerscough*, 92 Ill. App. 560.

Indiana. *Brickley v. Edwards*, 131 Ind. 3, 30 N. E. 708.

Iowa. *Shenandoah National Bank v. Marsh*, 89 Ia. 273, 48 Am. St. Rep. 381, 56 N. W. 458; *Gray v. Bricker*, 182 Ia. 816, 166 N. W. 284.

Louisiana. *McCowen v. Barnett*, 136 La. 994, 68 So. 102.

Massachusetts. *Potter v. Belden*, 105 Mass. 11; *Paika v. Perry*, 225 Mass. 563, 114 N. E. 830.

Michigan. *First National Bank v. Houseknecht*, 121 Mich. 313, 80 N. W. 13.

Missouri. *Fitzgerald v. Barker*, 96 Mo. 661, 9 Am. St. Rep. 375, 10 S. W. 45, s. c., 85 Mo. 13, 70 Mo. 685.

New York. *First National Bank v. Bank*, 170 N. Y. 88, 62 N. E. 1089.

Oklahoma. *First National Bank v.*

Walker, 39 Okla. 620, 50 L. R. A. (N.S.) 1115, 136 Pac. 408.

Oregon. *Everding v. Toft*, 82 Or. 1, 150 Pac. 757, 160 Pac. 1160.

South Carolina. *McLaughlin v. Braddy*, 63 S. Car. 433, 90 Am. St. Rep. 681, 41 S. E. 523; *Edens v. Gibson*, 100 S. Car. 353, 84 S. E. 1005; *Farmers' & Mechanics' Bank v. Whitehead*, 105 S. Car. 100, 89 S. E. 657.

Tennessee. *Tradesmen's National Bank v. Looney*, 99 Tenn. 278, 63 Am. St. Rep. 830, 38 L. R. A. 837, 42 S. W. 149.

² *National City Bank v. Shelton Electric Co.*, 96 Wash. 74, 164 Pac. 933.

³ *State v. Wegener*, 180 Ia. 102, 162 N. W. 1040; *Vinton v. King*, 86 Mass. (4 All.) 562; *Farmers', etc., Bank v. Butler*, 48 Mich. 192, 12 N. W. 36; *Keller v. Schmidt*, 104 Wis. 596, 80 N. W. 935.

Contra, *Palmer v. Poor*, 121 Ind. 135, 6 L. R. A. 469, 22 N. E. 984. (But in this case the evidence showed that there was no delivery, the note being forcibly taken from the maker by the payee.) *Barry v. Assurance Society*, 59 N. Y. 587.

Even a bona fide holder may be compelled to exhaust his remedies against one of two joint endorsers if the other was subjected to undue influence, before proceeding against such other. *Bensel v. Anderson*, 85 N. J. Eq. 391, 96 Atl. 910.

⁴ *Credit Co. v. Machine Co.*, 54 Conn. 357, 1 Am. St. Rep. 123, 8 Atl. 472; *Thompson v. West*, 59 Neb. 677, 49 L. R. A. 337, 82 N. W. 13.

want of authority in the agent indorsing the instrument if under the circumstances apparent he might have had power to indorse;⁵ the date of execution;⁶ that delivery was conditional only,⁷ as that the instrument, though delivered, was not to go into effect until signed by additional securities;⁸ that the instrument was authorized only for a purpose different from that to which it has been applied;⁹ want of consideration;¹⁰ indorsement in blank by a prior holder for collection;¹¹ illegality,¹² such as usury,¹³ gambling;¹⁴ that the note was given by way of compounding a

⁵Johnson v. Harrison, 177 Ind. 240, 39 L. R. A. (N.S.) 1207, 97 N. E. 930; Toms v. Jones, 127 N. Car. 464, 37 S. E. 480; Perry v. Oerman, 63 W. Va 566, 15 L. R. A. (N.S.) 310, 60 S. E. 604.

As to a bona fide holder, a bank is bound by a check, regularly certified, even if it proves to have been an overdraft. State v. Scarlett, 91 N. J. L. 200, 2 A. L. R. 83, 102 Atl. 160.

⁶Gray, etc., Co. v. Bank, 109 Ky. 694, 60 S. W. 537.

⁷Jefferson County Savings Bank v. Compton, 192 Ala. 16, 68 So. 261; Wauke Savings Bank v. Jones, 179 Ia. 261, 159 N. W. 691; German-American Bank v. Wright, 85 Wash. 460, 148 Pac. 769.

⁸Benton County Savings Bank v. Boddicker, 105 Ia. 548, 67 Am. St. Rep. 310, 45 L. R. A. 321, 75 N. W. 632.

⁹Rusmisse v. White Oak Stave Co., 80 W. Va. 400, 92 S. E. 672.

¹⁰California. Siebe v. Machine Works, 86 Cal. 390, 25 Pac. 14.

Georgia. Parr v. Erickson, 115 Ga. 873, 42 S. E. 240.

Illinois. Martina v. Muhlke, 186 Ill. 327, 57 N. E. 954.

Iowa. Bankers', etc., Bank v. Lathe Co. (Ia.), 90 N. W. 612.

Kentucky. Gaertner v. Kraft, 164 Ky. 712, 176 S. W. 207.

Maryland. Williams v. Huntington, 68 Md. 590, 6 Am. St. Rep. 477, 13 Atl. 336.

Massachusetts. Produce Exchange Trust Co. v. Bieberbach, 176 Mass. 577, 58 N. E. 162.

Montana. First National Bank v. Barrett, 52 Mont. 359, 157 Pac. 951.

Pennsylvania. Ross v. Eyre, 260 Pa. St. 303, 103 Atl. 894.

Tennessee. Bearden v. Moses, 75 Tenn. (7 Lea) 459.

Utah. Salisbury v. Stewart, 15 Utah 308, 62 Am. St. Rep. 934, 49 Pac. 777.

Vermont. Parry v. Empire Granite & Quarry Co., 90 Vt. 231, 97 Atl. 985.

Washington. National City Bank v. Shelton Electric Co., 96 Wash. 74, 164 Pac. 933.

¹¹Coors v. Bank, 14 Colo. 202, 7 L. R. A. 845, 23 Pac. 328.

¹²See, however, as to the effect of special statutory provisions. § 2351.

¹³United States. Hamilton v. Fowler, 99 Fed. 18, 40 C. C. A. 47.

Alabama. Vogler v. Manson, — Ala. —, 76 So. 117.

Kentucky. Newman v. Blades (Ky.), 54 S. W. 849.

New York. Schlesinger v. Gilhooly, 189 N. Y. 1, 81 N. E. 619.

Virginia. Lynchburg National Bank v. Scott, 91 Va. 652, 50 Am. St. Rep. 860, 29 L. R. A. 827, 22 S. E. 487.

Washington. Haynes v. Gay, 37 Wash. 230, 79 Pac. 794.

¹⁴Wirt v. Stubblefield, 17 D. C. App. 283; Whitman v. Fournier, — Mass. —, 125 N. E. 303.

felony;¹⁵ that the note was given to an unlicensed physician for professional services;¹⁶ or that it was given for stock which was sold without complying with statutory requirements;¹⁷ or was given to a foreign corporation which has not complied with the law authorizing it to do business in that state;¹⁸ or that it was given in violation of a statute which required the consideration to appear in detail on its face;¹⁹ fraud against the creditors of the maker;²⁰ that the taking of the note is obtaining a preference under the bankruptcy act;²¹ or discharge, as by failure of consideration,²² or partial failure of consideration;²³ payment;²⁴ dis-

¹⁵ *American National Bank v. Madison*, 144 Ky. 152, 38 L. R. A. (N.S.) 597, 137 S. W. 1076.

¹⁶ *Citizens' State Bank v. Nore*, 67 Neb. 69, 60 L. R. A. 737, 93 N. W. 160.

¹⁷ *Evans Co. v. Bryson*, 146 Ga. 278, 91 S. E. 71.

¹⁸ *Commercial National Bank v. Jordan*, 71 Fla. 566, 71 So. 760; *First National Bank v. Utterback*, 177 Ky. 76, L. R. A. 1918B, 838, 197 S. W. 534; *Finseth v. Scherer*, 138 Minn. 355, 165 N. W. 124; *National Bank v. Pick*, 13 N. D. 74, 99 N. W. 63.

¹⁹ As where it was given for lighting rods. *Arnd v. Sjoblom*, 131 Wis. 642, 10 L. R. A. (N.S.) 842, 111 N. W. 666.

²⁰ *Holmes v. Gardner*, 50 O. S. 167, 20 L. R. A. 329, 33 N. E. 644.

²¹ *Thompson v. Franklin National Bank*, 45 D. C. App. 218.

²² *Alabama*. *King v. Bank*, 127 Ala. 266, 28 So. 658.

Colorado. *Burnham Loan & Investment Co. v. Sethman*, — Colo. —, 171 Pac. 884.

Georgia. *English-American, etc., Co. v. Hiers*, 112 Ga. 823, 38 S. E. 103.

Mississippi. *Huddleston v. McMillan*, 112 Miss. 168, 72 So. 892.

Missouri. *First National Bank v. Skeen*, 101 Mo. 683, 11 L. R. A. 748, 14 S. W. 732.

New York. *Mayer v. Heidelberg*, 123 N. Y. 332, 9 L. R. A. 850, 25 N. E. 416.

North Carolina. *American National Bank v. Hill*, 169 N. Car. 235, 85 S. E. 209.

Oklahoma. *Conqueror Trust Co. v. Simmon*, — Okla. —, 162 Pac. 1098; *Producers' National Bank v. Elrod*, — Okla. —, L. R. A. 1918F, 1016, 173 Pac. 659.

Oregon. *Clarinda Trust & Savings Bank v. Doty*, 83 Or. 214, 163 Pac. 418.

South Carolina. *Iowa City State Bank v. Hoefer*, 101 S. Car. 207, 85 S. E. 406.

South Dakota. *Coleman v. Valentin*, 39 S. D. 323, 164 N. W. 67.

Texas. *Brannin v. Richardson*, 108 Tex. 112, 185 S. W. 562.

Vermont. *Parry v. Empire Granite & Quarry Co.*, 90 Vt. 231, 97 Atl. 985; *City Savings & Trust Co. v. Peck*, — Vt. —, 103 Atl. 1020.

Virginia. *Payne v. Zell*, 98 Va. 294, 36 S. E. 379.

Washington. *Fisk Rubber Co. v. Pinkey*, 100 Wash. 220, 170 Pac. 581.

West Virginia. *Mason v. Shaffer*, 82 W. Va. 632, 96 S. E. 1023.

²³ *Deming Investment Co. v. Shannon*, — Okla. —, 162 Pac. 471.

²⁴ *Arkansas*. *Calhoun v. Ainsworth*, 118 Ark. 316, L. R. A. 1915E, 395, 176 S. W. 316; *Hamilton National Bank v. Emigh*, 127 Ark. 545, 192 S. W. 913; *Manley Carriage Co. v. Fowler*, 128 Ark. 299, 194 S. W. 708.

Illinois. *Hunter v. Clarke*, 184 Ill. 158, 75 Am. St. Rep. 160, 56 N. E. 297.

charge by novation between the original parties;²⁵ or by substitution of other notes for the originals;²⁶ or a contract by a prior holder with the maker, giving an extension of time which would release sureties as to such holder;²⁷ or a contract as to collateral securities,²⁸ or set-off,²⁹ are defenses, none of which can be interposed as against a bona fide holder for value. So if a negotiable instrument payable in legal effect to bearer is stolen after delivery, it is valid in the hands of a bona fide holder.³⁰

§ 2348. Defenses available against a bona fide holder—Want of capacity. There are certain defenses, however, which may be made even against a bona fide holder for value. Any defense which goes to the capacity of the party against whom the liability is sought to be enforced, may be made.¹ Infancy,² insanity,³ and imbecility,⁴

Kentucky. *Citizens' Bank v. Waddy*, 126 Ky. 169, 103 S. W. 249 [sub nomine, *Citizens' Bank v. Weakley*, 11 L. R. A. (N.S.) 598].

Missouri. *Bacon v. Theiss*, — Mo. —, 208 S. W. 254.

North Carolina. *Rice v. Jones*, 103 N. Car. 226, 14 Am. St. Rep. 801, 9 S. E. 571.

Oklahoma. *Critser v. Steeley*, — Okla. —, 162 Pac. 795.

South Carolina. *Farmers' Bank v. Crawford*, 103 S. Car. 340, 88 S. E. 13.

Texas. *Brannin v. Richardson*, 108 Tex. 112, 185 S. W. 562.

Utah. *Rosenblum v. Gomoll*, — Utah —, 173 Pac. 243.

²⁵ *Shaffer v. Peavey*, 161 Wis. 149, 152 N. W. 829.

²⁶ *Farmers' Bank v. Crawford*, 103 S. Car. 340, 88 S. E. 13.

²⁷ *Nelson v. Brown*, 140 Mo. 580, 62 Am. St. Rep. 755, 41 S. W. 960.

²⁸ *Mercantile Trust Co. v. Donk*, — Mo. —, 178 S. W. 113.

²⁹ *Stevens v. Keegan*, 103 Kan. 79, 172 Pac. 1025.

³⁰ *Voss v. Chamberlain*, 139 Ia. 569, 19 L. R. A. (N.S.) 106, 117 N. W. 269; *Manhattan Savings Institution v. Bank*, 170 N. Y. 58, 88 Am. St. Rep. 640, 62 N. E. 1079; *Cochran v. Fox Checto Bank*, 209 Pa. St. 34, 103 Am. St. Rep. 976, 58 Atl. 117.

See also, *London Joint Stock Bank v. Simmons* [1892], A. C. 201. Where the negotiable instruments were wrongfully appropriated by the agent of the holder.

¹ *Murray v. Thompson*, 136 Tenn. 118, L. R. A. 1917B, 1172, 188 S. W. 578; *Brumley v. Chattanooga Speedway & Motordome Co.*, 138 Tenn. 534, 198 S. W. 775.

² *Howard v. Simpkins*, 70 Ga. 322; *Murray v. Thompson*, 136 Tenn. 118, L. R. A. 1917B, 1172, 188 S. W. 578. So under the Negotiable Instruments Act. *Murray v. Thompson*, 136 Tenn. 118, L. R. A. 1917B, 1172, 188 S. W. 578.

Infancy of the principal is not a discharge to the surety. *Hodgins v. Northwestern Finance Co.*, 46 Okla. 95, 148 Pac. 717.

³ *American Trust Co. v. Boone*, 102 Ga. 202, 66 Am. St. Rep. 167, 40 L. R. A. 250, 29 S. E. 182; *McClain v. Davis*, 77 Ind. 419.

Contra, *Moore v. Hershey*, 90 Pa. St. 196.

If A signs a note as accommodation indorser while sane and renews when insane, the payee being ignorant of his insanity, A is liable. *Bank v. Sneed*, 97 Tenn. 120, 56 Am. St. Rep. 788, 34 L. R. A. 274, 36 S. W. 716.

⁴ *Hosler v. Beard*, 54 O. S. 398, 56 Am. St. Rep. 720, 35 L. R. A. 161,

may be set up against a bona fide holder whenever such defenses could have been set up against the original payee. Voluntary intoxication has, however, been held not to be a valid defense against a bona fide holder.⁵ This rule is altered by the effect of the Negotiable Instruments Law, in the form in which it has been enacted in some jurisdictions; and intoxication is a defense as against a bona fide holder.⁶ Coverture may be interposed as a defense against a bona fide holder.⁷ Want of power of a public corporation may be set up against a bona fide holder,⁸ at least if such want of power exists generally and does not depend on certain facts which are unknown to such holder.⁹

§ 2349. Want of execution. Any defense which goes to the execution of the instrument, and shows that no instrument was ever in fact executed, may be made.¹ Forgery is a defense which

43 N. E. 1040; *Brumley v. Chattanooga Speedway & Motordome Co.*, 138 Tenn. 534, 198 S. W. 775.

⁵ *State Bank v. McCoy*, 69 Pa. St. 204, 8 Am. Rep. 246; *Smith v. Williamson*, 8 Utah 219, 30 Pac. 753.

⁶ Under a statute which provides: "The title of a person who negotiates an instrument is defective within the meaning of this act, when he obtains the instrument or any signature thereto, by fraud, duress, or force or fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud, and the title of such person is absolutely void when such instrument or signature was so procured from a person who did not know the nature of the instrument, and could not have obtained such knowledge by the use of ordinary care." (Wisconsin Statutes § 1676-25). A note given by an intoxicated maker is void in the hands of a bona fide holder. *Green v. Gunsten*, 154 Wis. 69, 46 L. R. A. (N.S.) 212, 142 N. W. 261.

⁷ Note by married woman to hus-

band, even if indorsed for debt of wife. *National Granite Bank v. Tynedale*, 176 Mass. 547, 51 L. R. A. 447, 57 N. E. 1022; *National Granite Bank v. Whicher*, 173 Mass. 517, 73 Am. St. Rep. 317, 53 N. E. 1004. Married woman surety for husband contrary to statute. *Voreis v. Nusbaum*, 131 Ind. 267, 16 L. R. A. 45, 31 N. E. 70.

Contra, *Davies v. Simpson*, — Ala. —, 79 So. 48; *Birmingham Trust & Savings Co. v. Howell*, — Ala. —, 79 So. 377.

⁸ *Swanson v. Ottumwa*, 131 Ia. 540, 5 L. R. A. (N.S.) 860, 106 N. W. 9.

⁹ See §§ 1965 et seq.

¹ *Arizona*. *Hurley v. Wilky*, 18 Ariz. 270, 158 Pac. 639 [reversing on rehearing, 18 Ariz. 45, 156 Pac. 83].

Illinois. *Vannatta v. Lindley*, 198 Ill. 40, 64 N. E. 735.

Montana. *First National Bank v. Barrett*, 52 Mont. 359, 157 Pac. 951.

Oklahoma. *First National Bank v. Wade*, 27 Okla. 102, 35 L. R. A. (N.S.) 775, 111 Pac. 205.

Utah. *Simpson v. Railroad*, 43 Utah, 105, 46 L. R. A. (N.S.) 1164, 134 Pac. 883.

may be interposed against a bona fide holder by the maker whose name is forged,² but not by other joint and several makers.³

If the instrument is never delivered, and passes into the possession of the payee without the fault of the maker, as where it was drawn for practice, and taken by the payee without the maker's knowledge,⁴ or is taken by the payee without the maker's consent before he is ready to deliver it,⁵ the maker may defend against a bona fide holder. There are some authorities, however, which hold that in such cases the maker is liable to a bona fide holder even if he is free from negligence in allowing the payee to take possession of the instrument,⁶ as where the instrument is taken from him forcibly,⁷ or is stolen from him.⁸ In these last cases, however, it does not always appear affirmatively that the maker was free from negligence, though that inference must be drawn from the facts appearing in the opinions. If the maker has been negligent, and thereby has allowed the instrument to come into the possession of the payee, he is liable to a bona fide holder, on principles of estoppel, though as between himself and the payee no delivery took place.⁹ Under the provision of the Negotiable Instruments Law, to the effect that "where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed," a holder in due course may recover against the maker on an instrument which was stolen from the maker before delivery.¹⁰

Even where negligence does not exist, the maker is liable to a bona fide holder on negotiable instruments not delivered by him

² First National Bank v. Barrett, 52 Mont. 359, 157 Pac. 951.

³ First National Bank v. Shaw, 149 Mich. 362, 13 L. R. A. (N.S.) 426, 112 N. W. 904.

⁴ Salley v. Terril, 95 Me. 553, 85 Am. St. Rep. 433, 55 L. R. A. 730, 50 Atl. 896.

⁵ Burson v. Huntington, 21 Mich. 415, 4 Am. Rep. 497; Salley v. Terril, 95 Me. 553, 85 Am. St. Rep. 433, 55 L. R. A. 730, 50 Atl. 896; Branch v. Commissioners, 80 Va. 427, 56 Am. Rep. 596; Dodd v. Dunne, 71 Wis. 578, 37 N. W. 430.

⁶ Clarke v. Johnson, 54 Ill. 296; Kinyon v. Wohlford, 17 Minn. 239, 10 Am. Rep. 165.

See also, Worcester County Bank v. Dorchester & M. Bank, 64 Mass. (10 Cush.) 488, 57 Am. Dec. 120 (unissued bank bills).

⁷ Clarke v. Johnson, 54 Ill. 296.

⁸ Shipley v. Carroll, 45 Ill. 285.

So of unissued bank-notes. Worcester County Bank v. Bank, 64 Mass. (10 Cush.) 488, 57 Am. Dec. 120.

So of unissued treasury-notes, Cooke v. United States, 91 U. S. 389, 23 L. ed. 237.

⁹ Dodd v. Dunne, 71 Wis. 578, 37 N. W. 430.

¹⁰ Angus v. Downs, 85 Wash. 75, L. R. A. 1915E, 351, 147 Pac. 630.

which are put into circulation by one to whom the maker has voluntarily entrusted their custody. Thus if the maker allows the payee to take possession of the instrument upon the understanding that it is to take effect only if others sign it, he can not defend against a bona fide holder to whom it passes without such signature,¹¹ though he could interpose such defense against the payee.¹² So if a note is deposited in escrow and is delivered in breach of the conditions of delivery and without the knowledge of the maker, he is liable thereon to a bona fide holder.¹³

If a maker signs a note by reason of operative mistake, misrepresentation or fraud in the execution,¹⁴ he may interpose such defense even as against a bona fide holder, if he has not been negligent in so signing it.¹⁵ Some authorities, however, hold that the maker is liable in such cases to a bona fide holder even if he was free from negligence.¹⁶

If the maker is negligent in executing the instrument without knowing its contents, he is liable to a bona fide holder of the instrument.¹⁷ Thus where A knew that B had tried to defraud him by an alleged order for lightning-rods, and A, who can not read, relies further on B's representations and signs a note, understanding that it is to be non-negotiable, A is liable thereon to a bona

¹¹ Iowa. *Micklewait v. Noel*, 69 Ia. 344, 28 N. W. 630.

Kentucky. *Smith v. Moberly*, 49 Ky. (10 B. Mon.) 266, 52 Am. Dec. 543.

Minnesota. *First National Bank of Freeport v. Mfg. Co.*, 61 Minn. 274, 63 N. W. 731.

North Dakota. *Porter v. Andrus*, 10 N. D. 558, 88 N. W. 567.

Tennessee. *Lookout Bank v. Aull*, 93 Tenn. 645, 42 Am. St. Rep. 934, 27 S. W. 1014.

¹² See § 1205.

¹³ *Graff v. Logue*, 61 Ia. 704, 17 N. W. 171; *Chase National Bank v. Faurot*, 149 N. Y. 532, 35 L. R. A. 605, 44 N. E. 164.

Contra, *Chipman v. Tucker*, 38 Wis. 43, 20 Am. Rep. 1.

¹⁴ See § 236.

¹⁵ Indiana. *Cline v. Guthrie*, 42 Ind. 227, 13 Am. Rep. 357.

Iowa. *Green v. Wilkie*, 98 Ia. 74,

60 Am. St. Rep. 184, 36 L. R. A. 434, 66 N. W. 1046.

Michigan. *Gibbs v. Linabury*, 22 Mich. 479, 7 Am. Rep. 675.

Nebraska. *Willard v. Nelson*, 35 Neb. 651, 37 Am. St. Rep. 455, 53 N. W. 572.

Ohio. *De Camp v. Hamma*, 29 O. S. 467.

Oklahoma. *First National Bank v. Wade*, 27 Okla. 102, 35 L. R. A. (N.S.) 775, 111 Pac. 205.

Utah. *Simpson v. Railroad*, 43 Utah, 105, 46 L. R. A. (N.S.) 1164, 134 Pac. 883.

Wisconsin. *Walker v. Ebert*, 29 Wis. 194, 9 Am. Rep. 548.

¹⁶ *Rowland v. Fowler*, 47 Conn. 347; *First National Bank of Parkersburg v. Johns*, 22 W. Va. 520, 46 Am. Rep. 506.

¹⁷ California. *Bedell v. Herring*, 77 Cal. 572, 11 Am. St. Rep. 307, 20 Pac. 129.

fide holder by reason of his negligence in trusting B after knowing that B was trying to defraud him.¹⁸

Irrespective of questions of negligence, the maker may be estopped as to bona fide holders by his own conduct in delivering an instrument to the wrong party. Thus X represented himself to be A, the traveling agent of Y. X telegraphed to Y, using A's name, to send him fifty dollars by telegraph. Y did so. The telegraph company drew a check to A and delivered it to X. While there was such a mistake as to the identity of the parties as would make the contract void between them, and while X was obliged to forge A's name, in indorsing the check, it was held that as against a bona fide indorsee, the telegraph company was estopped from denying that X was the true payee.¹⁹

§ 2350. Alteration. At common law, a material alteration renders the contract void.¹ In negotiable instruments, before the Negotiable Instruments Law, the defense that the instrument was materially altered after the delivery, could be set up against a bona fide holder for value, where it was not the negligence of the maker that made such alteration possible.² He may show that he had marked out the words of negotiability and that such mark

Indiana. *Ruddell v. Phalar*, 72 Ind. 533, 37 Am. Rep. 177.

Iowa. *Wright v. Flinn*, 33 Ia. 159.

Nebraska. *Willard v. Nelson*, 35 Neb. 651, 37 Am. St. Rep. 455, 53 N. W. 572.

Ohio. *Ross v. Doland*, 29 O. S. 473.

Wisconsin. *Keller v. Schmidt*, 104 Wis. 596, 80 N. W. 935.

¹⁸ *Keller v. Schmidt*, 104 Wis. 596, 80 N. W. 935.

¹⁹ *Burrows v. Telegraph Co.*, 86 Minn. 499, 91 Am. St. Rep. 380, 58 L. R. A. 433, 90 N. W. 1111.

¹ See ch. LXXXV.

² **United States.** *Exchange National Bank v. Bank*, 58 Fed. 140, 22 L. R. A. 686.

Arkansas. *Fordyce v. Kosminski*, 49 Ark. 40, 4 Am. St. Rep. 18, 3 S. W. 892; *Arnold v. Wood*, 127 Ark. 234, 191 S. W. 960.

Indiana. *Young v. Baker*, 29 Ind. App. 130, 64 N. E. 54.

Michigan. *Stevens v. Venema*, 202 Mich. 232, 168 N. W. 531.

Mississippi. *Simmons v. Lampton Co.*, 69 Miss. 862, 23 L. R. A. 599, 12 So. 263.

Nebraska. *Erickson v. Bank*, 44 Neb. 622, 28 L. R. A. 577, 62 N. W. 1078.

North Dakota. *Porter v. Hardy*, 10 N. D. 551, 88 N. W. 458; *Aamoth v. Hunter*, 33 N. D. 582, 157 N. W. 299.

Ohio. *Newman v. King*, 54 O. S. 273, 56 Am. St. Rep. 705, 35 L. R. A. 471, 43 N. E. 683.

Oklahoma. *Cox v. Kirkwood*, — Okla. —, 158 Pac. 930; *Wayne County National Bank v. Kneeland*, — Okla. —, 161 Pac. 193; *Voris v. Birdsall*, — Okla. —, 162 Pac. 951.

Pennsylvania. *Citizens' National Bank v. Williams*, 174 Pa. St. 66, 35 L. R. A. 464, 34 Atl. 303.

has been erased.³ If the negligence of the maker has made such alteration possible,⁴ as where he has left blanks in the instrument which have been filled so as to make an apparent contract different from the real contract entered into by the maker,⁵ or where he has written a material part of the contract on such a part of the paper that it can be detached from the rest of the paper easily and without chance of detection,⁶ he has been held liable to a bona fide holder on principles of estoppel. Some authorities, however, hold that even if the maker is negligent in giving opportunity for alteration, he is not liable in case of material alteration even to a bona fide holder.⁷ The ultimate view of some courts, however, seems to be that negligence on the part of the maker may estop him, in case an altered note passes to a bona fide holder, but that leaving a blank in a note is not negligence as a matter of law, but is merely a circumstance to be considered in determining the presence or absence of negligence.⁸

The Negotiable Instruments Law provides: "Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its

³ *Aamoth v. Hunter*, 33 N. D. 582, 157 N. W. 299.

⁴ *Merritt v. Boyden*, 191 Ill. 136, 85 Am. St. Rep. 246, 60 N. E. 907; *Trigg v. Taylor*, 27 Mo. 245, 72 Am. Dec. 263; *Garrard v. Hadden*, 67 Pa. St. 82, 5 Am. Rep. 412.

⁵ *Winter v. Pool*, 104 Ala. 580, 16 So. 543; *Merritt v. Boyden*, 191 Ill. 136, 85 Am. St. Rep. 246, 60 N. E. 907; *Kramer v. Schnitzer*, 268 Ill. 603, 109 N. E. 695; *Cason v. Bank*, 97 Ky. 487, 53 Am. St. Rep. 418, 31 S. W. 40; *Weidman v. Symes*, 120 Mich. 657, 77 Am. St. Rep. 603, 79 N. W. 894.

⁶ *Noll v. Smith*, 64 Ind. 511, 31 Am. Rep. 131; *Brown v. Reed*, 79 Pa. St. 370, 21 Am. Rep. 75.

⁷ *Contra, Wait v. Pomeroy*, 20 Mich. 425, 4 Am. Rep. 395.

⁸ *Fordyce v. Kosminski*, 49 Ark. 40, 4 Am. St. Rep. 18, 3 S. W. 892; *Knoxville National Bank v. Clark*, 51 Ia. 264, 33 Am. Rep. 129, 1 N. W. 491; *Burrows v. Klunk*, 70 Md. 451, 14 Am. St. Rep. 371, 3 L. R. A. 576, 17 Atl. 376; *Searles v. Seipp*, 6 S. D. 472, 61 N. W. 804.

⁹ See also, *National Exchange Bank v. Lester*, 194 N. Y. 461, 21 L. R. A. (N.S.) 402, 87 N. E. 779; *Conger v. Crabtree*, 88 Ia. 536, 45 Am. St. Rep. 249, 55 N. W. 335. If alteration by stranger to contract, bona fide holder may recover on original consideration. *Walsh v. Hunt*, 120 Cal. 46, 39 L. R. A. 697, 52 Pac. 115. If by party, no recovery. *Schwartz v. Wilmer*, 90 Md. 136, 44 Atl. 1059; *Moss v. Maddux*, 108 Tenn. 405, 67 S. W. 855.

original tenor."⁹ Under this section of the Negotiable Instruments Law, a holder in due course, who was not a party to the alteration, may enforce payment of the instrument according to its original tenor.¹⁰ He can not recover in accordance with the altered terms of the contract.¹¹ Under this statute it has been held that the fact that the maker leaves blanks in a check when he delivers it to the payee, does not prevent him from recovering from the bank if the bank has paid such check after it has been altered fraudulently by inserting a larger amount than that which the maker inserted, since by this statute such an alteration makes the instrument absolutely void.¹² If, however, the maker has received the benefit of the instrument as it was originally executed, he must allow the bank credit for the original amount.¹³ It is said that one who is not a bona fide holder can not recover upon a contract which has been altered materially.¹⁴ This section does not apply to an alteration in an overdue note.¹⁵ If the instrument has been altered after maturity by changing its date so as to make it appear that it is not yet due, a bona fide holder can not recover on such instrument against a maker who has paid it.¹⁶ This section does not apply to a holder who required that a fictitious payment be indorsed on the instrument before he would discount it;¹⁷ and it has been held not to apply to a case in which the payee takes for a pre-existing debt a note in which blanks have been filled in violation of instructions.¹⁸

An immaterial alteration does not affect the validity of a non-negotiable instrument,¹⁹ and it does not affect the validity of a

⁹ Section 124 of the Negotiable Instruments Law.

¹⁰ *Arnold v. Wood*, 127 Ark. 234, 191 S. W. 960; *Public Bank v. Burchard*, 135 Minn. 171 [sub nomine, *Public Bank v. Knox-Burchard Mercantile Co.*, 160 N. W. 667]; *Bothell v. Schweitzer*, 84 Neb. 271, 22 L. R. A. (N.S.) 263, 120 N. W. 1129; *Zehr v. Champlin*, — Okla. —, 159 Pac. 1185; *Conqueror Trust Co. v. Simmon*, — Okla. —, 162 Pac. 1098.

¹¹ *Bothell v. Schweitzer*, 84 Neb. 271, 22 L. R. A. (N.S.) 263, 120 N. W. 1129.

¹² *Commercial Bank v. Arden*, 177 Ky. 520, L. R. A. 1918B, 320, 197 S. W. 951.

¹³ *Commercial Bank v. Arden*, 177 Ky. 520, L. R. A. 1918B, 320, 197 S. W. 951.

¹⁴ *Zehr v. Champlin*, 60 Okla. 242, 159 Pac. 1185.

¹⁵ *Pensacola State Bank v. Melton*, 210 Fed. 57; *Fairfield County National Bank v. Hammer*, 89 Conn. 592, L. R. A. 1918E, 163, 95 Atl. 31.

¹⁶ *Fairfield County National Bank v. Hammer*, 89 Conn. 592, L. R. A. 1918E, 163, 95 Atl. 31.

¹⁷ *Washington Finance Corporation v. Glass*, 74 Wash. 653, 46 L. R. A. (N.S.) 1043, 134 Pac. 480.

¹⁸ *Vander Ploeg v. Van Zuuk*, 135 Ia. 350, 13 L. R. A. (N.S.) 490, 112 N. W. 807.

¹⁹ See ch. LXXXV.

negotiable instrument.²⁰ A memorandum to the effect that "this note is to fulfill a certain agreement," is not a material part of the instrument, and the fact that it is erased does not render the instrument invalid in the hands of a bona fide holder.

If the maker has authorized a change in the form of an instrument, such change is not an alteration,²¹ and it does not affect the validity of the negotiable instrument.²² Filling in blanks as to the amount of attorney's fees, to be paid in case of action, with "ten per cent.," does not render the note invalid.²³ A maker who has left blanks in an instrument and has given authority to fill them, but in a specified manner, is liable, although they are filled up in a manner in which he does not specify.²⁴ If a note is attached to an order and authority is given to detach the note upon acceptance, the maker of such note is liable to a bona fide holder after such note is detached from such order, although the maker attempted to countermand such order.²⁵

§ 2351. Defenses permitted by statute. Any defense may be made against a bona fide holder, which is allowed by the express terms of a statute or by its necessary effect.¹ Under a statute allowing "immoral and illegal considerations" to be interposed as a defense against a bona fide holder, a contract to stifle criminal prosecution,² or a contract for the sale of votes or of political influence,³ may be shown as a defense against a note given in performance of such contract. Statutes which make notes void when

²⁰ *Citizens' State Bank v. Johnson County*, 182 Ky. 531, 207 S. W. 8; *Mason v. Shaffer*, 82 W. Va. 632, 96 S. E. 1023.

²¹ See ch. LXXXV.

²² *Kramer v. Schnitzer*, 268 Ill. 603, 109 N. E. 695; *Stevens v. Khetter*, — S. Car. —, 96 S. E. 406; *Johnston v. Knipe*, 260 Pa. St. 504, L. R. A. 1918E, 1042, 103 Atl. 957; *Mason v. Shaffer*, 82 W. Va. 632, 96 S. E. 1023.

²³ *Kramer v. Schnitzer*, 268 Ill. 603, 109 N. E. 695.

²⁴ *Johnston v. Knipe*, 260 Pa. St. 504, L. R. A. 1918E, 1042, 103 Atl. 957.

²⁵ *Stevens v. Khetter*, — S. Car. —, 96 S. E. 406. The opposite result was

reached under a similar contract on the theory that the provision which authorized the note to be detached was in print so fine that the terms were not brought fairly to the knowledge of the maker. *Stevens v. Venema*, 202 Mich. 232, 168 N. W. 531.

¹ *Exchange National Bank v. Henderson*, 139 Ga. 260, 51 L. R. A. (N.S.) 549, 77 S. E. 36; *Eskridge v. Thomas*, 79 W. Va. 322, L. R. A. 1918C, 769, 91 S. E. 7.

² *Jones v. Dannenberg Co.*, 112 Ga. 426, 52 L. R. A. 271, 37 S. E. 729.

³ *Exchange National Bank v. Henderson*, 139 Ga. 260, 51 L. R. A. (N.S.) 549, 77 S. E. 36.

given on a gambling consideration,⁴ or as usury,⁵ or for intoxicating liquors,⁶ or for rent for a house to be used for prostitution,⁷ or by federal statute for land leased from Indians,⁸ or omitting such words as "peddlers' note,"⁹ or "given for a patent right,"¹⁰ permit such defenses to be set up against bona fide holders for value. Even under such statutes the maker may estop himself from setting up such defense by stating to the prospective indorsee before the purchase that the note is valid, and by misleading him by such statement.¹¹

§ 2352. Effect of Negotiable Instruments Law on statutory defenses. The enactment of the Negotiable Instruments Law has raised the question as to the repeal or abrogation of such legislation, with reference to defenses against bona fide holders. It has been urged that such defenses are defects of title, which can not be set up against bona fide holders by the express provisions of Section 57 of the Negotiable Instruments Law, and that such later

⁴ *Pope v. Hanke*, 155 Ill. 617, 28 L. R. A. 568, 40 N. E. 839; *Irwin v. Marquet*, 26 Ind. App. 383, 84 Am. St. Rep. 297, 59 N. E. 38; *Snoddy v. Bank*, 88 Tenn. 573, 17 Am. St. Rep. 918, 7 L. R. A. 705, 13 S. W. 127; *Swinney v. Edwards*, 8 Wyo. 54, 80 Am. St. Rep. 916, 55 Pac. 306.

But a statute applying to certain forms of wagers but not to sales without intention of delivering does not make a note given thereunder void in the hands of a bona fide holder. *Sondheim v. Gilbert*, 117 Ind. 71, 10 Am. St. Rep. 23, 5 L. R. A. 432, 18 N. E. 687; *Crawford v. Spencer*, 92 Mo. 498, 1 Am. St. Rep. 745, 4 S. W. 713.

Contra, that such a statute is to be construed as not applying to a bona fide holder. *Higginbotham v. McGready*, 183 Mo. 96, 105 Am. St. Rep. 461, 81 S. W. 883.

⁵ *Georgia*. *Clarke v. Havard*, 111 Ga. 242, 51 L. R. A. 499, 36 S. E. 837.

Massachusetts. *Bridge v. Hubbard*, 15 Mass. 96, 8 Am. Dec. 86.

New York. *Clafin v. Boorum*, 122 N. Y. 385, 25 N. E. 360; *Sabine v. Paine*, 223 N. Y. 401, 119 N. E. 849.

North Carolina. *Ward v. Sugg*, 113 N. Car. 489, 24 L. R. A. 280, 18 S. E. 717; *Faison v. Grandy*, 128 N. Car. 438, 38 S. E. 897.

West Virginia. *Eskridge v. Thomas*, 79 W. Va. 322, L. R. A. 1918C, 769, 91 S. E. 7.

⁶ *Streit v. Sanborn*, 47 Vt. 702.

⁷ *Mitchell v. Campbell*, 111 Miss. 806, 72 So. 231.

⁸ *Larson v. Bank*, 62 Neb. 303, 87 N. W. 18.

⁹ *Nunn v. Bank*, 107 Ky. 262, 53 S. W. 665.

¹⁰ *Wyatt v. Wallace*, 67 Ark. 575, 55 S. W. 1105. Under most statutes requiring a note given for a patent right to recite that fact the omission of these words does not affect a bona fide holder. *Smith v. Wood*, 111 Ga. 221, 36 S. E. 649; *Tescher v. Merea*, 118 Ind. 586, 21 N. E. 316; *Haskell v. Jones*, 86 Pa. St. 173.

¹¹ *Pritchett v. Ahrens*, 26 Ind. App. 56, 84 Am. St. Rep. 274, 59 N. E. 42; *Colonial Fur Ranching Co. v. First National Bank*, 227 Mass. 12, 116 N. E. 731.

legislation supersedes earlier legislation, which provides that such instruments shall be void even in the hands of bona fide holders. This view has been taken by some courts.¹ The great weight of authority, however, is to the effect that such earlier statutes make such instruments absolutely void; and that, accordingly, there is no "defect in title" in the sense in which the term is used in the Negotiable Instruments Law, but there is an absolute want of legal effect, which gains nothing by a transfer, even to a bona fide holder. Such earlier statutes are not, therefore, repealed by the Negotiable Instruments Law.² Where such legislation is in force, such defenses as usury,³ that the instrument was given upon a gambling consideration,⁴ or that it did not show that it was a peddlers' note,⁵ may be made under the Negotiable Instruments Law, even as against a bona fide holder.

§ 2353. Holder not bona fide acquires rights of assignor. If A holds a negotiable instrument under circumstances which make him a bona fide holder, and he transfers it regularly to B, who takes with notice, B takes all the rights of A,¹ unless B has held the

¹ *Wirt v. Stubblefield*, 17 D. C. App. 283.

See also, *Schlesinger v. Gilhooly*, 189 N. Y. 1, 81 N. E. 619.

² *Alexander v. Hazelrigg*, 123 Ky. 677, 97 S. W. 353; *Sabine v. Paine*, 223 N. Y. 401, 119 N. E. 849; *Twentieth Street Bank v. Jacobs*, 74 W. Va. 525, Ann. Cas. 1917D, 695, 82 S. E. 320; *Eskridge v. Thomas*, 79 W. Va. 322, L. R. A. 1918C, 769, 91 S. E. 7.

³ *Perry Savings Bank v. Fitzgerald*, 167 Ia. 446, 149 N. W. 497; *Sabine v. Paine*, 223 N. Y. 401, 119 N. E. 849; *Eskridge v. Thomas*, 79 W. Va. 322, L. R. A. 1918C, 769, 91 S. E. 7.

⁴ *Alexander v. Hazelrigg*, 123 Ky. 677, 97 S. W. 353; *Twentieth Street Bank v. Jacobs*, 74 W. Va. 525, Ann. Cas. 1917D, 695, 82 S. E. 320.

Contra, *Wirt v. Stubblefield*, 17 D. C. App. 283.

⁵ *Citizens' Bank v. Crittenden Record Press*, 150 Ky. 634, 150 S. W. 814; *Lawson v. First National Bank*, — Ky. —, 102 S. W. 324.

¹ *United States. Gunnison County*

v. Rollins, 173 U. S. 255, 43 L. ed. 689; *Pickens Township v. Post*, 99 Fed. 659, 41 C. C. A. 1.

Arkansas. *Miles v. Dodson*, 102 Ark. 422, 50 L. R. A. (N.S.) 83, 144 S. W. 908.

Georgia. *Burch v. Pope*, 114 Ga. 334, 40 S. E. 227.

Iowa. *Riegel v. Ormsby*, 111 Ia. 10, 82 N. W. 432; *German-American National Bank v. Kelley*, 183 Ia. 269, 166 N. W. 1053.

Kansas. *Underwood v. Fosha*, 96 Kan. 240, 150 Pac. 571.

Missouri. *Kelly v. Staed*, 136 Mo. 430, 58 Am. St. Rep. 648, 37 S. W. 1110.

Nebraska. *Knight v. Finney*, 59 Neb. 274, 80 N. W. 912.

New York. *Vosburgh v. Diefendorf*, 119 N. Y. 357, 16 Am. St. Rep. 836, 23 N. E. 801.

Texas. *Herman v. Gunter*, 83 Tex. 66, 29 Am. St. Rep. 632, 18 S. W. 428.

Contra, *Bank v. Pennsylvania & Kentucky Fire Brick Co.*, 175 Ky. 192, L. R. A. 1918E, 165, 194 S. W. 110.

instrument before A under circumstances which did not make him a bona fide holder,² as where he was the original payee with notice of defects.³ Accordingly, a transfer after maturity passes the rights of the transferor.⁴ Hence, if the latter took the note before maturity under circumstances making him a bona fide holder, his transferee has all the rights of a bona fide holder,⁵ unless the transferee is a prior party to the instrument, who was not himself a bona fide holder,⁶ or takes as agent of the original payee.⁷ One who takes with notice as transferee from a bona fide holder, acquires all the rights of his transferor.⁸ One who takes without

² *Hatch v. Johnson Loan & Trust Co.*, 79 Fed. 828; *Adair v. Bank of Hickory Flat*, 115 Miss. 29, 75 So. 758; *Shade v. Barnes*, 35 S. D. 142, 151 N. W. 42 [sub nomine, *Shade v. Hayes*, L. R. A. 1915D, 271].

³ *Massachusetts*. *Sawyer v. Wiswell*, 91 Mass. (9 All.) 39; *Berenson v. Conant*, 214 Mass. 127, 101 N. E. 60.

Mississippi. *Adair v. Bank of Hickory Flat*, 115 Miss. 29, 75 So. 758.

Missouri. *St. Charles Savings Bank v. Edwards*, 243 Mo. 553, 147 S. W. 978.

Ohio. *Tod v. Wick*, 36 O. S. 370.

Rhode Island. *Hoye v. Kalashian*, 22 R. I. 101, 46 Atl. 271.

South Dakota. *Shade v. Barnes*, 35 S. D. 142, 151 N. W. 42 [sub nomine, *Shade v. Hayes*, L. R. A. 1915D, 271].

Wisconsin. *Andrews v. Robertson*, 111 Wis. 334, 87 Am. St. Rep. 870, 54 L. R. A. 673, 87 N. W. 190.

⁴ *Miles v. Dodson*, 102 Ark. 422, 50 L. R. A. (N.S.) 83, 144 S. W. 908; *Dean v. Vice*, — Mass. —, 124 N. E. 672.

⁵ *England*. *Chalmers v. Lanion*, 1 Campbell 383.

United States. *National Bank v. Texas*, 87 U. S. (20 Wall.) 72, 22 L. ed. 295.

Arkansas. *Miles v. Dodson*, 102 Ark. 422, 50 L. R. A. (N.S.) 83, 144 S. W. 908.

California. *Bank of Sonoma County v. Gove*, 63 Cal. 355, 49 Am. Rep. 92.

Indiana. *Thomas v. Ruddell*, 66 Ind. 326.

Massachusetts. *Edgerly v. Lawson*, 176 Mass. 551, 51 L. R. A. 432, 57 N. E. 1020.

Michigan. *Carpenter v. Greenop*, 74 Mich. 664, 16 Am. St. Rep. 662, 42 N. W. 276.

North Carolina. *Lewis v. Long*, 102 N. Car. 206, 11 Am. St. Rep. 725, 9 S. E. 637.

Washington. *Moyses v. Bell*, 62 Wash. 534, 114 Pac. 193.

So under R. S. § 3173 of Ohio, prior to the Negotiable Instruments Act, *Sherman v. Investment Co.*, 19 Ohio C. C. 26, 10 Ohio C. D. 33. This rule is re-enacted in G. C., § 8163, of Ohio.

⁶ *Kost v. Bender*, 25 Mich. 515.

⁷ *Battersbee v. Calkins*, 128 Mich. 569, 87 N. W. 760.

⁸ *United States*. *Porter v. Pittsburg Bessemer Steel Co.*, 122 U. S. 267, 30 L. ed. 1210.

Iowa. *Riegel v. Ormsby*, 111 Ia. 10, 82 N. W. 432.

Kansas. *Underwood v. Fosha*, 96 Kan. 240, 150 Pac. 571.

Kentucky. *Citizens' Trust & Guaranty Co. v. Hays*, 167 Ky. 560, 180 S. W. 811.

Missouri. *McMurray v. McMurray*, 258 Mo. 405, 167 S. W. 513.

Ohio. *Bassett v. Avery*, 15 O. S. 299.

Wisconsin. *Prentiss v. Strand*, 116 Wis. 647, 93 N. W. 816.

paying value, as transferee of a bona fide holder, acquires all the rights of his transferor.⁹

The rule that a transferee acquires all the rights of the transferor, applies to cases in which the transferor may invoke estoppel against the maker to prevent him from interposing a defense which could have been interposed but for such estoppel.¹⁰ The transferee may take the same advantage of such estoppel that the transferor could have taken, although the transferee did not know the facts which misled the transferor.¹¹ If a bona fide holder of an instrument transfers it and subsequently reacquires such instrument with knowledge of defects therein, he can assert his original right as bona fide holder to hold free from such defenses,¹² that a transferee acquires the rights of his transferor.

The rule has been re-enacted in the Negotiable Instruments Law, which provides: "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter."¹³ Under this section, which is regarded as declaratory of the common law,¹⁴ one who is not a technical bona fide holder acquires all the rights of his transferor,¹⁵ if the transferee is not a party to any fraud or illegality affecting the instrument.

⁹ *Armstrong v. American Exchange National Bank*, 133 U. S. 433, 33 L. ed. 747; *Fowler v. Strickland*, 107 Mass. 552; *Sheridan v. New York*, 68 N. Y. 30.

¹⁰ *Dispatch Printing Co. v. National Bank of Commerce*, 109 Minn. 440, 50 L. R. A. (N.S.) 74, 124 N. W. 236.

¹¹ *Dispatch Printing Co. v. National Bank of Commerce*, 109 Minn. 440, 50 L. R. A. (N.S.) 74, 124 N. W. 266.

¹² *Ratliffe v. Costello*, 117 Va. 563, 85 S. E. 469.

¹³ Section 58 of the Negotiable Instruments Law.

¹⁴ *Comstock v. Buckley*, 141 Wis. 228, 135 Am. St. Rep. 34, 124 N. W. 414.

¹⁵ *Underwood v. Fosha*, 96 Kan. 240, 150 Pac. 571; *Moyses v. Bell*, 62 Wash. 534, 114 Pac. 193.

Contra, of one who takes after maturity, *Bank v. Pennsylvania & Kentucky Fire Brick Co.*, 175 Ky. 192, L. R. A. 1918E, 165, 194 S. W. 110 [citing, *Austin v. First National Bank*, 148 Ky. 587, 147 S. W. 35, and especially the opinion on rehearing in 150 Ky. 113, 150 S. W. 8, in which the transferee took from the original payee, on the theory that "a transferee from a prior transferee occupies no safer position than does a transferee from the original payee"].

IV

THE BONA FIDE HOLDER OR HOLDER IN DUE COURSE

§ 2354. The bona fide holder or the holder in due course—
General principles. Before the Negotiable Instruments Law was enacted, a person who held a negotiable instrument free from defenses which might be made as against the original payee, was generally known as the bona fide holder. The bona fide holder was usually defined as one who took in good faith, for a valuable consideration, in the usual course of business, before maturity, and without notice of a defense against the instrument or of the dishonor thereof.¹ The Negotiable Instruments Law does not use the term "bona fide holder," but instead it uses the term "holder in due course." It provides that "a holder in due course is a holder who has taken the instrument under the following conditions: (1) that it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."² This section of the Negotiable Instruments Law seems to be declar-

¹England. *Grant v. Vaughan*, 3 Burr. 1516.

United States. *Goodman v. Simonds*, 61 U. S. (20 How.) 343, 15 L. ed. 934.

Arkansas. *Morehead v. Harris*, 121 Ark. 634, 182 S. W. 521; *Johnson v. Harrison*, 177 Ind. 240, 39 L. R. A. (N.S.) 1207, 97 N. E. 930.

Kentucky. *American National Bank v. Madison*, 144 Ky. 152, 38 L. R. A. (N.S.) 597, 137 S. W. 1076.

Minnesota. *Robinson v. Smith*, 62 Minn. 62, 64 N. W. 90; *Pennington County Bank v. First State Bank*, 110 Minn. 263, 26 L. R. A. (N.S.) 849, 125 N. W. 119.

Ohio. *Selser v. Brock*, 3 O. S. 302.

Wisconsin. *Burnham v. Merchants' Exchange Bank*, 92 Wis. 277, 66 N. W. 510.

²Section 52 of the Negotiable Instruments Law.

For a discussion of this definition, see:

Arizona. *Ellis v. First National Bank*, 19 Ariz. 464, 172 Pac. 281.

Idaho. *Southwest National Bank v. Lindsley*, 29 Ida. 343, 158 Pac. 1082.

Iowa. *Higby v. Bahrenfuss*, 180 Ia. 316, 163 N. W. 247.

Kentucky. *Eichberg v. Board of Education*, 165 Ky. 814, 178 S. W. 1075.

Nebraska. *Fisher v. O'Hanlon*, 93 Neb. 529, L. R. A. 1918C, 727, 141 N. W. 157.

Oklahoma. *Hodgins v. Northwestern Finance Co.*, 46 Okla. 95, 148 Pac. 717; *Lambert v. Smith*, 53 Okla. 606, 157 Pac. 909; *Critser v. Steele*, — Okla. —, 162 Pac. 795.

Oregon. *Everding v. Toft*, 82 Or. 1, 150 Pac. 757, 160 Pac. 1160.

Virginia. *Ratliffe v. Costello*, 117 Va. 563, 85 S. E. 469.

atory of the pre-existing common law, except that on the one hand it omits the requirement that transfer must be in the usual course of business, and on the other hand, it calls the holder "a holder in due course," and not a "bona fide holder."

Notice of one defect does not prevent a holder from taking without notice of other defects; and accordingly he may be a bona fide holder as against defects of which he did not have notice.³ Notice of the fact that a note is given for a patent right does not prevent the holder from taking such note free from the defense of payment.⁴ One who has notice that an instrument is obtained by fraud or bad faith, is not, however, a bona fide holder, although he does not know the means by which such fraud was perpetrated.⁵

The maker may estop himself from claiming notice, by expressly promising to pay the transferee, thereby inducing him to accept the note.⁶

§ 2355. Taking without notice—Actual knowledge. Both common law, as derived from law-merchant, and the Negotiable Instruments Act agree¹ that the holder must take without notice of the defense sought to be interposed, in order to be a bona fide holder. If he has notice of defense he is not a bona fide holder, even if he pays full value.² Actual notice given by the maker of an instru-

West Virginia. Marion National Bank v. Harden, — W. Va. —, 97 S. E. 600.

See, Holder in Due Course, by A. M. Hamilton, 24 Juridical Review, 41.

³ Vaughn v. Johnson, 20 Ida. 669, 37 L. R. A. (N.S.) 816, 119 Pac. 879.

⁴ Allen v. Johnson, 20 Ohio C. C. 8.

⁵ Paika v. Perry, 225 Mass. 563, 114 N. E. 830.

⁶ Sutton v. Beckwith, 68 Mich. 303, 13 Am. St. Rep. 344, 36 N. W. 79.

¹ See §§ 1301, 2354.

² **United States.** Hanauer v. Doane, 79 U. S. (12 Wall.) 342, 20 L. ed. 439; In re Continental Engine Co., 234 Fed. 58, 148 C. C. A. 74.

California. Braly v. Henry, 71 Cal. 481, 60 Am. Rep. 543, 11 Pac. 385, 12 Pac. 623.

Georgia. Heard v. Shedden, 113 Ga.

162, 38 S. E. 387; Linderman v. Atkins, 143 Ga. 366, 85 S. E. 101.

Iowa. Wray v. Warner, 111 Ia. 64, 82 N. W. 455.

Kansas. Brook v. Teague, 52 Kan. 119, 34 Pac. 347.

Kentucky. Eichberg v. Board of Education, 165 Ky. 614, 178 S. W. 1075.

Maryland. Maitland v. Bank, 40 Md. 540, 17 Am. Rep. 620.

Massachusetts. Fisher v. Leland, 58 Mass. (4 Cush.) 456, 50 Am. Dec. 805; Cheney v. Taber, 221 Mass. 332, 108 N. E. 1072; Paika v. Perry, 225 Mass. 563, 114 N. E. 830.

Michigan. McNamara v. Gargett, 68 Mich. 454, 13 Am. St. Rep. 355, 36 N. W. 218.

Nebraska. Marshall v. Kirschbraun, 100 Neb. 876, L. R. A. 1917E, 788, 161 N. W. 577; Hatfield v. Jakway, 102 Neb. 831, 170 N. W. 181.

ment to one who subsequently purchases it, is sufficient to prevent the latter from being a bona fide holder.³ One who knows of fraud or unfair dealing in securing a negotiable instrument, is not a bona fide holder thereof, although he does not know the exact way in which the fraud was committed.⁴ If the holder knows that a surety executed a note for the purpose of having it discounted for value, and that it has been indorsed without consideration,⁵ or that an indorser for accommodation has ordered that his name should be erased before the note was negotiated,⁶ or that a note was to be held in escrow until the maker thereof was released from liability upon another instrument,⁷ he can not enforce the note against such party. If a note is obtained by false representations, one who took part in making such representations,⁸ or who knew that they had been made,⁹ can not be a bona fide holder. If a bank accepts checks for deposit, knowing that its depositor is "kiting" checks, it does not become a holder for value by giving credit.¹⁰

The actual knowledge of facts which do not affect the validity of the instrument, does not prevent the holder from taking in due course.¹¹ The actual knowledge of the fact that the negotiable instrument has been given without consideration to the indorser,¹²

Nevada. *Swinney v. Patterson*, 25 Nev. 411, 62 Pac. 1.

New York. *Schlesinger v. Lehmaier*, 191 N. Y. 69, 123 Am. St. Rep. 591, 16 L. R. A. (N.S.) 626, 83 N. E. 657.

Oklahoma. *Hardin v. Dale*, 45 Okla. 694, L. R. A. 1915D, 1099, 146 Pac. 717; *Nichols v. Thomas*, 51 Okla. 212, 151 Pac. 847.

South Carolina. *Greenville v. Ormand*, 51 S. Car. 58, 64 Am. St. Rep. 663, 39 L. R. A. 847, 28 S. E. 50.

South Dakota. *Barnard v. Tidrick*, 35 S. D. 403, 152 N. W. 690.

Tennessee. *Hickerson v. Raiguel*, 49 Tenn. (2 Heisk.) 329.

Utah. *Gregg v. Groesbeck*, 11 Utah 310, 32 L. R. A. 266, 40 Pac. 202.

See also, *First National Bank v. Lyons Exchange Bank*, 100 Kan. 194, 164 Pac. 137; *Marion National Bank v. Harden*, — W. Va. —, 97 S. E. 600.

³ *Barnard v. Tidrick*, 35 S. D. 403, 152 N. W. 690.

⁴ *Paika v. Perry*, 225 Mass. 563, 114 N. E. 830.

⁵ *Greenville v. Ormand*, 51 S. Car. 58, 64 Am. St. Rep. 663, 39 L. R. A. 847, 28 S. E. 50.

⁶ *Gregg v. Groesbeck*, 11 Utah 310, 32 L. R. A. 266, 40 Pac. 202.

⁷ *De Garmo v. Kay*, — Utah, —, 173 Pac. 129.

⁸ *Gwinn v. Ford*, 91 Wash. 498, 158 Pac. 536 [affirming judgment on rehearing, *Gwinn v. Ford*, 85 Wash. 571, 148 Pac. 891].

⁹ *Gwinn v. Ford*, 91 Wash. 498, 158 Pac. 536 [affirming judgment on rehearing, *Gwinn v. Ford*, 85 Wash. 571, 148 Pac. 891].

¹⁰ *People's State Bank v. Miller*, 185 Mich. 565, 152 N. W. 257.

¹¹ *Elmo State Bank v. Hildebrand*, — Kan. —, 177 Pac. 6; *White v. Wadhams*, — Mich. —, 170 N. W. 60; *Whitney v. Day*, 86 Or. 268, 168 Pac. 295.

¹² *White v. Wadhams*, — Mich. —, 170 N. W. 60.

or that the maker may have a set-off against the holder before the note comes due,¹³ does not prevent the holder from taking in due course. Knowledge that the payee is heavily indebted does not prevent an indorsee who has paid full value for a negotiable instrument from taking in good faith if he did not know that the transfer of the instrument was made to defraud the creditors of the payee.¹⁴

§ 2356. Contents of instrument as notice. The holder is charged with notice of everything that appears from the contents of the instrument,¹ or on its face.² A provision that on default in payment of one note, all shall become due, operates as notice, and one who knows of such default can not take as before maturity.³

If an agent pays personal debts with a check of his principals;⁴ or if an agent, who purports to borrow money on a negotiable instrument for the benefit of the maker thereof, consents to have a

¹³ *Elmo State Bank v. Hildebrand*, — Kan. —, 177 Pac. 6.

¹⁴ *Whitney v. Day*, 86 Or. 268, 168 Pac. 295.

¹ *Arkansas*. *Hooten v. State*, 119 Ark. 334, 178 S. W. 310; *Wimberly v. Scoggin*, 128 Ark. 67, 193 S. W. 264; *Schaap v. State National Bank*, — Ark. —, 208 S. W. 309.

Georgia. *Luden v. Enterprise Lumber Co.*, 146 Ga. 284, 91 S. E. 102.

Kentucky. *Taylor v. Harris' Administrator*, 164 Ky. 654, 176 S. W. 168; *Citizens' State Bank v. Johnson County*, 182 Ky. 531, 207 S. W. 8.

Massachusetts. *Quincy Mutual Fire Insurance Co. v. International Trust Co.* 217 Mass. 370, L. R. A. 1915B, 725, 104 N. E. 845.

Nebraska. *Marshall v. Kirschbraun*, 100 Neb. 876, 161 N. W. 577.

Oklahoma. *Keisel v. Baldock*, 55 Okla. 487, L. R. A. 1916D, 632, 154 Pac. 1194.

Oregon. *McLeod v. Despaigne*, 49 Or. 536, 19 L. R. A. (N.S.) 276, 90 Pac. 492.

Tennessee. *Ford v. Brown*, 114 Tenn. 467, 1 L. R. A. (N.S.) 188, 88 S. W. 1036.

Washington. *National City Bank v. Shelton Electric Co.*, 96 Wash. 74, 164 Pac. 933.

Wyoming. *Acme Coal Co. v. Northrup National Bank*, 23 Wyom. 66, L. R. A. 1915D, 1084, 146 Pac. 593.

This rule applies to a holder of municipal bonds. *Wilbur v. Wyatt*, 63 Neb. 261, 88 N. W. 499.

The addition of "majority stockholders" to the names of indorsers is not notice that they did not intend to assume liability as indorsers. *Winnebago National Bank v. Woodliff*, — Ga. —, 88 S. E. 973.

If a note and a contract so refer to each other that the note is a part of the contract and the contract, which is recorded, shows on its face that it is usurious, the holder of the note is charged with notice of the terms of the contract. *Wimberly v. Scoggin*, 128 Ark. 67, 193 S. W. 264.

² *Hooten v. State*, 119 Ark. 334, 178 S. W. 310.

³ *Marion National Bank v. Harden*, — W. Va. —, 97 S. E. 600.

⁴ *Lamson v. Beard*, 94 Fed. 30, 45 L. R. A. 822; *Gerard v. McCormick*, 130 N. Y. 261, 14 L. R. A. 234, 29 N. E. 115.

substantial part of such loan applied to the payment of his personal debt to the transferee;⁵ or a partner discounts a note given by the firm and has the proceeds deposited to his individual account;⁶ or if a partner transfers a negotiable instrument belonging to the partnership, in payment of his personal debt to the holder;⁷ or if a note appears on its face to have been issued by an unauthorized agent;⁸ or if the holder acquires a negotiable instrument from an agent of limited authority, with knowledge of such limitations;⁹ or if the holder acquires an instrument from one who holds as guardian and places the proceeds thereof to the personal account of the guardian,¹⁰ one who takes with knowledge of such facts is bound at his peril to ascertain the authority of the agent or partner to make such use of the funds.

That a note of a principal is payable to the agent executing it,¹¹ or to a former president of such corporation,¹² or that a note of a partnership is payable to a member of the firm,¹³ is said not to be notice of any irregularity in the execution.

That an instrument purports on its face to be executed by the officer of a corporation,¹⁴ or to be accepted¹⁵ or indorsed¹⁶ by a public officer, is notice to subsequent holders sufficient to put them on inquiry as to the powers of such officers.

Whether the addition of "trustee" or some word of similar import to the name of the payee is notice to those claiming under him by indorsement is a question on which there has been a divi-

⁵ Johnson v. Harrison, 177 Ind. 240, 39 L. R. A. (N.S.) 1207, 97 N. E. 930.

⁶ Brown v. Pettit, 178 Pa. St. 17, 56 Am. St. Rep. 742, 34 L. R. A. 723, 35 Atl. 865.

Contra, Bank v. Lowry, 81 W. Va. 578, 94 S. E. 985.

⁷ Redfield v. Wells, 31 Ida. 415, 173 Pac. 640; Nichols v. Thomas, 51 Okla. 212, L. R. A. 1916B, 908, 151 Pac. 847.

So under the Negotiable Instruments Law. Redfield v. Wells, 31 Ida. 415, 173 Pac. 640.

⁸ Chemical National Bank v. Wagner, 93 Ky. 525, 40 Am. St. Rep. 206, 20 S. W. 535. (Payable to himself.)

See also, Schaap v. State National Bank, — Ark. —, 208 S. W. 309.

⁹ Cheney v. Taber, 221 Mass. 332, 108 N. E. 1072.

¹⁰ Taylor v. Harris' Administrator, 164 Ky. 654, 176 S. W. 168.

¹¹ Africa v. Tribune Co., 82 Minn. 233, 83 Am. St. Rep. 424, 84 N. W. 1019; Cheever v. R. R., 150 N. Y. 59, 55 Am. St. Rep. 646, 34 L. R. A. 69, 44 N. E. 701.

¹² Jones v. Stoddart, 8 Ida. 210, 67 Pac. 650.

¹³ Second National Bank v. Weston, 161 N. Y. 520, 76 Am. St. Rep. 233, 55 N. E. 1080.

¹⁴ Chemical National Bank v. Wagner, 93 Ky. 525, 40 Am. St. Rep. 206, 20 S. W. 535.

¹⁵ The Floyd Acceptances, 74 U. S. (7 Wall.) 666, 19 L. ed. 169.

¹⁶ People v. Bank, 75 N. Y. 547.

sion of authority. The weight of authority holds that the addition of "trustee,"¹⁷ or "guardian,"¹⁸ or "attorney,"¹⁹ is notice to subsequent holders that other persons have equities in such instruments. The addition of the word "trustee" is notice of the rights of beneficiaries, but otherwise it does not prevent the contract from being negotiable.²⁰ If the trustee has power to transfer a negotiable instrument and to collect the proceeds thereof, one who acquires such instrument from him may be a bona fide holder.²¹

In other jurisdictions the addition of "agent,"²² or "sheriff,"²³ has been held not to amount to notice.

One who accepts an instrument executed or indorsed by a corporation through one of its officers, in payment of the individual debt of such officer, can not be a bona fide holder.²⁴ If the note is payable to the officer by whom it is executed, the holder is charged with notice of such apparent want of power or abuse of power.²⁵ If the note is payable to a third person and indorsed over by the payee, the holder is not charged with notice of want of power or abuse of power by reason of the form of the instrument,²⁶ even if such payee is a corporation which bears the name of such officer,

¹⁷ *Third National Bank v. Lange*, 51 Md. 138, 34 Am. Rep. 304; *Shaw v. Spencer*, 100 Mass. 382, 1 Am. Rep. 115 (a stock certificate); *McLeod v. Despain*, 49 Or. 536, 19 L. R. A. (N.S.) 276, 90 Pac. 492; *Ford v. Brown*, 114 Tenn. 467, 1 L. R. A. (N.S.) 188, 88 S. W. 1036.

¹⁸ *Strong v. Strauss*, 40 O. S. 87.

¹⁹ *Hazeltine v. Keenan*, 54 W. Va. 600, 102 Am. St. Rep. 953, 46 S. E. 609.

²⁰ *Tradesmen's National Bank v. Looney*, 99 Tenn. 278, 63 Am. St. Rep. 830, 38 L. R. A. 837, 42 S. W. 149; *Dollar Savings & Trust Co. v. Crawford*, 69 W. Va. 109, 33 L. R. A. (N.S.) 587, 70 S. E. 1089.

²¹ *Dollar Savings & Trust Co. v. Crawford*, 69 W. Va. 109, 33 L. R. A. (N.S.) 587, 70 S. E. 1089.

²² *Yates v. Spofford*, 7 Ida. 737, 97 Am. St. Rep. 267, 65 Pac. 501.

²³ *Fletcher v. Schaumburg*, 41 Mo. 501 (on the ground that "sheriff" was merely a descriptio personae).

²⁴ *Colorado. DeBaca v. Higgins*, 58 Colo. 75, L. R. A. 1915B, 1091, 143 Pac. 832.

Georgia. Luden v. Enterprise Lumber Co., 146 Ga. 284, 91 S. E. 102.

Kentucky. Kenyon Realty Co. v. National Deposit Bank, 140 Ky. 133, 31 L. R. A. (N.S.) 169, 130 S. W. 965.

Oklahoma. Jenkins v. Planters' and Mechanics' Bank, 34 Okla. 607, 126 Pac. 757.

Rhode Island. Cook v. American Tubing & Webbing Co., 28 R. I. 41, 9 L. R. A. (N.S.) 193, 65 Atl. 641.

See on this question, *Quincy Mutual Fire Insurance Co. v. International Trust Co.*, 217 Mass. 370, L. R. A. 1915B, 725, 104 N. E. 845.

²⁵ *Luden v. Enterprise Lumber Co.*, 146 Ga. 284, L. R. A. 1917C, 485, 91 S. E. 102.

²⁶ *Burnham Loan & Investment Co. v. Sethman*, — Colo. —, L. R. A. 1918F, 1158, 171 Pac. 884; *National City Bank v. Shelton Electric Co.*, 96 Wash. 74; 164 Pac. 933.

if he has no interest therein at the time.²⁷ Where a note shows that a bank indorsed it out of the chain of title and before delivery, the holder is bound to inquire whether such indorsement is not *ultra vires*.²⁸ Memoranda on an instrument showing that it had been refused discount at the bank at which it was payable,²⁹ or that it is "to be held as collateral,"³⁰ or that it is "to be applied" to payment of a certain debt, "if found correct,"³¹ operate as notice. But a memorandum "C. I. P." on the face of a note is not notice that it was given for a patent right so as to be subject to defenses.³²

The fact that alterations are apparent on the face of the instrument is notice, although the original terms of the instrument may not be apparent.³³ An indorsement of part payments upon an instrument, which appears to have been made when the instrument was issued, is not notice of defects.³⁴ If the holder causes indorsements of part payments to be made upon an instrument before he takes it, and such payments were in fact never made, the holder is not a holder in due course.³⁵ The fact that the instrument bears a lower rate than the customary rate is not notice.³⁶

If the statute requires the note to be stamped and the note shows on its face that it is not stamped, the purchaser can not be a bona fide holder.³⁷

§ 2357. Indorsement as notice. Indorsement "for collection" is notice that the holder is not the beneficial owner,¹ even if such

See also, *Voss v. Chamberlain*, 139 Ia. 569, 19 L. R. A. (N.S.) 106, 117 N. W. 269.

²⁷ *National City Bank v. Shelton Electric Co.*, 96 Wash. 74, 164 Pac. 933

²⁸ *National Park Bank v. Warehouse Co.*, 116 N. Y. 281, 5 L. R. A. 673, 22 N. E. 567.

²⁹ *Fowler v. Brantly*, 39 U. S. (14 Pet.) 318, 10 L. ed. 473

³⁰ *National Security Bank v. McDonald*, 127 Mass. 82.

³¹ *Slimmer v. State Bank*, 134 Minn. 349, 159 N. W. 795.

³² *First National Bank v. Stockell*, 92 Tenn. 252, 20 L. R. A. 605, 21 S. W. 523. ("C. I. P." meaning "Chapin's Iron Process.")

³³ *Hooten v. State*, 119 Ark. 334, 176 S. W. 310.

³⁴ *Bland v. Fidelity Trust Co.*, 71 Fla. 499, L. R. A. 1916F, 209, 71 So. 630.

³⁵ *Washington Finance Corporation v. Glass*, 74 Wash. 653, 46 L. R. A. (N.S.) 1043, 134 Pac. 480.

³⁶ *White v. Wadhams*, — Mich. —, 170 N. W. 60.

³⁷ *Lutton v. Baker*, — Ia. —, 174 N. W. 599.

¹ *United States. Lanier v. Nash*, 121 U. S. 404, 30 L. ed. 947.

Louisiana. Moore v. Bank, 44 La. Ann. 99, 32 Am. St. Rep. 332, 10 So. 407.

Massachusetts. Manufacturers' National Bank v. Bank, 148 Mass. 553, 2

indorsement has been erased, as long as it is still legible.² Indorsement "for account" of indorsers has been held to have the same effect;³ but "for deposit to the credit of" the indorser has been held not to have this effect, but to make the indorsee the absolute owner.⁴

An indorsement without recourse is not notice of defenses.⁵

§ 2358. Recital or notice of consideration as notice of defect.

The fact that the consideration is recited on the face of the note,¹ or on the back thereof,² or is known to the holder,³ especially if

L. R. A. 609, 20 N. E. 193; *Freeman's National Bank v. Tube Works Co.*, 151 Mass. 413, 21 Am. St. Rep. 461, 8 L. R. A. 42, 24 N. E. 779.

New York. *National, etc., Bank v. Hubbell*, 117 N. Y. 384, 15 Am. St. Rep. 515, 7 L. R. A. 852, 22 N. E. 1031.

Ohio. *National Bank v. Bank*, 58 O. S. 207, 65 Am. St. Rep. 748, 41 L. R. A. 584, 50 N. E. 723.

²*Cussen v. Brandt*, 97 Va. 1, 75 Am. St. Rep. 762, 32 S. E. 791.

³*United States National Bank v. Geer*, 55 Neb. 462, 70 Am. St. Rep. 390, 41 L. R. A. 444, 75 N. W. 1088.

⁴*Ditch v. Bank*, 79 Md. 192, 47 Am. St. Rep. 375, 23 L. R. A. 164, 29 Atl. 72, 138. (Decided by a divided court.)

⁵*United States. Hamilton v. Fowler*, 99 Fed. 18, 40 C. C. A. 47.

Arkansas. *Evans v. Hardware Co.*, 65 Ark. 204, 67 Am. St. Rep. 919, 45 S. W. 370.

Illinois. *Stevenson v. O'Neal*, 71 Ill. 314.

Iowa. *Higby v. Bahrenfuss*, 180 Ia. 316, 163 N. W. 247.

Michigan. *Borden v. Clark*, 26 Mich. 410.

Nebraska. *First National Bank v. Bank*, 34 Neb. 71, 33 Am. St. Rep. 618, 15 L. R. A. 386, 51 N. W. 305.

Pennsylvania. *Bisbing v. Graham*, 14 Pa. St. 14, 53 Am. Dec. 510.

See also, *Mee v. Carlson*, 22 S. D. 365, 29 L. R. A. (N.S.) 351, 117 N. W. 1033.

¹*Bank v. Barrett*, 38 Ga. 126, 95 Am. Dec. 384; *Hardin v. Bank*, 145 Ga. 494, 89 S. E. 613; *Siegel v. Bank*, 131 Ill. 569, 19 Am. St. Rep. 51, 7 L. R. A. 537, 23 N. E. 417; *Heard v. Bank*, 8 Neb. 10, 30 Am. Rep. 811; *Brannin v. Richardson*, 108 Tex. 112, 185 S. W. 562.

²*Snelling State Bank v. Clasen*, 132 Minn. 404, 157 N. W. 643.

³**Arizona.** *Phoenix Safety Investment Co. v. Michaels*, — Ariz. —, 170 Pac. 587.

California. *Pezzoni v. Greenwell*, — Cal. —, 174 Pac. 60.

Georgia. *McManus v. Cash Grocery Co.*, 143 Ga. 623, 85 S. E. 858.

Illinois. *Siegel v. Bank*, 131 Ill. 569, 19 Am. St. Rep. 51, 7 L. R. A. 537, 23 N. E. 417.

Iowa. *McKnight v. Parsons*, 136 Ia. 390 [sub nomine, *McKnight v. Parson*, 22 L. R. A. (N.S.) 718, 113 N. W. 858].

Michigan. *Miller v. Ottaway*, 81 Mich. 196, 21 Am. St. Rep. 513, 8 L. R. A. 428, 45 N. W. 665.

Missouri. *Jennings v. Todd*, 118 Mo. 296, 40 Am. St. Rep. 373, 24 S. W. 148.

Montana. *Baker State Bank v. Grant*, 54 Mont. 7, 166 Pac. 27.

Nebraska. *Rublee v. Davis*, 33 Neb. 779, 29 Am. St. Rep. 509, 51 N. W. 135; *Nebraska National Bank v. Pen-nock*, 55 Neb. 188, 75 N. W. 554.

New York. *Davis v. McGready*, 17 N. Y. 230, 72 Am. Dec. 461; *Trades-*

the maker of the notes tells the purchaser that they are valid obligations,⁴ is not notice of any defenses arising by reason of failure of the consideration, unless the holder knows that the consideration has failed,⁵ or must fail.⁶

The fact that the transferee knows that the note is given upon an executory consideration, does not prevent him from being a bona fide holder if he does not know that such executory consideration has failed or that it will fail.⁷ If the transferee takes the note, together with the contract under which it was given as security therefor, the transferee is said not to be a bona fide purchaser.⁸ One who has taken part in selling realty can not be a bona fide holder of an instrument given for such realty, if the consideration therefor fails.⁹ One who knows that a note is given for a patent right, takes subject to all defenses by reason of failure of such consideration under a statute which requires all such notes to recite that they were "given for a patent right," although such words do not appear upon the instrument.¹⁰

§ 2359. Bill of lading as notice of defect in bill of exchange to which it is collateral. Analogous to this last question is one often presented in slightly differing forms under modern methods of business. A consigns goods, takes a bill of lading, and attaches it

men's National Bank v. Curtis, 167 N. Y. 194, 52 L. R. A. 430, 60 N. E. 429.

Oklahoma. Security Trust & Savings Bank v. Gleichmann, 50 Okla. 441, L. R. A. 1915F, 1203, 150 Pac. 908; Producers' National Bank v. Elrod, — Okla. —, L. R. A. 1918F, 1016, 173 Pac. 659.

Oregon. United States National Bank v. Floss, 38 Or. 68, 84 Am. St. Rep. 752, 62 Pac. 751.

West Virginia. Dollar Savings & Trust Co. v. Crawford, 69 W. Va. 109, 33 L. R. A. (N.S.) 587, 70 S. E. 1089.

⁴ Moore v. Burling, 93 Wash. 217, 160 Pac. 420.

⁵ Paika v. Perry, 225 Mass. 563, 114 N. E. 830; Jennings v. Todd, 118 Mo. 296, 40 Am. St. Rep. 373, 24 S. W. 148; Baker State Bank v. Grant, 54 Mont.

7, 166 Pac. 27; Barry v. Kniseley, 56 Okla. 324, 155 Pac. 1168.

⁶ Russ Lumber Co. v. Water Co., 120 Cal. 521, 65 Am. St. Rep. 186, 52 Pac. 995 (where the consideration is a promise made by a corporation which has become insolvent); Hardin v. Dale, 45 Okla. 694, L. R. A. 1915D, 1099, 146 Pac. 717.

⁷ McNight v. Parsons, 136 Ia. 390 [sub nomine, McKnight v. Parsons, 22 L. R. A. (N.S.) 718, 113 N. W. 858]; Snelling State Bank v. Clasen, 132 Minn. 404, 157 N. W. 643; Baker State Bank v. Grant, 54 Mont. 7, 166 Pac. 27.

⁸ Todd v. State Bank, 182 Ia. 276, 165 N. W. 593.

⁹ Parker v. Horton, 176 N. Car. 143, 96 S. E. 904.

¹⁰ Benton v. Sikyta, 84 Neb. 808, 24 L. R. A. (N.S.) 1057, 122 N. W. 61.

to a draft. The draft is accepted by the drawee in reliance on the bill of lading. Either before or after acceptance it is indorsed over to a bona fide purchaser. Is the bill of lading a part of the draft, or is it notice to the indorsee of the entire transaction? The question becomes material if the quality or title of the goods covered by the bill of lading is defective. In such case the drawee either tries to avoid paying the draft, or if he has paid it to the indorsee, he seeks to recover such payment. The weight of authority is that the bill of lading is neither part of the draft nor notice to the indorsee of the entire transaction; and accordingly such defect in quality or in title creates no liability against him.¹ Under this view the acceptor is liable to the payee.² If the acceptor has paid the bill of exchange and the property covered by the bill of lading is then attached, he can not recover such payment.³

A minority of the courts hold that such defense can be interposed by the acceptor.⁴ Of these cases, *Landa v. Lattin*, decided by an intermediate court,⁵ has been overruled by the court of last resort of that state.⁶

If the bank has purchased the goods as well as the draft upon the purchaser for which the bill of lading is security, the pur-

¹ *United States*. *Goetz v. Bank*, 119 U. S. 551, 30 L. ed. 515.

Iowa. *Tolerton v. Bank*, 112 Ia. 706, 50 L. R. A. 777, 84 N. W. 930.

Kansas. *Hall v. Keller*, 64 Kan. 211, 91 Am. St. Rep. 209, 67 Pac. 518. (This case holds that the defenses of the consignee remain the same against the transferee as against the assignor.)

Kentucky. *Hawkins v. Alfalfa Products Co.*, 152 Ky. 152, 44 L. R. A. (N.S.) 600, 153 S. W. 201.

Michigan. *First National Bank v. Grand Rapids & I. Ry. Co.*, 195 Mich. 1, 161 N. W. 859.

Missouri. *Columbian Bank v. White*, 65 Mo. App. 677.

New York. *Springs v. Hanover National Bank*, 209 N. Y. 224, 52 L. R. A. (N.S.) 241, 103 N. E. 156 (bill of lading a forgery).

Tennessee. *Leonhardt v. Small*, 117 Tenn. 153, 6 L. R. A. (N.S.) 887, 96 S. W. 1051.

Texas. *S. Blaisdell, Jr., Co. v. Bank*, 96 Tex. 626, 97 Am. St. Rep. 944, 75 S. W. 292.

See also, *National Bank of Commerce v. Bossemeyer*, 101 Neb. 96, L. R. A. 1917E, 374, 162 N. W. 503.

² *S. Blaisdell, Jr., Co. v. Bank*, 96 Tex. 626, 97 Am. St. Rep. 944, 75 S. W. 292.

³ *Hall v. Keller*, 64 Kan. 211, 91 Am. St. Rep. 209, 67 Pac. 518; *Lewis v. Small*, 117 Tenn. 153, 6 L. R. A. (N.S.) 887, 96 S. W. 1051.

⁴ *Finch v. Gregg*, 126 N. Car. 176, 49 L. R. A. 679, 35 S. E. 251; *Landa v. Lattin*, 19 Tex. Civ. App. 246, 46 S. W. 48.

See, also, as to a note and a land contract under which it was given which was assigned as security thereof. *Todd v. State Bank*, 182 Ia. 278, 165 N. W. 593.

⁵ 10 Tex. Civ. App. 246, 46 S. W. 48.

⁶ *S. Blaisdel, Jr., v. Bank*, 96 Tex. 626, 97 Am. St. Rep. 944, 75 S. W. 292.

chaser may recover from the bank the amount thus paid if the goods do not conform to the contract under which they were purchased,⁷ and the purchaser could avoid such contract as against the seller on the ground that he had no opportunity to inspect them.⁸

§ 2360. Taking under circumstances of suspicion. Whether one who takes a negotiable instrument with knowledge of facts and circumstances which suggests suspicion and which would lead a reasonably prudent man to make inquiries, as a result of which he would have discovered defects or infirmities in the instrument, is a bona fide holder, and whether his failure to make the inquiries which a reasonable and prudent man would have made, would have prevented him from being a bona fide holder, is a question upon which there has been a conflict of authority and a vacillation in judicial opinion. The original English rule seems to have been that such acts did not prevent the person who took the instrument from being a bona fide holder.¹ Subsequently, Lord Tenterden expressed the view that one who takes a negotiable instrument under circumstances that would arouse the suspicions of a reasonable and prudent man, can not be a technical bona fide holder.² This decision had a depressing effect on the value of English paper on the continent, and after taking the intermediate position that gross negligence, and that alone, could operate to prevent one who took without notice from being a bona fide holder,³ the English courts adopted the original rule.⁴

It is now generally held that the mere fact that the circumstances are such as would suggest suspicion, and that if the holder had made such inquiries as a prudent man would have made, he would have learned of the defense, does not prevent him from being a bona fide holder.⁵ In order to prevent him from being a

⁷ *Munson v. DeTamble Motors Company*, 88 Conn. 415, L. R. A. 1915A, 881, 91 Atl. 531.

⁸ *Munson v. DeTamble Motors Company*, 88 Conn. 415, L. R. A. 1915A, 881, 91 Atl. 531.

¹ *Peacock v. Rhodes*, Douglass 633.

² *Gill v. Cubitt*, 3 B. & C. 466.

Some of the earlier American decisions inclined to this rule. *Adkins v. Blake*, 25 Ky. (2 J. J. Mar.) 40; *Mer-*

ritt v. Duncan, 54 Tenn (7 Heisk.) 156, 19 Am. Rep. 612.

³ *Crook v. Jadia*, 5 B. & Ad. 909.

⁴ *Goodman v. Harvey*, 4 Ad. & El. 870.

⁵ *United States*. *Swift v. Smith*, 102 U. S. 442, 26 L. ed. 193; *Brent v. Simpson*, 238 Fed. 285, 151 C. C. A. 301.

Alabama. *Sample v. Tennessee Valley Bank*, — Ala. —, 76 So. 936.

Arizona. *Ellis v. First National Bank*, 19 Ariz. 464, 172 Pac. 281.

bona fide holder, the facts must create a "presumption that he knew facts impeaching its validity."⁶ It is said that the facts must be such as to show bad faith on the part of the holder,⁷ or to

Colorado. Burnham Loan & Investment Co. v. Sethman, — Colo. —, 171 Pac. 884.

Connecticut. Credit Co. v. Machine Co., 54 Conn. 357, 1 Am. St. Rep. 123, 8 Atl. 472.

District of Columbia. Hazen v. Van Senden, 43 D. C. App. 161.

Georgia. Linderman v. Atkins, 143 Ga. 366, 85 S. E. 101; McManus v. Cash Grocery Co., 143 Ga. 623, 85 S. E. 858.

Illinois. Merritt v. Boyden, 191 Ill. 136, 60 N. E. 907.

Iowa. Richards v. Monroe, 85 Ia. 359, 39 Am. St. Rep. 301, 52 N. W. 339; Lundean v. Hamilton, — Ia. —, 169 N. W. 208.

Kentucky. Citizens' State Bank v. Johnson County, 182 Ky. 531, 207 S. W. 8.

Massachusetts. International Trust Co. v. Wilson, 161 Mass. 80, 36 N. E. 589.

Minnesota. Rosemond v. Graham, 54 Minn. 323, 40 Am. St. Rep. 336, 56 N. W. 38.

Missouri. Borgess Investment Co. v. Vette, 142 Mo. 560, 64 Am. St. Rep. 567, 44 S. W. 754.

Montana. Harrington v. Butte and Boston Mining Co., 33 Mont. 330, 114 Am. St. Rep. 821, 83 Pac. 467.

New Mexico. First National Bank v. Stover, 21 N. M. 453, L. R. A. 1916D, 1280, 155 Pac. 905.

New York. Second National Bank v. Weston, 161 N. Y. 520, 76 Am. St. Rep. 283, 55 N. E. 1080.

Oklahoma. McPherrin v. Tittle, 36 Okla. 510, 44 L. R. A. (N.S.) 395, 129 Pac. 721; Security Trust & Savings Bank v. Gleichmann, 50 Okla. 441, L. R. A. 1915F, 1203, 150 Pac. 908; Voris v. Birdsall, — Okla. —, 162 Pac. 951;

Cline v. First National Bank, — Okla. —, 170 Pac. 472; State v. Emery, — Okla. —, 174 Pac. 770.

Pennsylvania. Phelan v. Moss, 67 Pa. St. 59, 5 Am. Rep. 402; Clarion Second National Bank v. Morgan, 165 Pa. St. 199, 44 Am. St. Rep. 652, 30 Atl. 957.

Virginia. Fleshman v. Bibb, 118 Va. 582, 88 S. E. 64.

Washington. Moore v. Burling, 93 Wash. 217, 160 Pac. 420; Citizens' Bank & Trust Co. v. Limpricht, 93 Wash. 361, 160 Pac. 1046; Shultz v. Crewdson, 95 Wash. 266, 163 Pac. 734; National City Bank v. Shelton Electric Co., 96 Wash. 74, 164 Pac. 933.

West Virginia. Marion National Bank v. Harden, — W. Va. —, 97 S. E. 600.

"The rights of the holder are to be determined by the simple test of honesty and good faith, and not by speculative views as to his diligence or negligence." Cheever v. R. R. 150 N. Y. 59, 55 Am. St. Rep. 646, 34 L. R. A. 69, 44 N. E. 701.

Contra, before the Negotiable Instruments Law, Boxell v. Bright National Bank, 184 Ind. 631, 112 N. E. 3.

⁶Sinkler v. Siljan, 136 Cal. 356, 68 Pac. 1024.

See also, Bank v. Beecher, 133 Minn. 81, 157 N. W. 1070; Slimmer v. State Bank, 134 Minn. 349, 159 N. W. 795; Voris v. Birdsall, — Okla. —, 162 Pac. 951.

⁷Alabama. Sample v. Tennessee Valley Bank, — Ala. —, 76 So. 936.

Iowa. Lundean v. Hamilton, — Ia. —, 169 N. W. 208.

Kentucky. Citizens' State Bank v. Johnson County, 182 Ky. 531, 207 S. W. 8.

show that he believes that the instrument is defective,⁸ or to show guilty knowledge on his part.⁹ Lack of due diligence is not sufficient to establish notice of defects.¹⁰

This rule has been enacted in the Negotiable Instruments Law, which provides: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."¹¹

If the transferee refrains from making inquiry because he believes that inquiry on his part will show that the instrument is defective, he is said not to be a bona fide holder.¹² One who takes a negotiable instrument which discloses no defect on its face, is not bound to make active inquiries as to its validity.¹³ If a partner executes partnership paper and discounts it, the transferee is not bound to exercise ordinary care to learn whether the partner is applying the proceeds of such instrument to his personal debt or not.¹⁴ It is the bad faith of the holder and not the bad faith of the indorser, from whom he takes the instrument, that prevents him from being a bona fide holder.¹⁵

Minnesota. *Bank v. Beecher*, 133 Minn. 81, 157 N. W. 1070.

Montana. *Harrington v. Butte and Boston Mining Co.*, 33 Mont. 330, 114 Am. St. Rep. 821, 83 Pac. 467.

Nebraska. *Benton v. Sikyta*, 84 Neb. 808, 24 L. R. A. (N.S.) 1057, 122 N. W. 61.

Oklahoma. *McPherrin v. Tittle*, 36 Okla. 510, 44 L. R. A. (N.S.) 395, 129 Pac. 721; *Security Trust & Savings Bank v. Gleichmann*, 50 Okla. 441, L. R. A. 1915F, 1203, 150 Pac. 908; *Cline v. First National Bank*, — Okla. —, 170 Pac. 472.

Oregon. *Everding v. Toft*, 82 Or. 1, 150 Pac. 757, 160 Pac. 1160.

Washington. *National City Bank v. Shelton Electric Co.*, 96 Wash. 74, 164 Pac. 933.

⁸*Benton v. Sikyta*, 84 Neb. 808, 24 L. R. A. (N.S.) 1057, 122 N. W. 61; *First National Bank v. Stover*, 21 N.

M. 453, L. R. A. 1916D, 1280, 155 Pac. 905.

⁹*Hazen v. Van Senden*, 43 D. C. App. 161.

¹⁰*Citizens' State Bank v. Johnson County*, 182 Ky. 531, 207 S. W. 8.

¹¹Section 56 of the Negotiable Instruments Law.

¹²*Brent v. Simpson*, 238 Fed. 285, 151 C. C. A. 301; *Lundean v. Hamilton*, — Ia. —, 169 N. W. 208; *Everding v. Toft*, 82 Or. 1, 150 Pac. 757, 160 Pac. 1160.

¹³*Gigoux v. Moore*, — Kan. —, 184 Pac. 636; *Citizens' Bank & Trust Co. v. Limpricht*, 93 Wash. 361, 160 Pac. 1046; *Shultz v. Crewdson*, 95 Wash. 266, 163 Pac. 734.

¹⁴*Bank v. Lowry*, 81 W. Va. 578, 94 S. E. 985.

¹⁵*Shultz v. Crewdson*, 95 Wash. 266, 163 Pac. 734.

The fact that default has been made in payment of interest,¹⁶ or in one of a series of notes,¹⁷ is not notice of defects. The fact that by oversight a note, issued while the War Revenue Act was in force, was unstamped, is not notice of defenses.¹⁸ The fact that the indorsee required a very full guaranty from his indorser does not show as a matter of law that he had notice of defenses.¹⁹ The fact that one to whom a check is transferred knows that there are no funds on hand to meet it,²⁰ or that the maker has requested a delay before the check is presented for payment,²¹ does not prevent him from being a bona fide holder. Since accommodation paper is intended as a loan of credit by the accommodation party, one who takes such paper with notice that it is accommodation paper is not thereby charged with notice of defects,²² unless the accommodation maker is acting in excess of its legal power, as where it is a corporation.²³

One who buys the assets of a bank is bound to use due diligence to ascertain the true ownership of the negotiable instruments which have been indorsed to such bank.²⁴

¹⁶ *Indiana*. *Cooper v. Bank*, 21 Ind. App. 358, 69 Am. St. Rep. 365, 50 N. E. 775.

Iowa. *Higby v. Bahrenfuss*, 180 Ia. 316, 163 N. W. 247.

Oklahoma. *McPherrin v. Tittle*, 36 Okla. 510, 44 L. R. A. (N.S.) 395, 129 Pac. 721.

Oregon. *United States National Bank v. Floss*, 38 Or. 68, 84 Am. St. Rep. 752, 62 Pac. 751.

Washington. *Shultz v. Crewdson*, 95 Wash. 266, 163 Pac. 734.

Contra, *First National Bank v. Forsyth*, 67 Minn. 257, 64 Am. St. Rep. 415, 69 N. W. 909. The fact that the transferee knows that interest is overdue is a fact to be considered in determining whether or not he took in good faith although it is not of itself notice. *McPherrin v. Tittle*, 36 Okla. 510, 44 L. R. A. (N.S.) 395, 129 Pac. 721; *Shultz v. Crewdson*, 95 Wash. 266, 163 Pac. 734.

¹⁷ *Bank v. Mfg. Co.*, 62 Fed. 98, 18 L. R. A. 201.

Contra, *Harrell v. Broxton*, 78 Ga. 129, 3 S. E. 5.

¹⁸ *Ebert v. Gitt*, 95 Md. 186, 52 Atl. 900; *Burson v. Huntington*, 21 Mich. 415, 4 Am. Rep. 497.

¹⁹ *Cover v. Myers*, 75 Md. 406, 32 Am. St. Rep. 394, 23 Atl. 850.

²⁰ *Johnson v. Harrison*, 177 Ind. 240, 39 L. R. A. (N.S.) 1207, 97 N. E. 930.

²¹ *Matlock v. Scheuerman*, 51 Or. 49, 17 L. R. A. (N.S.) 747, 93 Pac. 823.

²² *Evans v. Hardware Co.*, 65 Ark. 204, 67 Am. St. Rep. 619, 45 S. W. 370; *New Haven Bank Nat. Banking Association v. Jordan Co. (Conn.)*, 104 Atl. 392; *Bass v. Geiger (Fla.)*, 73 So. 796; *Baker v. Bank*, 63 Neb. 801, 93 Am. St. Rep. 484, 89 N. W. 269.

See as to suretyship of wife for husband. *Birmingham Trust & Savings Co. v. Howell (Ala.)*, 79 So. 377.

²³ *Cook v. American Tubing & Webbing Co.*, 28 R. I. 41, 9 L. R. A. (N.S.) 193, 65 Atl. 641. See § 2356.

²⁴ *Stockyards National Bank v. First National Bank*, 249 Fed. 421; *Bank v. Jordan (Ala.)*, 75 So. 930.

See as to married woman as accommodation maker for her husband. *Wilbour v. Hawkins*, 38 R. I. 116, 94 Atl. 856.

§ 2361. Circumstantial evidence of bad faith. Direct evidence of bad faith is not necessary however. The fact that the holder takes under circumstances which should arouse suspicion, or is guilty of gross negligence, is a circumstance to be considered in determining whether he takes in good faith. The transferee may know facts extrinsic to the note which raise so strong an inference of its irregularity that a finding of fact that he did not take in good faith may be warranted.¹ Thus if the transferee knows that the note was given for "hull-less oats," and that the "hull-less oats" scheme as operated by the Hull-less Oats Company, the payee, is a fraud;² or if he knows that the amount of the note is disproportionately large for the means of the maker;³ or if he knows that the maker and his sons have been under arrest on a charge of murder, that the payee is their attorney, and that the amount of the note is exorbitant;⁴ or that his indorser is a gambler, the certificate of deposit being sold at much less than its face value;⁵ or that the instrument was given for corporate stock which was practically worthless,⁶ such knowledge may justify a finding of bad faith as a fact.

Whether the knowledge of the holder, that his indorser has obtained other notes of like general character, which were subject to defenses, prevents such holder from being a bona fide holder in case he does not know of defenses to the particular note, is a question upon which there is a conflict of authority. In some jurisdictions it is held that such knowledge is sufficient to prevent the holder from taking in good faith, or at least is sufficient to justify a finding of bad faith.⁷ In other jurisdictions it seems to be held

¹ **Indiana.** *Shirk v. Neible*, 156 Ind. 66, 83 Am. St. Rep. 150, 59 N. E. 281.

Michigan. *Goodrich v. McDonald*, 77 Mich. 486, 43 N. W. 1019.

Minnesota. *Bank v. Beecher*, 133 Minn. 81, 157 N. W. 1070.

New York. *Canajoharie National Bank v. Diefendorf*, 123 N. Y. 191, 10 L. R. A. 676, 25 N. E. 402.

South Dakota. *Dunn v. Bank*, 15 S. D. 454, 90 N. W. 1045.

Washington. *Hamilton v. Mihills*, 92 Wash. 675, 159 Pac. 887.

See also *Stockyards National Bank v. First National Bank*, 249 Fed. 421.

² *Griffith v. Shipley*, 74 Md. 591, 14

L. R. A. 405, 22 Atl. 1107. For a similar case involving a Bohemian oats note, see *McNamara v. Gargett*, 68 Mich. 454, 13 Am. St. Rep. 355, 36 N. W. 218.

³ *Canajoharie National Bank v. Diefendorf*, 123 N. Y. 191, 10 L. R. A. 676, 25 N. E. 402.

⁴ *Shirk v. Neible*, 156 Ind. 66, 83 Am. St. Rep. 150, 59 N. E. 281.

⁵ *Dunn v. Bank*, 15 S. D. 454, 90 N. W. 1045.

⁶ *Hamilton v. Mihills*, 92 Wash. 675, 159 Pac. 887.

⁷ *State Bank v. Lawrence*, 177 Ind. 515, 42 L. R. A. (N.S.) 326, 96 N. E.

that notice as to the invalidity of such other notes does not prevent the holder from being a bona fide holder of the specific notes concerning which he had no actual notice.⁸

Under some jurisdictions, however, it is still held that one who has knowledge of facts which would put a reasonably prudent man on inquiry, and who fails to make such inquiry, is not a bona fide holder as to defenses which such inquiry would have disclosed.⁹ The fact that the indorser is one who is comparatively a stranger to the indorsee, is a non-resident, and that he indorses the notes without recourse at a distance from the residence of the maker, although there are several banks in the vicinity of the residence of the maker, has been said to be sufficient to put the indorsee upon inquiry as a reasonable and prudent man, so as to prevent him from being a bona fide holder.¹⁰

§ 2362. To whom notice may be given—Constructive notice. Notice to an agent of the holder of defenses,¹ such as want of consideration,² is notice to the principal if within the scope of the agent's authority. Thus if a mortgagor sells the mortgaged property as agent of the mortgagee, and makes false statements about

947; *Stevens v. Venema*, 202 Mich. 232, L. R. A. 1918F, 1145, 168 N. W. 531; *Madison Trust Co. v. Stahlman*, 134 Tenn. 402, 183 S. W. 1012.

⁸ *Neill v. Central National Bank*, — Ala. —, 78 So. 73; *Citizens' Trust & Savings Bank v. Stackhouse*, 91 S. Car. 455, 40 L. R. A. (N.S.) 454, 74 S. E. 977; *Scandinavian American Bank v. Johnston*, 63 Wash. 187, 115 Pac. 102.

⁹ *Idaho. Vaughn v. Johnson*, 20 Ida. 669, 37 L. R. A. (N.S.) 816, 119 Pac. 879.

Minnesota. *Pennington County Bank v. First State Bank*, 110 Minn. 263, 26 L. R. A. (N.S.) 849, 125 N. W. 119.

Oklahoma. *Keisel v. Baldock*, 55 Okla. 487, L. R. A. 1916D, 632, 154 Pac. 1194.

South Dakota. *Mee v. Carlson*, 22 S. D. 365, 29 L. R. A. (N.S.) 351, 117 N. W. 1033.

Vermont. *Pierson v. Huntington*, 82 Vt. 482, 29 L. R. A. (N.S.) 695, 74 Atl.

88. "As we have seen, a party who takes a note procured by fraud from the maker must not only show that he is a purchaser for value before maturity, without notice, but that he purchased it in good faith. If, therefore, there were circumstances connected with the transaction which would arouse the suspicion of an ordinarily prudent man, and he failed to make the investigation suggested by these suspicions, he cannot be said to be a purchaser in good faith." *Kirby v. Berguin*, 15 S. D. 444, 90 N. W. 856 [quoted in *Mee v. Carlson*, 22 S. D. 365, 29 L. R. A. (N.S.) 351, 117 N. W. 1033].

¹⁰ *Mee v. Carlson*, 22 S. D. 365, 29 L. R. A. (N.S.) 351, 117 N. W. 1033.

¹ *Shedden v. Heard*, 110 Ga. 461, 35 S. E. 707; *Roberts v. Tavenner*, 48 W. Va. 632, 37 S. E. 576.

² *Morris v. Banking Co.*, 109 Ga. 12, 46 L. R. A. 506, 34 S. E. 378.

such property to the vendee to induce him to buy, the mortgagee, when taking a check for such property indorsed over by the mortgagor, does not take without notice.³

Whether the knowledge of an officer is to be imputed to a corporation, or the knowledge of the corporation is to be imputed to an officer, so that notice to one may prevent the other from being a bona fide holder of a negotiable instrument, depends in part upon the general rules of constructive notice as between a corporation and its officers. If, by the application of the general rules on the subject of constructive notice, one is charged with the knowledge of the other, such knowledge may prevent the holder from being a bona fide holder of a negotiable instrument.⁴ The president of a corporation or managing officer may be charged with the knowledge of the corporation concerning a negotiable instrument which he purchases from such corporation,⁵ even if he does not take an active part in the management thereof.⁶ If two corporations are under the same general management, the notice of one may prevent the other from being a bona fide holder of a negotiable instrument.⁷ If, on the other hand, the officer has an interest in the transaction adverse to that of the corporation, the corporation is not charged with the knowledge of such officer,⁸ and such knowledge will not, accordingly, be imputed to the corporation so as to prevent it from being a bona fide holder.⁹

³ *National Citizens' Bank v. Ertz*, 83 Minn. 12, 85 Am. St. Rep. 438, 53 L. R. A. 174, 85 N. W. 821.

⁴ *McCarty v. Kepreta*, 24 N. D. 395, 48 L. R. A. (N.S.) 65, 139 N. W. 992; *Hardin v. Dale*, 45 Okla. 694, L. R. A. 1915D, 1099, 146 Pac. 717.

⁵ *Denver Suburban Homes & Water Co. v. Fugate*, — Colo. —, 168 Pac. 33; *McCarty v. Kepreta*, 24 N. D. 395, 48 L. R. A. (N.S.) 65, 139 N. W. 992.

⁶ *McCarty v. Kepreta*, 24 N. D. 395, 48 L. R. A. (N.S.) 65, 139 N. W. 992.

⁷ *Madison Trust Co. v. Stahlman*, 134 Tenn. 402, 183 S. W. 1012.

⁸ *First National Bank v. Fairfield Auto Co.*, 91 Conn. 260, 99 Atl. 577; *Arlington Brewing Co. v. Bluethenthal*, 36 D. C. App. 209, L. R. A. 1918C,

901; *Security Trust & Savings Bank v. Gleichmann*, 50 Okla. 441, L. R. A. 1915F, 1203, 150 Pac. 908, *Rusmisse v. White Oak Stave Co.*, 80 W. Va. 400, 92 S. E. 672 [sub nomine, *Rusmisse v. White Oak Stave Co.*, L. R. A. 1917F, 453].

⁹ *First National Bank v. Fairfield Auto Co.*, 91 Conn. 260, 99 Atl. 577; *Arlington Brewing Co. v. Bluethenthal*, 36 D. C. App. 209, L. R. A. 1918C, 901; *Security Trust & Savings Bank v. Gleichmann*, 50 Okla. 441, L. R. A. 1915F, 1203, 150 Pac. 908; *Rusmisse v. White Oak Stave Co.*, 80 W. Va. 400, 92 S. E. 672 [sub nomine, *Rusmisse v. White Oak Stave Co.*, L. R. A. 1917F, 453].

Notice by publication in a newspaper is not notice to one who is not shown to have actually known thereof.¹⁰

§ 2363. When notice must be given. The time at which notice must be given to the holder, in order to be operative, depends on the time at which the holder has paid value for the instrument, in whole or in part.¹ One who holds a note as collateral before notice and buys it after notice,² or who has made some advances before notice and other advances after notice,³ does not take as a bona fide holder as to what he pays after notice. One who has paid for a negotiable instrument by giving his own negotiable instrument, which has been transferred to a bona fide holder, takes for value.⁴ If, however, he has paid his own note to his original payee after notice of defects in the indorsed note, he does not hold the latter note for value.⁵

This rule has been carried into the Negotiable Instruments Law, which provides: "Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him."⁶ Such a statute is intended to protect the maker only, and not the payee by whom it has been acquired by fraud.⁷

§ 2364. Payee as bona fide holder. Before the Negotiable Instruments Law was enacted, it was held that the payee of an instrument might be a bona fide holder, if he took for value without notice before maturity, and in the usual course of business,

¹⁰ *English-American, etc., Co. v. Hiers*, 112 Ga. 823, 38 S. E. 103.

¹ *Glenn v. Rice*, 174 Cal. 269, 162 Pac. 1020; *State v. Emery*, — Okla. —, 174 Pac. 770.

See also *Madison Trust Co. v. Stahlman*, 134 Tenn. 402, 183 S. W. 1012.

² *First National Bank v. Buchan*, 79 Minn. 322, 82 N. W. 641.

³ *United States Dresser v. Construction Co.*, 93 U. S. 92, 23 L. ed. 815.

California. Glenn v. Rice, 174 Cal. 269, 162 Pac. 1020.

Massachusetts. Hubbard v. Chapin, 84 Mass. (2 All.) 328.

Oklahoma. State v. Emery, — Okla. —, 174 Pac. 770.

Oregon. Benson v. Keller, 37 Or. 120, 60 Pac. 918.

⁴ *Simmons v. Hodges*, 250 Fed. 424.

⁵ *Simmons v. Hodges*, 250 Fed. 424.

⁶ Section 54 of the Negotiable Instruments Law. See *Central Savings Bank v. Stotter* (Mich.), 174 N. W. 142.

⁷ *Voss v. Chamberlain*, 139 Ia. 569, 10 L. R. A. (N.S.) 106, 117 N. W. 269.

although the instrument was not, of course, indorsed to him by the original payee.¹ Such a set of facts arises, as a rule, when one or more of the original makers has been guilty of unfair dealing toward other makers, of which the original payee is ignorant. In such a case the original payee has been protected, and it has been assumed that the rule which requires a bona fide holder to take by delivery, or by indorsement and delivery, according to the nature of the instrument,² applies only when the bona fide holder claims by transfer from the original payee. Under the Negotiable Instruments Law, it has been held in some jurisdictions that the original payee may take as a holder in due course, on the theory that the Negotiable Instruments Law was intended, upon this point, to codify the pre-existing law; and that the provisions with reference to delivery, or to indorsement and delivery, applied only when the holder in due course claimed as the transferee from the original payee.³ While this would seem to be the necessary result of the Negotiable Instruments Law taken as a whole, it has been held,⁴ sometimes without discussion,⁵ that the provisions, with reference to delivery or with reference to delivery and indorsement, preclude the original payee from being a holder in due course. In other jurisdictions the courts have refused to recognize an innocent payee as a holder in due course, under the facts of the particular case,

¹ *Munroe v. Bordier*, 8 C. B. 862; *Armstrong v. American Exchange Bank*, 133 U. S. 433, 33 L. ed. 747; *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140, 97 Am. St. Rep. 426, 66 N. E. 646.

See also *Redfield v. Wells* (Ida.), 173 Pac. 640; *Johnston v. Knipe* (Pa. St.), 103 Atl. 957.

If a renewal note is made out directly to an indorsee of a prior note, the payee of the second note may be regarded as a holder for value. *New Haven Bank Nat. Banking Association v. Jordan Co.* (Conn.), 104 Atl. 392; *American National Bank v. Hill*, 169 N. Car. 235, 85 S. E. 209.

² See § 2365.

³ *Alabama. Ex parte Goldberg*, — Ala. —, 67 So. 839.

District of Columbia. Thompson v. Franklin National Bank, 45 D. C. App. 218.

Idaho. Redfield v. Wells, 31 Ida. 415, 173 Pac. 640.

Massachusetts. Liberty Trust Co. v. Tilton, 217 Mass. 462, L. R. A. 1915B, 144, 105 N. E. 605; *Colonial Fur Ranching Co. v. First National Bank*, 227 Mass. 12, 116 N. E. 731.

Pennsylvania. Johnston v. Knipe (Pa. St.), 103 Atl. 957.

⁴ *St. Charles Savings Bank v. Edwards*, 243 Mo. 553, 147 S. W. 978.

See on this question. *Long v. Mason* (Mo.), 200 S. W. 1062.

⁵ *Bowles Co. v. Clark*, 59 Wash. 336, 31 L. R. A. (N.S.) 613, 109 Pac. 812.

but they have kept from laying down the rule that the original payee never could be a holder in due course.⁶

§ 2365. Delivery or indorsement—Necessity. A holder, to be a bona fide holder, must take in accordance with the nature of the instrument. If it is payable to the payee or bearer, delivery alone is sufficient.¹ Without delivery, a person who acquires rights in a negotiable instrument does not become a bona fide holder.² If A has wrongfully taken an instrument which belongs to B, and which is indorsed in blank, from B's safety deposit box, and A has pledged such instrument to C to secure A's indebtedness, A's act in receiving such instrument from C for collection and placing it in A's safety deposit box, does not amount to a new delivery to A, so that A's rights are prior to those of C.³ The act of one who has, in his custody, an instrument indorsed in blank, in showing it to another whose money he has for investment, and telling him that such instrument represents an investment, does not amount to delivery.⁴

If the instrument is payable to payee or order, the payee must indorse the instrument—that is, he must write his name upon the back of it, as well as deliver it to the holder, to constitute the latter a bona fide holder.⁵ If a note is assigned but not delivered, as where it is not in the assignor's possession,⁶ or where the assignor shows it to the assignee but does not deliver it,⁷ the assignee takes subject to all defenses. If a note payable to "order" is assigned and delivered but not indorsed, the assignee takes subject to all

⁶ *Vander Ploeg v. Van Zuuk*, 135 Ia. 350, 124 Am. St. Rep. 275, 13 L. R. A. (N.S.) 490, 112 N. W. 807.

¹ *United States. Thompson v. Perine*, 106 U. S. 589, 27 L. ed. 298.

Massachusetts. Truesdell v. Thompson, 53 Mass. (12 Met.) 565; *Avery v. Latimer*, 14 Ohio, 542.

² *Voss v. Chamberlain*, 139 Ia. 569, 19 L. R. A. (N.S.) 106, 117 N. W. 269.

³ *Voss v. Chamberlain*, 139 Ia. 569, 19 L. R. A. (N.S.) 106, 117 N. W. 269.

⁴ *Bettanier v. Smith*, 129 Ia. 597, 5 L. R. A. (N.S.) 628, 105 N. W. 999.

⁵ *Georgia. Sulunias v. Poolos*, 148 Ga. 409, 96 S. E. 868.

Kentucky. Instone v. Williamson, 5 Ky. (2 Bibb.) 83; *Bellis v. Lyons*, 97 Mich. 398, 56 N. W. 770.

Minnesota. Cochran v. Stein, 118 Minn. 323, 41 L. R. A. (N.S.) 391, 136 N. W. 1037.

Oklahoma. Phelps v. Womack, — Okla. —, 167 Pac. 478.

South Carolina. First National Bank v. Wood, — S. Car. —, 95 S. E. 140.

See also, *Mangold & Glandt Bank v. Utterback*, — Okla. —, L. R. A. 1917B, 364, 160 Pac. 713.

⁶ *Muller v. Pondir*, 55 N. Y. 325, 14 Am. Rep. 259.

⁷ *Bettanier v. Smith*, 129 Ia. 597, 5 L. R. A. (N.S.) 628, 105 N. W. 999 (instrument the property of the original indorser and not the property of the subsequent assignor).

defenses,⁸ although he takes the interest of his assignor.⁹ Thus if A transfers a note to B without indorsement, B taking without notice of defenses, and subsequently after B has notice of defenses A indorses to B, B is not a bona fide holder.¹⁰

These rules have been carried into the Negotiable Instruments Law, which provides: "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery."¹¹

§ 2366. What constitutes indorsement. A note which is payable to either of two persons in the alternative, may be indorsed by one of them so that the indorsee is a holder in due course.¹ The paper on which the indorser writes his name must be attached

⁸ **United States.** Thompson-Houston Electric Co. v. Electric Co., 56 Fed. Rep. 849.

Alabama. Vann v. Marbury, 100 Ala. 438, 46 Am. St. Rep. 70, 23 L. R. A. 325, 14 So. 273.

California. Hays v. Plummer, 126 Cal. 107, 77 Am. St. Rep. 153, 58 Pac. 447; More v. Finger, 128 Cal. 313, 60 Pac. 933.

Georgia. Benson v. Abbott, 95 Ga. 69, 22 S. E. 127; Sulunias v. Poolos, 148 Ga. 409, 96 S. E. 866.

Indiana. First National Bank v. Henry, 156 Ind. 1, 58 N. E. 1057.

Michigan. Marskey v. Turner, 81 Mich. 62, 45 N. W. 644.

Minnesota. Cochran v. Stein, 118 Minn. 323, 41 L. R. A. (N.S.) 391, 136 N. W. 1037.

Montana. Helena National Bank v. Telegraph Co., 20 Mont. 379, 63 Am. St. Rep. 628, 51 Pac. 829.

Nebraska. Sackett v. Montgomery, 57 Neb. 424, 73 Am. St. Rep. 522, 77 N. W. 1083.

New York. Goshen National Bank v. Bingham, 118 N. Y. 349, 16 Am. St. Rep. 765, 7 L. R. A. 595, 23 N. E. 180.

Ohio. Kyle v. Thompson, 11 O. S. 616.

Oklahoma. Phelps v. Womack, — Okla. —, 167 Pac. 478.

South Carolina. First National Bank v. Wood, — S. Car. —, 95 S. E. 140.

Washington. Puget Sound State Bank v. Washington Paving Co., 94 Wash. 504, 162 Pac. 870.

Wisconsin. Galusha v. Sherman, 105 Wis. 263, 47 L. R. A. 417, 81 N. W. 495.

Wyoming. Capitol Hill State Bank v. Rawlins National Bank, 24 Wyom. 423, 160 Pac. 1171.

⁹ O'Keeffe v. Bank, 49 Kan. 347, 33 Am. St. Rep. 370, 30 Pac. 473; Stevens v. Hannan, 86 Mich. 305, 24 Am. St. Rep. 125, 48 N. W. 951; Sackett v. Montgomery, 57 Neb. 424, 73 Am. St. Rep. 522, 77 N. W. 1083; Hopkins v. Manchester, 16 R. I. 663, 7 L. R. A. 387, 19 Atl. 243.

¹⁰ Pavey v. Stauffer, 45 La. Ann. 353, 10 L. R. A. 716, 12 So. 512; Goshen National Bank v. Bingham, 118 N. Y. 349, 16 Am. St. Rep. 765, 7 L. R. A. 595, 23 N. E. 180.

¹¹ Section 30 of the Negotiable Instruments Law.

¹ Voris v. Schoonover, 91 Kan. 530, 50 L. R. A. (N.S.) 1097, 138 Pac. 607.

physically to the instrument.² The owner's writing his name on a separate piece of paper,³ even if pinned to the note,⁴ is not indorsement, unless the back of the note is filled with indorsements and the additional paper is necessary for additional indorsements.

Whether a written guaranty of an instrument or a waiver of demand and notice are equivalent to an indorsement so that the holder to whom such instrument is delivered under such contract is not subject to all the defenses which could have been made against the original payee, is a question upon which there has been some conflict of judicial opinion. By the great weight of authority, such a transfer amounts to an indorsement and delivery of the instrument, and the guaranty and waiver of demand and notice are intended to add to the rights of the transferee and not to detract from them. He is, accordingly, protected as a bona fide holder.⁵ An indorsement, "payment guaranteed, protest waived,"⁶ or "pay to any bank or banker, all previous indorsements guaranteed,"⁷ or "for value received we hereby warrant the makers of this note financially good on execution,"⁸ or "for value received I hereby guarantee payment of the within at maturity or any time thereafter, with interest at the rate of eight per cent. per annum until paid, waiving demand and notice of non-payment and pro-

² *Commercial Security Co. v. Main Street Pharmacy*, 174 N. Car. 655, 94 S. E. 298.

³ *Hays v. Plummer*, 126 Cal. 107, 77 Am. St. Rep. 153, 58 Pac. 447; *French v. Turner*, 15 Ind. 59; *Doll v. Hollenbeck*, 19 Neb. 639; *Commercial Security Co. v. Main Street Pharmacy*, 174 N. Car. 655, 94 S. E. 298.

⁴ *Bishop v. Chase*, 156 Mo. 158, 56 S. W. 1080.

⁵ *Georgia. Hendrix v. Bauhard*, 138 Ga. 473, 43 L. R. A. (N.S.) 1028, 75 S. E. 588.

Iowa. Voss v. Chamberlain, 139 Ia. 569, 19 L. R. A. (N.S.) 106, 117 N. W. 269.

Kansas. Kellogg v. Douglas County Bank, 58 Kan. 43, 62 Am. St. Rep. 596, 48 Pac. 587.

Missouri. Maddox v. Duncan, 143 Mo. 613, 65 Am. St. Rep. 678, 41 L. R. A. 581, 45 S. W. 688.

Nebraska. National Bank of Commerce v. Bossemeyer, 101 Neb. 96, L. R. A. 1917E, 374, 162 N. W. 503.

Oklahoma. First National Bank v. Cummings, — Okla. —, L. R. A. 1918D, 1099, 171 Pac. 862 [following, *McNary v. Farmers' National Bank*, 33 Okla. 1, 41 L. R. A. (N.S.) 1009, Ann. Cas. 1914B, 248, 124 Pac. 286; *Mangold & Glandt Bank v. Utterback*, — Okla. —, L. R. A. 1917B, 364, 160 Pac. 713; and overruling, *Ireland v. Floyd*, 42 Okla. 609, L. R. A. 1915C, 661, 142 Pac. 401].

⁸ *Mangold & Glandt Bank v. Utterback*, — Okla. —, L. R. A. 1917B, 364, 160 Pac. 713.

⁷ *National Bank of Commerce v. Bossemeyer*, 101 Neb. 96, L. R. A. 1917E, 374, 162 N. W. 503.

⁶ *Hendrix v. Bauhard*, 138 Ga. 473, 43 L. R. A. (N.S.) 1028, 75 S. E. 588.

test,"⁹ has been held in each case to make the transferee a bona fide holder. An indorsement by the payee, "I hereby acknowledge myself a principal maker of this note," amounts to an indorsement.¹⁰

There is, however, some authority for holding that the addition of a guaranty is so inconsistent with the liability of an indorser, that the transferee is not a bona fide holder.¹¹ This view was taken under the Oklahoma statute, in force before the Negotiable Instruments Law.¹² Oklahoma has, however, changed its views on this question more than once.¹³

An indorsement which shows that another person has an interest in the proceeds of the note destroys its negotiability and puts the purchaser upon inquiry as to the interest of such other person.¹⁴

An assignment of a note written upon the back thereof, and signed by the payee, is generally regarded as equivalent to an indorsement.¹⁵ This view is generally taken under the Negotiable Instruments Law.¹⁶ Whether a transfer of all of the holder's "right, title and interest," amounts to an indorsement, is a question upon which there is a conflict of authority. In some jurisdictions such assignment is held to be equivalent to an indorsement so that the transferee is a bona fide holder,¹⁷ while in other jurisdictions such an assignment is held at most to be a qualified indorsement which does not render the transferee a bona fide holder.¹⁸

⁹ First National Bank v. Cummings, — Okla. —, L. R. A. 1918D, 1099, 171 Pac. 862.

¹⁰ Kistner v. Peters, 223 Ill. 607, 114 Am. St. Rep. 362, 79 N. E. 311.

¹¹ New York Central Trust Co. v. Wyandotte First National Bank, 101 U. S. 68, 25 L. ed. 876; Ireland v. Floyd, 42 Okla. 609, L. R. A. 1915C, 661, 142 Pac. 401 [overruled in, First National Bank v. Cummings, — Okla. —, L. R. A. 1918D, 1099, 171 Pac. 862].

¹² Douglass v. Brown, 56 Okla. 6, 155 Pac. 887.

¹³ See note 5 ante, this section.

¹⁴ Keisel v. Baldock, 55 Okla. 487, L. R. A. 1916D, 632, 154 Pac. 1194.

¹⁵ Markey v. Corey, 108 Mich. 184, 62 Am. St. Rep. 698, 36 L. R. A. 117, 66 N. W. 493; Colona v. Parksley National Bank, 120 Va. 812, 92 S. E. 979; Thorp v. Mindeman, 123 Wis. 149, 107 Am. St. Rep. 1003, 68 L. R. A. 146, 101 N. W. 417.

¹⁶ Farnsworth v. Burdick, 94 Kan. 749, 147 Pac. 863; Colona v. Parksley National Bank, 120 Va. 812, 92 S. E. 979.

¹⁷ Coddington Savings Bank v. Anderson, 64 Neb. 205, 89 N. W. 787; Marion National Bank v. Harden, — W. Va. —, 97 S. E. 600.

¹⁸ Gale v. Mayhew, 161 Mich. 96, 29 L. R. A. (N.S.) 648, 125 N. W. 781.

§ 2367. Value. In order to be a bona fide holder, the holder must take for value. If the holder does not give value for the note he is not a bona fide holder.¹ "Value" means valuable consideration.² A receiver,³ as the receiver of an insolvent bank,⁴ or an assignee for the benefit of creditors,⁵ parts with nothing of value and is not a holder for value. One who takes for collection is the agent of the indorser and is not a holder for value.⁶ If the indorser of such instrument has checked out the amount of such deposit, the indorsee is a holder for value, even if he originally took for collection.⁷ Even if the amount of the instrument is placed to the credit of the indorser who has the right to check on such account, the fact that the indorsee reserves the right to charge back the amount of the instrument if it is not paid, renders the indorsee an agent for collection and not a holder for value.⁸ The fact, however, that the indorser had an account which was greater than the amount of the instrument thus deposited to his credit, is not of itself conclusive of the fact that the indorsee was an agent for collection and not a holder for value.⁹

If the holder has obtained restitution from his indorser, he can not thereafter claim as a bona fide holder.¹⁰

¹ *Security State Bank v. Clarke*, 99 Kan. 18, 160 Pac. 1149; *Smith v. Bayer*, 46 Or. 143, 114 Am. St. Rep. 858, 79 Pac. 497.

A bank which takes over the assets and assumes the liabilities of another bank is held not to purchase the notes of such other bank unconditionally for value; and accordingly the purchasing bank is not regarded as a holder in due course. *Bank v. Jordan* (Ala.), 75 So. 930. See, *Donatio Mortis Causa of Negotiable Paper*, by Francis R. Jones, 6 *Harvard Law Review*, 36.

² Section 190 of the Negotiable Instruments Law.

See also, *Miller v. Marks*, 46 Utah 257, 148 Pac. 412.

³ *Litchfield Bank v. Peck*, 29 Conn. 384.

⁴ *Colton v. Loan Association*, 90 Md. 85, 78 Am. St. Rep. 431, 46 L. R. A. 388, 45 Atl. 23.

⁵ *Roberts v. Hall*, 37 Conn. 205, 9 Am. Rep. 308.

⁶ *People's State Bank v. Miller*, 185 Mich. 565, 152 N. W. 257; *Worth Co. v. International Sugar Feed No. 2 Co.*, 172 N. Car. 335, 90 S. E. 295; *Smith v. Bayer*, 46 Or. 143, 114 Am. St. Rep. 858, 79 Pac. 497.

⁷ *Standard Trust Co. v. Commercial National Bank*, 240 Fed. 303; *Standard Trust Co. v. Commercial National Bank*, 166 N. Car. 112, 81 S. E. 1074. See § 2370.

⁸ *Worth Co. v. International Sugar Feed No. 2 Co.*, 172 N. Car. 335, 90 S. E. 295.

⁹ *Worth Co. v. International Sugar Feed No. 2 Co.*, 172 N. Car. 335, 90 S. E. 295.

¹⁰ *First National Bank v. Lyons Exchange Bank*, 100 Kan. 194, 164 Pac. 137.

The holder need not pay the full face of the instrument to be a holder for value,¹¹ and the fact that he paid less than the face of the instrument is material only if the discount is so great as to suggest that the bona fide holder knew of defenses to the instrument.¹² The general rule is that a bona fide holder can recover the full amount of the instrument with interest, even if he has paid less than par therefor.¹³ Some authorities, however, limit the right of recovery of a bona fide holder of a note obtained through fraud, without consideration to the amount paid by him therefor, with interest.¹⁴ The latter rule has been adopted by the Negotiable Instruments Law.¹⁵

Past services which created no legal liability do not amount to value for the transfer of a negotiable instrument.¹⁶ Love and affection is said to be such a value that the holder may enforce a note which was made on Sunday, but which was dated on a secular day, if the holder did not know of such defect when he took such

¹¹ **United States.** *Goodman v. Simonds*, 61 U. S. (20 How.) 343, 15 L. ed. 934.

Alabama. *Bernheimer v. Gray*, — Ala. —, 78 So. 840.

Arizona. *Phoenix Safety Investment Co. v. Michaels*, — Ariz. —, 176 Pac. 587.

Kentucky. *Farmers' Bank v. First National Bank*, 164 Ky. 548, 175 S. W. 1019.

Massachusetts. *Wheeler v. Guild*, 37 Mass. (20 Pick.) 545, 32 Am. Dec. 231.

Ohio. *Kitchen v. Loudenback*, 48 O. S. 177, 29 Am. St. Rep. 540, 26 N. E. 979 (\$367.50 paid for a note for \$450).

Tennessee. *Oppenheimer v. Bank*, 97 Tenn. 19, 56 Am. St. Rep. 778, 33 L. R. A. 767, 36 S. W. 705 (discount of twenty per cent.).

Washington. *McNamara v. Jose*, 28 Wash. 461, 68 Pac. 903 (discounted for one-half its face value); *Moore v. Burling*, 93 Wash. 217, 160 Pac. 420.

¹² **Alabama.** *Bernheimer v. Gray*, — Ala. —, 78 So. 840 (such discount is not usury).

Arizona. *Phoenix Safety Invest-*

ment Co. v. Michaels, — Ariz. —, 176 Pac. 587.

Maryland. *Williams v. Huntington*, 68 Md. 590, 6 Am. St. Rep. 477, 13 Atl. 336.

Texas. *Wilson v. Denton*, 82 Tex. 531, 27 Am. St. Rep. 908, 18 S. W. 620.

Washington. *Moore v. Burling*, 93 Wash. 217, 160 Pac. 420.

¹³ *Wade v. Ry.*, 149 U. S. 327, 37 L. ed. 755; *Murphy v. Lucas*, 58 Ind. 360; *Oldham v. Turner*, 42 Ky. (3 B. Mon.) 67; *Kitchen v. Loudenback*, 48 O. S. 177, 29 Am. St. Rep. 540, 26 N. E. 979.

¹⁴ *Richards v. Monroe*, 85 Ia. 359, 39 Am. St. Rep. 301, 52 N. W. 339 (by statute); *DeKay v. Water Co.*, 38 N. J. Eq. 158; *Oppenheimer v. Bank*, 97 Tenn. 19, 56 Am. St. Rep. 778, 33 L. R. A. 767, 36 S. W. 705; *Green v. Stuart*, 66 Tenn. (7 Baxt.) 422; *Petty v. Hannum*, 21 Tenn. (2 Humph.) 102, 36 Am. Dec. 303.

¹⁵ Section 54 of the Negotiable Instruments Law.

See also, *In re Continental Engine Co.*, 234 Fed. 58.

¹⁶ *Gooch v. Gooch*, 178 Ia. 902, L. R. A. 1917C, 582, 160 N. W. 333.

note.¹⁷ One to whom a note has been transferred and who has paid a part of the value therefor, is a holder in due course, although another person has paid a part of the value therefor, and although such other person has an equal interest in such negotiable instrument.¹⁸

§ 2368. Payment as value. Payment of a pre-existing debt constitutes "value."¹ One who takes a note as collateral and subsequently surrenders the note which evidences the principal debt in consideration of such collateral note as payment, is a bona fide holder of the collateral note.² Under the Negotiable Instruments Law, however, it has been held that a payee of a note, who accepts it in good faith for past indebtedness, is not a holder in due course so that he can enforce such note against the maker if blanks in such note have been filled up contrary to the instructions of such maker.³ Payment of a note by one who is already liable as guarantor thereof, is not such value that the holder may acquire any greater rights than those of the party to whom he gave such guaranty.⁴ The fact that the only value which was given was a

¹⁷ *Gooch v. Gooch*, 178 Ia. 902, L. R. A. 1917C, 582, 160 N. W. 333.

¹⁸ *Fleshman v. Bibb*, 118 Va. 582, 88 S. E. 64.

¹ *United States. Levy, etc., Co. v. Kauffman*, 114 Fed. 170, 52 C. C. A. 126; *In re United States Hair Co.*, 239 Fed. 703, 152 C. C. A. 537.

Arkansas. *Tabor v. Bank*, 48 Ark. 454, 3 Am. St. Rep. 241, 3 S. W. 805.

Georgia. *Lee v. Johnson*, 110 Ga. 286, 34 S. E. 568.

Illinois. *Foy v. Blackstone*, 31 Ill. 538, 83 Am. Dec. 246.

Indiana. *McKnight v. Knisely*, 25 Ind. 336, 87 Am. Dec. 364.

Kansas. *Benjamin v. Welda State Bank*, 98 Kan. 361, 158 Pac. 65.

Kentucky. *Frank v. Quast*, 86 Ky. 649, 6 S. W. 909.

Massachusetts. *Blanchard v. Stevens*, 57 Mass. (3 Cush.) 162, 50 Am. Dec. 723; *Boston, etc., Co. v. Steuer*, 183 Mass. 140, 97 Am. St. Rep. 426, 66 N. E. 646.

New York. *Kelso v. Ellis*, 224 N. Y. 528, 121 N. E. 364.

Ohio. *Carlisle v. Wishart*, 11 Ohio 172 [overruling, *Riley v. Johnson*, 8 Ohio 526].

Tennessee. *Tradesmen's National Bank v. Looney*, 99 Tenn. 278, 63 Am. St. Rep. 830, 38 L. R. A. 837, 42 S. W. 149.

Texas. *Herman v. Gunter*, 83 Tex. 66, 29 Am. St. Rep. 632, 18 S. W. 428.

Virginia. *Payne v. Zell*, 98 Va. 294, 36 S. E. 379.

Contra, Ferriss v. Tavel, 87 Tenn. 386, 3 L. R. A. 414, 11 S. W. 93.

This is the rule under the Negotiable Instruments Law. *Kelso v. Ellis*, 224 N. Y. 528, 121 N. E. 364.

² *Farmers' & Merchants' State Bank v. Beal*, 102 Kan. 481, 170 Pac. 1007.

³ *Vander Ploeg v. Van Zuuk*, 135 Ia. 350, 13 L. R. A. (N.S.) 490, 112 N. W. 807. The fact that the payee claimed as the holder in due course was possibly the reason for the result of this case.

⁴ *Rockefeller v. Ringle*, 77 Kan. 515, 15 L. R. A. (N.S.) 737, 94 Pac. 810.

credit upon a pre-existing indebtedness, may be considered in determining whether the holder takes in good faith.⁵

§ 2369. Giving note, check, etc., as value. If A buys a note from B, and gives to B A's own note therefor, A is holder for value of the note transferred by B,¹ even if B was the agent of the real owner of the note without authority to sell, if A did not know this and if A's note is in the hands of a bona fide holder.²

If a bank gives its certificate of deposit for a negotiable instrument, and such certificate is transferred to a bona fide holder,³ or is paid by the bank after it is transferred to such bona fide holder,⁴ the bank is a bona fide holder of the negotiable instrument for which such certificate of deposit was given. If the bank has not paid its certificate of deposit and such certificate is not transferred to a bona fide holder, it is said that the bank is not a holder for value of the negotiable instrument for which such certificate was given.⁵ It has, however, been said without reference to negotiation or payment of the certificate of deposit, that a bank which gives an interest-bearing certificate of deposit, which is due in a specified time, becomes a holder for value of the negotiable instrument for which such certificate of deposit was given.⁶

If A has given his check to B in exchange for an instrument which is payable to B, A becomes a bona fide holder,⁷ even though A could stop payment upon his check after he learns of defects in the check which B transferred to A.⁸ One who has accepted a check in good faith as payee may enforce payment against the maker, even though such payee has on hand a deposit belonging to an indorser of such check exceeding the amount of such check.⁹ The payee is not bound to apply such deposit to the payment of the check for the protection of the maker, even though it learns,

⁵ *Kelso v. Ellis*, 224 N. Y. 528, 121 N. E. 364.

¹ *Simmons v. Hodges*, 250 Fed. 424.

² *Wilson v. Denton*, 82 Tex. 531, 27 Am. St. Rep. 908, 18 S. W. 620.

³ *Elmore County Bank v. Avant*, 189 Ala. 418, 66 So. 509; *White v. Wadhams*, — Mich. —, 170 N. W. 60.

⁴ *Elmore County Bank v. Avant*, 189 Ala. 418, 66 So. 509.

⁵ *Armstrong v. Walker*, — Ala. —, 76 So. 280.

⁶ *Neill v. Central National Bank*, — Ala. —, 78 So. 73.

⁷ *Matlock v. Scheuerman*, 51 Or. 49, 17 L. R. A. (N.S.) 747, 93 Pac. 823; *Miller v. Marks*, 46 Utah 257, 148 Pac. 412.

⁸ *Matlock v. Scheuerman*, 51 Or. 49, 17 L. R. A. (N.S.) 747, 93 Pac. 823; *Miller v. Marks*, 46 Utah 257, 148 Pac. 412.

⁹ *Camas Prairie State Bank v. Newman*, 15 Ida. 719, 21 L. R. A. (N.S.) 703, 99 Pac. 833.

after it has advanced money on such check, that the check was given to enable the maker to borrow money with which to pay a gambling debt to such indorser.¹⁰ One who has taken a check in good faith and for value is not bound to enforce such check against the indorser in order to protect the maker,¹¹ even if he discovers that such check was given in payment of a gambling debt.¹²

§ 2370. Giving credit on account as value. If A credits B on his account, with the value of a negotiable instrument which B has transferred to A, and B checks out such deposit before A has notice of defects in such instrument, A is holder for value.¹ According to the weight of authority, it is not the giving credit but honoring checks to the extent of such credit in whole or in part that makes the bank a holder for value,² and until such credit is checked out, A is not a holder for value.³ If the entire amount

¹⁰ *Camas Prairie State Bank v. Newman*, 15 Ida. 719, 21 L. R. A. (N.S.) 703, 99 Pac. 833.

¹¹ *Matlock v. Scheuerman*, 51 Or. 49, 17 L. R. A. (N.S.) 747, 93 Pac. 823.

¹² *Matlock v. Scheuerman*, 51 Or. 49, 17 L. R. A. (N.S.) 747, 93 Pac. 823.

¹ *United States. Armstrong v. American Exchange Bank*, 133 U. S. 433, 33 L. ed. 747.

Arkansas. *Hamilton National Bank v. Emigh*, 127 Ark. 545, 192 S. W. 913.

Illinois. *American Exchange Nat. Bk. v. Theummler*, 195 Ill. 90, 88 Am. St. Rep. 177, 58 L. R. A. 51, 62 N. E. 932.

Iowa. *Shaw v. Jacobs*, 89 Ia. 713, 719, 48 Am. St. Rep. 411, 21 L. R. A. 440, 55 N. W. 333, 56 N. W. 684.

Massachusetts. *Shawmut National Bank v. Manson*, 168 Mass. 425, 47 N. E. 196.

Minnesota. *First National Bank v. McNairy*, 122 Minn. 215, Ann. Cas. 1914D, 977, 142 N. W. 139.

Nebraska. *National Bank v. Bossemeyer*, 101 Neb. 96, L. R. A. 1917E, 374, 162 N. W. 503.

Oklahoma. *First National Bank v. Stallings*, — Okla. —, 177 Pac. 373.

Utah. *Helper State Bank v. Jackson*, 48 Utah 430, 160 Pac. 287.

Wisconsin. *Northfield National Bank v. Arndt*, 132 Wis. 383, 12 L. R. A. (N.S.) 82, 112 N. W. 451.

See, *When is a Bank the Bona Fide Owner of a Check Left for Deposit or Collection?* by Albert S. Bolles, 56 *Pennsylvania Law Review*, 375.

² *Fruitticher Electric Co. v. Birmingham Trust & Savings Co.*, — Ala. —, 79 So. 248; *Dreilling v. Bank*, 43 Kan. 197, 19 Am. St. Rep. 126, 23 Pac. 94; *Union National Bank v. Winsor*, 101 Minn. 470, 118 Am. St. Rep. 641, 112 N. W. 999; *Citizens' State Bank v. Cowles*, 180 N. Y. 346, 105 Am. St. Rep. 765, 73 N. E. 33.

³ *United States. Dresser v. Construction Co.*, 93 U. S. 92, 23 L. ed. 815.

Alabama. *Alabama Grocery Co. v. First National Bank*, 158 Ala. 143, 132 Am. St. Rep. 18, 48 So. 340; *Sherill v. Merchants' Bank*, 195 Ala. 175, 70 So. 723; *Fruitticher Electric Co. v. Birmingham Trust & Savings Co.*, — Ala. —, 79 So. 248.

Iowa. *McKnight v. Parsons*, 136 Ia. 390 [sub nomine, *McKnight v. Parsons*, 22 L. R. A. (N.S.) 718, 113 N. W. 858].

of the deposit is checked out before A has notice of defects in the paper for which such credit was given, A is a bona fide holder.⁴ If A applies the amount of such instrument to the payment of B's indebtedness to A, with B's consent, A is a holder for value.⁵

Whether A can be a bona fide holder if less than the entire amount of the credit has been exhausted, is a question on which there is a conflict of authority. It is said that as long as B has on deposit with A an amount of money greater than the amount of the negotiable instrument, A is not a holder for value.⁶ If B's checks against the deposit and his prior indebtedness do not, when added together, equal or exceed the credit, the bank is not a bona fide holder as to such excess.⁷ On the other hand, it is said that the withdrawal of a substantial amount of the credit is sufficient to make A a bona fide holder.⁸ If B deposits a large number of notes with A, and checks out half of the total amount thus deposited, it has been said that A is a bona fide holder for value, although A has on hand an amount exceeding the face of the instrument which he has thus acquired.⁹

In any event, the existence of an apparent balance which consists of credit upon other deposits which prove to be of no value, does not prevent A from being a holder for value.¹⁰

Minnesota. Union National Bank v. Winsor, 101 Minn. 470, 118 Am. St. Rep. 641, 112 N. W. 999.

Nebraska. National Bank of Commerce v. Bossemeyer, 101 Neb. 96, L. R. A. 1917E, 374, 162 N. W. 503.

New York. Citizens' State Bank v. Cowles, 180 N. Y. 346, 105 Am. St. Rep. 765, 73 N. E. 33.

Oklahoma. Morrison v. Bank, 9 Okla. 697, 60 Pac. 273.

Pennsylvania. Dougherty v. Bank, 93 Pa. St. 227, 39 Am. Rep. 750.

West Virginia. Marion National Bank v. Harden, — W. Va. —, 97 S. E. 600.

⁴ Hamilton National Bank v. Emigh, 127 Ark. 545, 192 S. W. 913; First National Bank v. Stallings, — Okla. —, 177 Pac. 373; Northfield National Bank v. Arndt, 132 Wis. 383, 12 L. R. A. (N.S.) 82, 112 N. W. 451.

⁵ Mechanics' Bank v. Chardavoyne, 69 N. J. L. 256, 101 Am. St. Rep. 701, 55 Atl. 1080.

⁶ McNight v. Parsons, 136 Ia. 390 [sub nomine, McKnight v. Parsons, 22 L. R. A. (N.S.) 718, 113 N. W. 858]; Central Savings Bank v. Stotter (Mich.), 174 N. W. 142; Citizens' State Bank v. Cowles, 180 N. Y. 346, 105 Am. St. Rep. 765, 73 N. E. 33; Marion National Bank v. Harden, — W. Va. —, 97 S. E. 600.

⁷ Tatum v. Commercial Bank, 185 Ala. 245, 64 So. 561.

⁸ Bland v. Fidelity Trust Co., 71 Fla. 499, L. R. A. 1916F, 209, 71 So. 630; First National Bank v. Persall, 110 Minn. 333, 136 Am. St. Rep. 499, 125 N. W. 506, 675; United States National Bank v. McNair, 114 N. Car. 335, 19 S. E. 361.

⁹ Bland v. Fidelity Trust Co., 71 Fla. 499, L. R. A. 1916F, 209, 71 So. 630.

¹⁰ Standard Trust Co. v. Commercial National Bank, 240 Fed. 303.

§ 2371. Collateral security as value. Transfer of a negotiable instrument as collateral security for a contemporaneous debt, is a transfer for value.¹ One who takes a note as collateral security remains a holder for value, although he has extended the time of the original indebtedness.² In some jurisdictions, an indorsee for collateral security is a bona fide holder only to the amount of his claim against his debtor.³ If a defense exists which can be interposed against any but a bona fide holder, he can recover only the amount of his claim,⁴ and if such debt is paid he ceases at once to be a bona fide holder,⁵ nor can the original holder claim any protection because the instrument has once been pledged as collateral.⁶

¹ **United States.** *Bank v. Mfg. Co.*, 52 Fed. 98, 18 L. R. A. 201.

Colorado. *Burnham Loan & Investment Co. v. Sethman*, — Colo. —, 171 Pac. 884.

Illinois. *Justice v. Stonecipher*, 267 Ill. 448, 108 N. E. 722.

Iowa. *Des Moines National Bank v. Chisholm*, 71 Ia. 675, 33 N. W. 234.

Kentucky. *Citizens' Bank v. Waddy*, 126 Ky. 169, 103 S. W. 249 [sub nomine, *Citizens' Bank v. Weakley*, 11 L. R. A. (N.S.) 598]; *Harrison v. Nicholson-Foley Co.*, 179 Ky. 513, 200 S. W. 929.

Minnesota. *St. Paul Gaslight Co. v. Sandstone*, 73 Minn. 225, 75 N. W. 1050.

Mississippi. *First National Bank v. John McGrath & Sons Co.*, 111 Miss. 872, 72 So. 701.

Nebraska. *Connecticut, etc., Co. v. Fletcher*, 61 Neb. 166, 85 N. W. 59; *Connecticut, etc., Co. v. Trumbo* (Neb.) 90 N. W. 216.

North Carolina. *American National Bank v. Hill*, 169 N. Car. 235, 85 S. E. 209.

South Carolina. *Union National Bank v. Cook*, — S. Car. —, 96 S. E. 484.

Utah. *Interstate Trust Co. v. Headlund*, — Utah —, 171 Pac. 515.

Vermont. *Noyes v. Landon*, 59 Vt. 569, 10 Atl. 342.

Virginia. *Colona v. Parksley National Bank*, 120 Va. 812, 92 S. E. 979.

Washington. *Citizens' Bank & Trust*

Co. v. Limpright, 93 Wash. 361, 160 Pac. 1046.

Wisconsin. *Bowman v. Van Keuren*, 29 Wis. 209, 9 Am. Rep. 554.

This is the rule under the Negotiable Instruments Law. *Burnham Loan & Investment Co. v. Sethman*, — Colo. —, 171 Pac. 884; *Harrison v. Nicholson-Foley Co.*, 179 Ky. 513, 200 S. W. 929; *First National Bank v. John McGrath & Sons Co.*, 111 Miss. 872, 72 So. 701; *Interstate Trust Co. v. Headlund*, — Utah —, 171 Pac. 515.

² *First National Bank v. John McGrath & Sons Co.*, 111 Miss. 872, 72 So. 701.

³ *Crewdson v. Shultz*, 254 Fed. 24.

See § 2367.

⁴ **United States.** *Crewdson v. Shultz*, 254 Fed. 24.

Georgia. *Linderman v. Atkins*, 143 Ga. 366, 85 S. E. 101.

Massachusetts. *Paika v. Perry*, 225 Mass. 563, 114 N. E. 830.

Minnesota. *St. Paul National Bank v. Cannon*, 46 Minn. 95, 24 Am. St. Rep. 189, 48 N. W. 526.

Missouri. *Crawford v. Spencer*, 92 Mo. 498, 1 Am. St. Rep. 745, 4 S. W. 713.

Washington. *Citizens' Bank & Trust Co. v. Limpright*, 93 Wash. 361, 160 Pac. 1046.

⁵ *First National Bank v. Mann*, 94 Tenn. 17, 27 Am. St. Rep. 565, 27 L. R. A. 565, 27 S. W. 1015.

⁶ *Booher v. Allen*, 153 Mo. 613, 55 S. W. 238.

Whether collateral security for an antecedent debt constitutes "value," is a question on which authorities are in conflict, some courts holding that it is,⁷ others that it is not.⁸ The fact that the United States supreme court has taken this view and that it is very important to secure uniformity on commercial matters through the United States, has driven some state courts to adopt this view

⁷ **United States.** *Swift v. Tyson*, 41 U. S. (16 Pet.) 1, 10 L. ed. 865 (a case arising in New York, in which the United States supreme court refused to follow the New York rule); *Hamilton v. Fowler*, 99 Fed. 18, 40 C. C. A. 47.

Arkansas. *Exchange National Bank v. Coe*, 94 Ark. 387, 31 L. R. A. (N.S.) 287, 127 S. W. 453; *Miles v. Dodson*, 102 Ark. 422, 50 L. R. A. (N.S.) 83, 144 S. W. 908.

California. *Sackett v. Johnson*, 54 Cal. 107; *Pezzoni v. Greenwell*, — Cal. —, 174 Pac. 60.

Georgia. *Linderman v. Atkins*, 143 Ga. 366, 85 S. E. 101.

Illinois. *Bank v. Adam*, 138 Ill. 483, 28 N. E. 955.

Kansas. *National Bank v. Dakin*, 54 Kan. 656, 45 Am. St. Rep. 299, 39 Pac. 180; *Birket v. Elward*, 68 Kan. 295, 104 Am. St. Rep. 405, 64 L. R. A. 568, 74 Pac. 1100.

Massachusetts. *Fisher v. Fisher*, 98 Mass. 303.

Minnesota. *Rosemond v. Graham*, 54 Minn. 323, 40 Am. St. Rep. 336, 56 N. W. 38; *Snelling State Bank v. Clasen*, 132 Minn. 404, 157 N. W. 643; *Bank v. Beecher*, 133 Minn. 81, 157 N. W. 1070.

Montana. *Yellowstone National Bank v. Gagnon*, 19 Mont. 402, 61 Am. St. Rep. 520, 44 L. R. A. 243, 48 Pac. 762.

Oklahoma. *Ricks v. Johnson*, — Okla. —, 162 Pac. 476.

Tennessee. *First National Bank v. Stockell*, 92 Tenn. 252, 20 L. R. A. 605, 21 S. W. 523.

West Virginia. *Mercantile Bank v. Boggs*, 48 W. Va. 289, 37 S. E. 587.

Washington. *German-American Bank v. Wright*, 85 Wash. 460, 148 Pac. 769.

See also *Voss v. Chamberlain*, 139 Ia. 569, 19 L. R. A. (N.S.) 106, 117 N. W. 269. See, *Antecedent Debt as Consideration Under Negotiable Instruments Law*, by Amasa M. Eaton, 23 Yale Law Journal, 293.

This is the rule under the *Negotiable Instruments Law*. *Davies v. Simpson*, — Ala. —, 79 So. 48; *Vogler v. Manson*, — Ala. —, 76 So. 117; *German-American Bank v. Wright*, 85 Wash. 460, 148 Pac. 769.

⁸ **Iowa.** *Galbraith v. McLaughlin*, 91 Ia. 399, 59 N. W. 338; *Cable v. Buchanan*, 109 Ia. 661, 80 N. W. 1066.

Kentucky. *May v. Quimby*, 66 Ky. (3 Bush.) 96.

Maine. *Smith v. Bibber*, 82 Me. 34, 17 Am. St. Rep. 464, 19 Atl. 89.

Mississippi. *First National Bank v. Strauss*, 66 Miss. 479, 14 Am. St. Rep. 579, 6 So. 232.

Michigan. *Maynard v. Davis*, 127 Mich. 571, 86 N. W. 1051.

Missouri. *Loewen v. Forsee*, 137 Mo. 29, 59 Am. St. Rep. 489, 38 S. W. 712.

New York. *United States National Bank v. Ewing*, 121 N. Y. 506, 27 Am. St. Rep. 615, 30 N. E. 501; *Coddington v. Bay*, 20 Johns. (N. Y.) 637, 11 Am. Dec. 342. (The leading case on this point.)

North Carolina. *Brooks v. Sullivan*, 129 N. Car. 190, 39 S. E. 822.

North Dakota. *Porter v. Andrus*, 10 N. D. 558, 88 N. W. 567.

in spite of personal opinions in favor of the theory that a transfer of collateral security for a pre-existing debt is not a consideration.⁹ If any right of value is surrendered by the party taking the collateral security,¹⁰ as where in consideration of such collateral he agrees upon an extension of time,¹¹ or surrenders other collateral,¹² or surrenders other collateral and gives an extension of time,¹³ he is a holder for value. The fact that a bank examiner has been induced to regard a gratuitous negotiable instrument as a part of the assets of the bank, prevents the maker thereof from setting up the defense of want of consideration after the bank has passed into the hands of a receiver.¹⁴

§ 2372. Taking before maturity. A holder, to be a bona fide holder, must take the instrument before maturity. If he takes after maturity he gets no better title than that of his indorser as against defenses which the maker may interpose and which arise

Ohio. *Roxborough v. Messick*, 6 O. S. 448, 67 Am. Dec. 346; *Renzor v. Hatch*, 7 O. S. 248 (obiter, as the note was held valid as between the original parties); *Cleveland v. Bank*, 16 O. S. 236, 88 Am. Dec. 445.

Pennsylvania. *Altoona, etc., Bank v. Dunn*, 151 Pa. St. 228, 31 Am. St. Rep. 742, 25 Atl. 80.

Tennessee. *Bank v. Johnston*, 105 Tenn. 521, 59 S. W. 131; *Badger Machinery Company v. United States Bank & Trust Co.*, 166 Wis. 18 [sub nomine, *Badger Machinery Co. v. Columbia County Electric Light & Power Co.*, 163 N. W. 188].

⁹ *Birket v. Elward*, 68 Kan. 295, 104 Am. St. Rep. 405, 64 L. R. A. 568, 74 Pac. 1100.

¹⁰ **California.** *Payne v. Bensley*, 8 Cal. 260, 68 Am. Dec. 318.

Illinois. *Zollman v. Jackson Trust & Savings Bank*, 238 Ill. 290, 32 L. R. A. (N.S.) 858, 87 N. E. 297.

Iowa. *Ruddick v. Lloyd*, 15 Ia. 441, 83 Am. Dec. 423; *Voss v. Chamberlain*, 139 Ia. 569, 19 L. R. A. (N.S.) 106, 117 N. W. 269.

New York. *American Exchange National Bank v. N. Y. Packing Co.*, 148 N. Y. 698, 43 N. E. 168.

Oklahoma. *Farmers' National Bank v. McCall*, 25 Okla. 600, 26 L. R. A. (N.S.) 217, 106 Pac. 866.

¹¹ **Alabama.** *Louisville Banking Co. v. Howard*, 123 Ala. 380, 82 Am. St. Rep. 126, 26 So. 207.

Missouri. *Crawford v. Spencer*, 92 Mo. 498, 1 Am. St. Rep. 745, 4 S. W. 713.

Ohio. *First National Bank v. Fowler*, 36 O. S. 524, 38 Am. Rep. 610.

Oklahoma. *Farmers' National Bank v. McCall*, 25 Okla. 600, 26 L. R. A. (N.S.) 217, 106 Pac. 866.

Wisconsin. *Shaffer v. Peavey*, 161 Wis. 149, 152 N. W. 829.

¹² *Zollman v. Jackson Trust & Savings Bank*, 238 Ill. 290, 32 L. R. A. (N.S.) 858, 87 N. E. 297; *Voss v. Chamberlain*, 139 Ia. 569, 19 L. R. A. (N.S.) 106, 117 N. W. 269; *American Exchange National Bank v. Packing Co.*, 148 N. Y. 698, 43 N. E. 168.

¹³ *Kingsland v. Pryor*, 33 O. S. 19.

¹⁴ *Lyons v. Benney*, 230 Pa. St. 117, 34 L. R. A. (N.S.) 105, 79 Atl. 250.

out of the instrument itself.¹ The fact that the maker left the instrument in the hands of the payee after it was paid at maturity, and the fact that the payee altered the instrument as to the date and time of payment, so that it appears on its face that it is not yet due, does not make the subsequent indorsee for value and without notice a bona fide holder.² One who acquires overdue interest coupons on a municipal bond is not a holder for value.³ A note indorsed over on the second day of grace is indorsed before maturity.⁴ A note is not due before the time fixed in the body of the note for the payment of the principal, although a memorandum on

¹ *United States. Morgan v. United States*, 113 U. S. 476, 28 L. ed. 1044.

Alabama. Marshall v. Shiff, 130 Ala. 545, 30 So. 335.

Arkansas. Calhoun v. Ainsworth, 118 Ark. 316, L. R. A. 1915E, 395, 176 S. W. 316.

California. Risley v. Gray, 98 Cal. 40, 32 Pac. 884.

Connecticut. Fairfield County National Bank v. Hammer, 89 Conn. 592, L. R. A. 1918E, 163, 95 Atl. 31.

Florida. Tucker v. Fouts, — Fla. —, L. R. A. 1917F, 916, 76 So. 130.

Georgia. Harrell v. Banking Co., 111 Ga. 846, 36 S. E. 460; *Railway Postal Clerks' Investment Association v. Wells*, 147 Ga. 377, 94 S. E. 228.

Iowa. State Trust Co. v. Turner, 111 Ia. 664, 53 L. R. A. 136, 82 N. W. 1029; *Freittenburg v. Rubel*, 123 Ia. 154, 98 N. W. 624.

Kansas. Security State Bank v. Clarke, 99 Kan. 18, 160 Pac. 1149.

Kentucky. Bank v. Pennsylvania & Kentucky Fire Brick Co., 175 Ky. 192, L. R. A. 1918E, 165, 194 S. W. 110; *Ohio Valley Banking & Trust Co. v. Great Southern Fire Insurance Co.*, 176 Ky. 694, 197 S. W. 399.

Missouri. Loewen v. Forsee, 137 Mo. 29, 59 Am. St. Rep. 489, 38 S. W. 712; *Bacon v. Reichardt*, — Mo. —, 208 S. W. 24.

Montana. Northwestern Improvement Co. v. Rhoades, — Mont. —, 158 Pac. 832.

Nebraska. Koehler v. Dodge, 31 Neb. 328, 28 Am. St. Rep. 518, 47 N. W. 913; *First National Bank v. Bank*, 34 Neb. 71, 33 Am. St. Rep. 618, 15 L. R. A. 386, 51 N. W. 305.

Tennessee. Easley v. East Tennessee National Bank, 138 Tenn. 369, L. R. A. 1918C, 689, 198 S. W. 66.

Washington. Hanson v. Roesch, 104 Wash. 257, 176 Pac. 349.

Wisconsin. Union Investment Co. v. Epley, 164 Wis. 438, 160 N. W. 175.

See also, *Rockefeller v. Ringle*, 77 Kan. 515, 15 L. R. A. (N.S.) 737, 94 Pac. 810.

The rule is the same under the express provisions of the Negotiable Instruments Law. *Ohio Valley Banking & Trust Co. v. Great Southern Fire Insurance Co.*, 176 Ky. 694, 197 S. W. 399; *Union Investment Co. v. Epley*, 164 Wis. 438, 160 N. W. 175.

This rule protects the maker, but not a payee who has indorsed in blank. *Justice v. Stonecipher*, 267 Ill. 448, 108 N. E. 722. See, *Some Problems in Overdue Paper*, by Francis R. Jones, 11 *Harvard Law Review*, 40; and *Rights in Overdue Paper*, by Zechariah Chafee, Jr., 31 *Harvard Law Review*, 1104.

² *Fairfield County National Bank v. Hammer*, 89 Conn. 592, L. R. A. 1918E, 163, 95 Atl. 31.

³ *State v. Sapulpa*, — Okla. —, 160 Pac. 489.

⁴ *Haug v. Riley*, 101 Ga. 372, 40 L. R. A. 244, 29 S. E. 44.

the margin shows that partial payments will be made before the date of maturity and before the date of the transfer of such instrument,⁵ since such notation gives to the maker the right to pay such instrument at maturity or to make such partial payments before maturity.⁶ The fact that the transferor has acted in some respects as the agent of the maker, does not protect a transferee after maturity from the defense of payment.⁷ An extension of time indorsed on a note prolongs maturity.⁸ The fact that a note contains a provision for an extension of time upon payment of part of the principal at maturity, does not operate as such an extension that a transfer of such note after the period of maturity named therein is to be regarded in effect as a transfer before maturity,⁹ especially if such payments have not been made.¹⁰ A provision that failure to pay a note of a series when it is due operates automatically to make the remaining notes due, is to be given such effect as against one who knows of such provision; and he can not be a bona fide purchaser of another note in such series, even if by the terms of such note it is not yet due.¹¹ By the express provisions of General Code, Section 4287, of the Civil Code of Georgia of 1910, knowledge that one of a series of notes is due and unpaid prevents the transferee of another note of such series from being a bona fide holder thereof, even if such note is not yet due by its terms.¹²

A note which is payable on demand is not mature until a reasonable time has elapsed.¹³ On this point the Negotiable Instruments Law provides: "Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the

⁵ *Union State Bank v. Benson*, 38 N. D. 396, L. R. A. 1918C, 345, 165 N. W. 509.

⁶ *Union State Bank v. Benson*, 38 N. D. 396, L. R. A. 1918C, 345, 165 N. W. 509.

⁷ *Bank v. Pennsylvania & Kentucky Fire Brick Co.*, 175 Ky. 192, L. R. A. 118E, 165, 194 S. W. 110.

⁸ *Whitney National Bank v. Cannon*, 52 La. Ann. 1484, 27 So. 948.

See also, *Farmers' & Merchants' State Bank v. Beal*, 102 Kan. 481, 170 Pac. 1007.

⁹ *Calhoun v. Ainsworth*, 118 Ark.

316, L. R. A. 1915E, 395, 176 S. W. 316.

¹⁰ *Calhoun v. Ainsworth*, 118 Ark. 316, L. R. A. 1915E, 395, 176 S. W. 316.

¹¹ *Marion National Bank v. Harden*, — W. Va. —, 97 S. E. 600.

¹² *Railway Postal Clerks' Investment Association v. Wells*, 147 Ga. 377, 94 S. E. 228.

¹³ *Title Loan & Investment Co. v. Fuller* (Kan.), 184 Pac. 727; *Guckian v. Newbold*, 23 R. I. 553, 594, 51 Atl. 210; *Colona v. Parksley National Bank*, 120 Va. 812, 92 S. E. 979.

holder is not deemed a holder in due course." ¹⁴ Within the meaning of this rule, two months has been held not to be an unreasonable time. ¹⁵ On the other hand, a year and a half has been held to be an unreasonable time. ¹⁶ The fact that a note which by its terms is payable at a certain time, contains a provision which authorizes the payee to declare such note to be due before such period of maturity in case the payee feels himself insecure, does not render such note a demand note; ¹⁷ and for the purpose of transfer it is due at the time fixed and not in a reasonable time. ¹⁸ For the purpose of determining the rights of the holder, a check is not overdue until a reasonable time has elapsed. ¹⁹ One day, ²⁰ four days, ²¹ five days, ²² six days, ²³ or ten days, ²⁴ have been held not unreasonable intervals. It has been held that the express provision of section 186 of the Negotiable Instruments Law, to the effect that a check must be presented within a reasonable time after it is issued or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay, composes the sole consequence of failure to present a check for payment within a reasonable time; and that, accordingly, one who takes a check for value and without notice after the lapse of a reasonable time, ²⁵ such as five weeks after it is drawn, ²⁶ may be a bona fide holder.

A certificate of deposit, which provides that it shall not bear interest after twelve months, is to be regarded as due after a reasonable time, which must not exceed twelve months from its date. ²⁷ A certificate of deposit, which is to bear interest if left for six

¹⁴ Section 53 of the Negotiable Instruments Law.

¹⁵ *Colona v. Parksley National Bank*, 120 Va. 812, 92 S. E. 979.

¹⁶ *Guckian v. Newbold*, 23 R. I. 553, 594 51 Atl. 210.

Twenty months is an unreasonable time. *Title Loan & Investment Co. v. Fuller*, — Kan. —, 184 Pac. 726.

¹⁷ *Puget Sound State Bank v. Washington Paving Co.*, 94 Wash. 504, 162 Pac. 870.

¹⁸ *Puget Sound State Bank v. Washington Paving Co.*, 94 Wash. 504, 162 Pac. 870.

¹⁹ *Johnson v. Harrison*, 177 Ind. 240, 39 L. R. A. (N.S.) 1207, 97 N. E. 930; *Matlock v. Scheuerman*, 51 Or. 49, 17 L. R. A. (N.S.) 747, 93 Pac. 823.

²⁰ *Matlock v. Scheuerman*, 51 Or. 49, 17 L. R. A. (N.S.) 747, 93 Pac. 823.

²¹ *Johnson v. Harrison*, 177 Ind. 240, 39 L. R. A. (N.S.) 1207, 97 N. E. 930.

²² *Fealey v. Bull*, 163 N. Y. 397, 57 N. E. 631.

²³ *Rothschild v. Corney*, 9 Barn. & C. 388; *Estes v. Shoe Co.*, 59 Minn. 504, 50 Am. St. Rep. 424, 61 N. W. 674. (Especially if the parties are a considerable distance apart.)

²⁴ *Ames v. Meriam*, 98 Mass. 294.

²⁵ *German-American Bank v. Wright*, 85 Wash. 460, 148 Pac. 769.

²⁶ *German-American Bank v. Wright*, 85 Wash. 460, 148 Pac. 769.

²⁷ *Easley v. East Tennessee National Bank*, 138 Tenn. 369, L. R. A. 1918C, 689, 198 S. W. 66.

months, and which is not to bear interest after twelve months, is presented in a reasonable time if presented eleven months after it was issued.²⁸ A certificate of deposit, payable when returned, is not overdue until it is returned.²⁹

If a bona fide holder of a negotiable instrument has transferred it as collateral for his own debt, he acquires his original rights upon paying such debt or upon repurchasing such instrument from the person to whom he has transferred it, even though he reacquires it after maturity.³⁰ The renewal of the original note for which another note has been transferred as collateral security, does not prevent the payee from holding such collateral note as a bona fide holder.³¹

There is a conflict of authority as to whether one who takes after maturity takes subject to collateral defenses, such as set-off and counter-claim. Some courts hold that such defenses can not be interposed,³² and others that they can.³³ But even where set-off can not ordinarily be asserted against a transferee after maturity, such set-off may be asserted against a transferee where the note is assigned fraudulently to defeat the set-off.³⁴

§ 2373. Presumption as to bona fides of holder. One who is in possession of a negotiable instrument which has been delivered to him if payable to bearer, or which has been indorsed to him, or which is indorsed generally, is presumed to be a bona fide holder thereof for value, without notice and before maturity.¹ If, how-

²⁸ *White v. Wadhams*, — Mich. —, 170 N. W. 60.

²⁹ *Tobin v. McKinney*, 15 S. D. 257, 88 N. W. 572 [affirming, 14 S. D. 52, 84 N. W. 228].

³⁰ *Miles v. Dodson*, 102 Ark. 422, 50 L. R. A. (N.S.) 83, 144 S. W. 908.

³¹ *First National Bank v. John McGrath & Sons Co.*, 111 Miss. 872, 72 So. 701.

³² *Way v. Lamb*, 15 Ia. 79; *Cutler v. Cook*, 77 Mo. 388; *Chandler v. Drew*, 6 N. H. 469 26 Am. Dec. 704; *Haley v. Congdon*, 56 Vt. 65.

³³ *Illinois*. *Favorite v. Lord*, 35 Ill. 142.

Massachusetts. *Sargent v. Southgate*, 22 Mass. (6 Pick.) 312, 16 Am. Dec. 409.

Minnesota. *Gould v. Svendsgaard*, — Minn. —, 170 N. W. 595.

Oklahoma. *Curlee v. Ruland*, 56 Okla. 329, 155 Pac. 1182.

Tennessee. *Galliher v. Galliher*, 78 Tenn. (10 Lea) 23.

³⁴ *Davis v. Noll*, 38 W. Va. 66, 45 Am. St. Rep. 841, 17 S. E. 791.

¹ *England*. *King v. Milsom*, 2 Campbell 5.

United States. *Goodman v. Simonds*, 61 U. S. (20 How.) 343, 15 L. ed. 934; *Pana v. Bowler*, 107 U. S. 529, 27 L. ed. 424.

Connecticut. *Parsons v. Utica Cement Co.*, 92 Conn. 333, 135 Am. St. Rep. 278, 73 Atl. 785.

Idaho. *Yates v. Spofford*, 7 Ida. 737, 97 Am. St. Rep. 267, 65 Pac. 501.

ever, certain defenses are shown which could have been interposed against the original payee and the holder of the instrument is seeking to avoid the force of such defense by invoking his standing as bona fide holder, it is held that he is bound to show affirmatively that he took for value without notice and before maturity, by a transfer which passed the legal title.² These rules are carried into the Negotiable Instruments Law, which provides: "Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."³ The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.⁴

If the instrument is voidable by reason of fraud, the holder must show that he is a bona fide holder.⁵ He must show that he

Illinois. *Cook v. Norwood*, 106 Ill. 558.

Iowa. *Benton County Savings Bank v. Boddicker*, 105 Ia. 548, 67 Am. St. Rep. 310, 45 L. R. A. 321, 75 N. W. 632.

Kansas. *Clark v. Skeen*, 61 Kan. 526, 78 Am. St. Rep. 337, 49 L. R. A. 100, 60 Pac. 327.

Kentucky. *Alexander v. Bank*, 59 Ky. (2 Met.) 534; *United States Cast Iron Pipe & Foundry Co. v. Henry Vogt Machine Co.* — Ky. —, 206 S. W. 806.

Massachusetts. *Pettee v. Prout*, 69 Mass. (3 Gray) 502, 63 Am. Dec. 778.

Missouri. *Vastine v. Wilding*, 45 Mo. 89, 100 Am. Dec. 347.

Montana. *Rossiter v. Loeber*, 18 Mont. 372, 45 Pac. 560.

Nebraska. *Haslach v. Wolf*, 73 Neb. 658, 103 N. W. 317.

New York. *Manhattan Savings In-*

stitution v. Bank, 170 N. Y. 58, 88 Am. St. Rep. 640, 62 N. E. 1079.

Ohio. *Davis v. Bartlett*, 12 O. S. 534, 80 Am. Dec. 375.

Oklahoma. *First National Bank v. Walker*, 39 Okla. 620, 50 L. R. A. (N.S.) 1115, 136 Pac. 408.

Rhode Island. *Third National Bank v. Angell*, 18 R. I. 1, 29 Atl. 500.

Utah. *Voorhees v. Fisher*, 9 Utah 303, 34 Pac. 64.

Wisconsin. *Gutwilling v. Stumes*, 47 Wis. 428, 2 N. W. 774.

² *Tucker v. Fouts*, — Fla. —, L. R. A. 1917F, 916, 76 So. 130; *Cochran v. Stein*, 118 Minn. 323, 41 L. R. A. (N.S.) 391, 136 N. W. 1037.

³ Section 59 of the Negotiable Instruments Law.

⁴ Section 55 of the Negotiable Instruments Law.

⁵ *Iowa. McNight v. Parsons*, 136 Ia. 390 [sub nomine, *McKnight v. Par-*

paid value for the instrument,⁶ and that he did not know of the defenses interposed.⁷ Similar principles apply where it is shown that the note was originally obtained by duress.⁸ So if the instrument is shown to have been given without consideration and fraudulently transferred by the payee,⁹ or on an illegal consideration,¹⁰ or if it is shown that the instrument is usurious,¹¹ the burden is on the holder. It has been held that if the holder shows that he gave value for the instrument and took it before maturity, it will be presumed that he had no notice of defenses.¹²

The weight of authority seems to be that if the defect in the instrument is merely want of consideration or failure of consideration without any element of fraud, the burden is not on the holder to show that he is a bona fide holder,¹³ though there is some

sons, 22 L. R. A. (N.S.) 718, 113 N. W. 858].

Kansas. *Brook v. Teague*, 52 Kan. 119, 34 Pac. 347.

Michigan. *Carrier v. Cameron*, 31 Mich. 373, 18 Am. Rep. 192.

Minnesota. *Cochran v. Stein*, 118 Minn. 323, 41 L. R. A. (N.S.) 391, 136 N. W. 1037.

Missouri. *The Famous Shoe Co. v. Crosswhite*, 124 Mo. 34, 46 Am. St. Rep. 424, 26 L. R. A. 568, 27 S. W. 397.

Montana. *Thamling v. Duffey*, 14 Mont. 567, 43 Am. St. Rep. 658, 37 Pac. 363.

New York. *Vosburgh v. Diefendorf*, 119 N. Y. 357, 16 Am. St. Rep. 836, 23 N. E. 801.

Tennessee. *National Bank v. Chatfield*, 118 Tenn. 481, 10 L. R. A. (N.S.) 801, 101 S. W. 765.

This result is reached under the Negotiable Instruments Law. *McKnight v. Parsons*, 136 Ia. 390 [sub nomine, *McKnight v. Parsons*, 22 L. R. A. (N.S.) 718, 113 N. W. 858]; *Lundean v. Hamilton*, — Ia. —, 169 N. W. 208.

⁶ *Vosburgh v. Diefendorf*, 119 N. Y. 357, 16 Am. St. Rep. 836, 23 N. E. 801.

⁷ *Carrier v. Cameron*, 31 Mich. 373, 18 Am. Rep. 192; *Vosburgh v. Diefendorf*, 119 N. Y. 357, 16 Am. St. Rep. 836, 23 N. E. 801.

⁸ *French v. Paving Co.*, 100 Mich. 443, 69 N. W. 166.

⁹ *Williams v. Huntington*, 68 Md. 590, 6 Am. St. Rep. 477, 13 Atl. 336.

¹⁰ *United States. Marion County v. Clark*, 94 U. S. 278, 24 L. ed. 59.

California. *Union Collection Co. v. Buckman*, 150 Cal. 159, 119 Am. St. Rep. 164, 9 L. R. A. (N.S.) 568, 11 Am. & Eng. Ann. Cas. 609, 88 Pac. 708.

Massachusetts. *Emerson v. Burns*, 114 Mass. 348.

Oregon. *Matlock v. Scheuerman*, 51 Or. 49, 17 L. R. A. (N.S.) 747, 93 Pac. 823.

Tennessee. *National Bank of Commerce v. Chatfield*, 118 Tenn. 481, 10 L. R. A. (N.S.) 801, 101 S. W. 765.

¹¹ *Tucker v. Fouts*, — Fla. —, L. R. A. 1917F, 916, 76 So. 130; *Daniels v. Bunch*, — Okla. —, 172 Pac. 1086.

Contra, where the usury does not appear on the face of the instrument. *Haynes v. Gay*, 37 Wash. 230, 79 Pac. 794.

¹² *Market, etc., Bank v. Sargent*, 85 Me. 349, 35 Am. St. Rep. 376, 27 Atl. 192; *Henry v. Sneed*, 99 Mo. 407, 17 Am. St. Rep. 580, 12 S. W. 663.

¹³ *United States. Goetz v. Kansas City Bank*, 119 U. S. 551, 30 L. ed. 515.

Idaho. *Yates v. Spofford*, 7 Ida.

authority even in this case for holding that the burden is on the holder.¹⁴

737, 97 Am. St. Rep. 267, 65 Pac. 501.

Indiana. Shirk v. Mitchell, 137 Ind. 185, 36 N. E. 850.

Michigan. Little v. Mills, 98 Mich. 423, 57 N. W. 26C.

Nebraska. Kelman v. Calhoun, 43 Neb. 157, 61 N. W. 615.

Missouri. Johnson v. Grayson, 230 Mo. 380, 130 S. W. 673.

¹⁴ Mercantile Guaranty Co. v. Hilton, 191 Mass. 141, 77 N. E. 312; Blaney v. Pelton, 60 Vt. 275, 13 Atl. 564.

CHAPTER LXXIII

CONTRACTS FOR THE BENEFIT OF A THIRD PERSON

- § 2374. Contracts for benefit of third person—General nature of problem.
- § 2375. Rights of beneficiary at early English law—Action of account.
- § 2376. Action of debt.
- § 2377. Action of assumpsit.
- § 2378. Rights of promisee and beneficiary respectively.
- § 2379. Classes of cases in which beneficiary could bring action.
- § 2380. Transition to theory that beneficiary can not sue.
- § 2381. Minority American rule—Beneficiary denied right of action.
- § 2382. The rule in Georgia.
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- § 2384. The rule in Michigan.
- § 2385. The rule in Pennsylvania.
- § 2386. The rule in Virginia and West Virginia.
- § 2387. Majority American rule—Right of beneficiary recognized.
- § 2388. Privity.
- § 2389. Statutory provision permitting real party in interest to bring action.
- § 2390. General principles of contract affecting this type—Formation of contract.
- § 2391. Designation of beneficiary.
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- § 2393. Beneficiary's rights dependent on validity of original contract and on terms thereof.
- § 2394. Rescission by mutual assent of original parties.
- § 2395. Consideration between promisor and promisee.
- § 2396. Consideration between promisor and beneficiary.
- § 2397. Necessity of obligation between promisee and beneficiary.
- § 2398. Promisor's right to attack validity of obligation between promisee and beneficiary.
- § 2399. Intention to benefit third person directly necessary.
- § 2400. Sole and concurrent benefits.
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- § 2402. Contracts intended to confer benefit—Assumption of debts on consideration of conveyance.
- § 2403. Doctrine not limited to assumption of debts on consideration of conveyance.
- § 2404. Contracts of indemnity.
- § 2405. Right of third person to enforce contract in equity.
- § 2406. Right of third person to sue on bonds.
- § 2407. Bonds controlled by special statute.
- § 2408. Bonds to protect laborers and materialmen on public improvements.
- § 2409. Right of third person to enforce sealed instrument.
- § 2410. Right of promisee to enforce contract.

§ 2374. Contracts for benefit of third person—General nature of problem. The great difficulty in the development of contract consists in the inability of law in its early stages to conceive of a binding promise unless it is made in some set and rigid form, or unless it is accompanied by the delivery of a thing in return for which the promise is made.¹ As the idea of a binding promise of any other type begins to develop, it is likely to follow the analogy of the formal contract, and it is generally thought of as an obligation by one of the parties thereto in favor of the other.² There is, accordingly, a strong tendency to assume that a contract between A and B can not confer any rights upon C, who is a stranger to the contract, although B stipulates expressly for a promise by A to do some act for the benefit of C.

The Roman law began with the assumption that the beneficiary had no rights of any sort under such a contract. The question was not one of procedure. It did not involve the question whether the promisee or the beneficiary should bring an action upon the contract. It was assumed that only the immediate parties to the contract could acquire any rights thereunder. As primitive and rigid concepts were succeeded by broad and philosophical theories, the fact that the original party had intended the contract to be for the benefit of a third person and that no effect could be given to the actual intention of the original party to the contract unless the third person was treated as the real promisee, led ultimately to the theory that the beneficiary could enforce the promise against the original obligor in accordance with its terms and in accordance with the true intent of the parties.³

As will be seen from the following discussion, the different jurisdictions in which Anglo-American law is in force have differed widely upon the fundamental question of the existence of the right of the beneficiary to enforce such a promise. The peculiar development of the law in England, based as it was largely upon the history of the different forms of action, induced the English courts to abandon their earlier theory that the beneficiary had rights under such a contract and to adopt the reactionary view that whatever

¹ See ch. 1.

² See §§ 25 et seq.

³ See on this question, *Contracts for the Benefit of a Third Person in the Civil Law*, by Samuel Williston, 16 *Harvard Law Review* 43.

See also, *Successional Provisions in Marriage Contracts*, by J. Dove Wilson, 6 *Juridical Review* 118, and *Marriage Contract Provisions in Favor of Children*, by A. C. Black, 24 *Juridical Review* 292.

rights the promisee might have, the beneficiary had none.⁴ In the United States some of the courts still adhere in outward form of words, at least, to the modern English view.⁵ In other jurisdictions the courts have reverted to the earlier English view and they have recognized the existence of rights in the beneficiary; but the scope and content of the rights of the beneficiary and their connection with the rights of the promisee, involving the question of whether the promisee has any rights at all under such contract, are questions which have caused the courts a great deal of trouble.

§ 2375. Rights of beneficiary at early English law—Action of account. The most common cases in which the rights of the beneficiary are involved are cases in which B has placed money or other property in A's hands, out of which A agrees to pay money to C.¹ B's motive for entering into a transaction of this sort is usually one of two things. In one case B owes a debt to C, and B enters into the contract with A, so that he can secure payment of such debt. In the other class of cases, C is related to B, and B enters into the contract with A in order to make some provision for C.² At early English law, one who placed money in the hands of another to be expended in a certain way, or who allowed another to receive money from third persons to be paid over to the person granting such authority, could bring an action of account against the person in whose hands such money was, to compel him to state the amount thus received and the disposition which he had made of it. If B placed money in A's hands under a contract by which A agreed to pay such money over to C, C could have an action of account against A to compel A to account to C for the money thus paid over.³ At the outset the right of the third person seems to be limited to account. It is said that account will lie but that debt will not.³ After assumpsit develops, it is assumed that if B places money in A's hands in reliance on A's promise to pay such money over to C, and A converts the money to his own use, B may have the action of account against A, or the action on the case, but C can have only the action of account.⁴

⁴ See § 2380.

⁵ See §§ 2381 et seq.

¹ See § 2402.

² Y. B., 6 Hen., IV f, 7 pl. 33; *Robsert v. Andrews*, Cro. Eliz. 82; *Dyer*, f 21a, pl. 128.

For a thorough discussion of this subject see, *The Limitations of the*

Action of Assumpsit as Affecting the Right of the Beneficiary, by Crawford D. Hening, 43 *American Law Register* (N.S.) 764, 44 *American Law Register* (N.S.) 112, and 56 *Pennsylvania Law Review* 73.

³ Y. B., 6 Hen., IV f, 7 pl. 33.

⁴ *Anonymous*, *Keilw.*, 77 pl. 25.

§ 2376. Action of debt. As between the person who deposits his own money with one who is thus bound to account to him, and the person with whom such money is deposited, it became settled that if the person with whom such money was deposited refused to account, he could be treated as a debtor against whom the action of debt would lie; and this right was finally extended to the beneficiary, and upon default of the obligor, in whose hands money or property was placed for the benefit of the beneficiary, and upon his refusal to render an account, the beneficiary was allowed to choose between debt and account,¹ wherever, by reason of the transaction between A and B, "the right of the money" was in C.² The theory that the beneficiary might choose between debt and account did not, of course, develop until the courts had abandoned their original theory that only one kind of action could be brought upon a given right; and that if an earlier action were given in the historical development of law, newer actions which developed might be made the means of enforcing analogous rights, but that they could not be made the means of enforcing the identical rights for which a remedy was already given, even though such remedy might be insufficient.³ It is said that debt will lie if it is sought to recover the bare deposit, but that if the increase thereof is sought, account must be brought.⁴

§ 2377. Action of assumpsit. With the development of indebitatus assumpsit,¹ the theory was adopted that wherever debt would lie, indebitatus assumpsit would lie;² and accordingly it was held that if B placed money or property in A's hands to pay over to C, C could bring an action of assumpsit upon A's promise.³ C's right to recover in assumpsit was especially clear where A had promised to C to pay the amount to him upon some additional consideration.⁴ as where C had agreed to give an extension of time.⁵ In some of

¹ Dyer, 21a, pl. 128; Harris v. De Bervoir, Cro. Jac. 687, Clark's Case, Godboldt, 210; Shaw v. Sherwood, Cro. Eliz. 729, Owen 127 [sub nomine, Wherwood v. Shaw, 1 Browne & Gold. 82; Shaw v. Norwood, Moore 667 and Wherwood v. Shaw, Yelv. 25].

² Cramlington v. Evans, 2 Vent. 307 (obiter, as this was an action in case under the Law Merchant).

³ See §§ 25 and 31.

⁴ 1 Dyer, 20b (pl. 125).

⁵ See § 31, and §§ 1493 et seq.

² See § 31.

³ Bafeild v. Collard, Aleyn 1; Levett v. Hawes, Cro. Eliz. 619, 652; Lever v. Heys, Moore 550; Bell v. Chaplain, Hardres' 321; Hornsey v. Dimocke, 1 Vent. 119; Davison v. Haslip, 1 Vent. 152.

⁴ Oble v. Dittlesfield, 1 Vent. 153.

⁵ Oble v. Dittlesfield, 1 Vent. 153.

the cases, this rule was laid down in obiter, but as a rule which was thoroughly well settled.⁶ If B was C's executor, it was said that C could have sued if C had lived, and that therefore B could sue as C's executor; but that if C had not had a right of action upon the promise, B could have then sued in his own name, and the description of B, as executor, could be rejected as surplusage.⁷

The difficulties that bothered the English courts in later years, growing out of the fact that C was a stranger to the promise and also a stranger to the consideration, did not seem to trouble the courts at this time.⁸ The objection that the promise was not made to the beneficiary was answered by holding that the person who had the interest in the promise, and not the person by whom the promise was made, was the party who could bring an action thereon,⁹ or by holding that the right of action was in the person "to whom the satisfaction was to be made."¹⁰ If the plaintiff alleged that the defendant had received a certain sum of money from diverse persons to the use of the plaintiff, such allegation was sufficient after a verdict as against a motion in arrest of judgment, and it was not necessary to allege from whom the defendant received such money, since the consideration was executed.¹¹

The question of pleading such a contract is discussed very little. In most of the cases the reference to the writ or to the declaration seems to indicate that the promise was pleaded in exact accordance with the facts, namely, as a promise by A, the defendant, to B, for the benefit of C, the defendant. It was said, however, that if C wished to sue upon a promise which was made by A to B for the benefit of C, C should allege that the promise was made to C, and that under such allegation the promise which was actually made to

⁶ *Hornsey v. Dimocke*, 1 Vent. 119; *Brown v. London*, 1 Vent. 152.

⁷ *Hornsey v. Dimocke*, 1 Vent. 119.

See also, *Sadler v. Paine*, Sav. 23; *Legat's Case*, Latch 206 (principal could declare on promise to his agent); *Core's cases* (1 Dyer, 21a) in argument.

⁸ *De la Bar v. Gold*, Keb. 44 (13 Car. II [Pasch.], pl. 117), Keb. 63 (13 Car. II [Trin.] pl. 31); *Gold v. Dela Bar*, Keb. 121 (13 Car. II [Mich.], pl. 30); *Corny v. Collidon*, 1 Freem. 284.

"It matters not from whom the consideration moveth, but who hath the benefit thereby." *De la Bar v. Gold*, Keb. 44 (13 Car. II [Pasch.], pl. 117), Keb. 63 (13 Car. II [Trin.], pl. 31); *Gold v. Dela Bar*, Keb. 121 (13 Car. II [Mich.], pl. 30).

⁹ "Where a promise is made to a stranger upon a good consideration, he that hath interest in the promise shall have the action." *Corny v. Collidon*, 1 Freem. 284.

¹⁰ *Hadves v. Levit, Hetley* 176.

¹¹ *Babington v. Lambert*, Moore 854.

B could be given in evidence.¹² If this was the general rule of pleading, and if the forms of writs and declarations were drawn in accordance with this theory, it may be that we have here the reason that the courts at a later period, finding the rule of pleading and forgetting the rule of evidence, came to hold that C could not maintain an action against A upon such promise.¹³

§ 2378. Rights of promisee and beneficiary respectively. The relation between the rights of B and the rights of C growing out of A's promise, caused trouble then as they cause it now, in jurisdictions in which the beneficiary is held to have a right of action. It was said that if B delivered C's goods to A in reliance upon A's promise to deliver them over to C, B or C could sue upon the promise but that they could not join.¹ There was, however, considerable authority for holding that if the contract was intended to be for the sole benefit of C, B could not bring an action thereon. If A makes a promise to B to settle money or property upon B's son or daughter, C, in consideration of C's marriage with A's son, X, B can not maintain an action upon such contract against A, since only C was to have the advantage of such promise.² If A makes a promise to B to make a settlement upon B's son, C, upon C's marriage to A's daughter, X, and A refuses to make such settlement, B can not enforce such promise as against A, even though B has been constrained to give money to C and X for maintenance,³ since the satisfaction of A's promise was to be made to C.⁴ If A makes a promise to B to the effect that in consideration of B's refraining from criminal prosecution against A's son, X, for an assault upon B and B's son, C, X should keep the peace as against B and C, and X subsequently makes an assault upon C, B can not recover against A in case X makes such assault, if B is not bound to pay for curing C of his wounds, even though B has in fact paid such expenses.⁵ C, however, can maintain an action upon such promise against A.⁶ If B placed money or property in A's hands in reliance upon A's promise to pay B's debt to C, it was held that C could sue A upon such promise or he could sue B upon the original obligation.⁷ In

¹² *Company of Feltmakers v. Davis*,
¹ Bos. & P. 98.

¹³ See § 2380.

¹ *Bell v. Chaplain*, Hardres 321.

² *Levet v. Hawes*, Cro. Eliz. 619, 652.

³ *Hadves v. Levit, Hetley* 176.

⁴ *Hadves v. Levit, Hetley* 176.

⁵ *Rippon v. Norton*, Cro. Eliz. 849.

⁶ *Rippon v. Norton*, Cro. Eliz. 881,
Yelv. 1.

⁷ *Davison v. Haslip*, 1 Vent. 152.

the case in which B surrendered a copyhold to A, in consideration of which A agreed to pay a certain sum to each of B's daughters, it was held that one of such daughters could enforce the promise against A in an action upon the case. The right of the daughter to bring the action was assumed and the only question which was argued to the court was whether she could bring a separate action or whether she must join the other beneficiaries.⁸

§ 2379. Classes of cases in which beneficiary could bring action.

As in modern case, B's motive for furnishing the value for A's promise usually was either to provide for a near relation by blood or marriage, or to secure the payment of his own debt. If A made a promise to B to settle money upon B's son, C, upon C's marriage, especially if with a near relation of A's, it was clear that C could enforce such contract as against A.¹ At the same time, C's right of action against A was not limited to contracts in consideration of marriage or to cases in which C was closely related to B. Where B gave goods to his son, A, in consideration of which A promised to pay a certain sum of money to C, it was held that C could enforce such promise as against A without any blood relationship between C and B.² While apparently B made such contract with A in order to secure the payment of B's debt to C, the existence of such debt does not appear to have been alleged; but the court said, "The case was this: The father gave goods to his son, in consideration that the son should pay the plaintiff in this action twenty pounds. It was urged that this can be no consideration for the plaintiff to bring his action, because here is no debt due to him, but only an appointment for the son to pay money to him, in consideration of the goods given him by his father. But Hales, on the other side, said, that if there may be a debt by any intendment due to the plaintiff, then the assumpsit is good, and here is a debt due to him, therefore the assumpsit is good. Roll, chief justice, held, that it is good as it is, for there is a plain contract, because the goods were given for the benefit of the plaintiff, though the contract be not between him and the defendant, and he may well have an action upon the case, for here is a promise in law made to the plaintiff, though there be not a promise in fact, there is a debt here, and the assumpsit is good."³

⁸ Thomas v. —, Styles 461.

² Starkey v. Mill, Style 296.

¹ Levet v. Hawes, Cro. Eliz. 619.

³ Starkey v. Mill, Style 296.

652: Lever v. Heyn, Moore 550; Thomas v. —, Styles 461; Bafeild v. Collard, Aleyn 1; Sprat v. Agar, 2 Sid. 115.

Roll's statement of the case is as follows: If B delivers goods to A worth eighty pounds out of which A

§ 2380. Transition to theory that beneficiary can not sue. In spite of the ease with which the courts in some of these cases disposed of the objection that the plaintiff was a stranger to the promise, and to the consideration, other judges continue to be troubled thereby. In a case in which A promised to B for value to pay B's debt to C, it was held that C could not maintain assumpsit against A on the ground that C "did nothing of trouble to himself or benefit to the defendant, but is a mere stranger to the consideration."¹ The cases which were cited in support of C's right to recover,² were cases in which C was closely related to B; and the court distinguished these cases from the case at bar on the theory that in marriage settlement contracts the beneficiary, C, performed the "meritorious act" in marrying the daughter of A, the promisor; and that in the other cases, "the nearness of the relation gives to" C "the benefit of the consideration performed by" B, who is C's near relation.

In a case decided shortly afterwards,³ A made a promise to B, his father, that in consideration of B's refraining from cutting certain wood on B's realty, A would pay a certain sum of money to B's daughter, C; and it was held that C could enforce such promise against A, "for the son hath the benefit by having of the wood and the daughter hath lost her portion by this means."⁴

Up to this point the authorities in favor of permitting C to maintain the action greatly outweigh the authorities against it. In a subsequent case,⁵ A promised to B to pay B's debt to C, in consideration of B's transferring a house to A. Out of the existing mass of authority only three cases were cited.⁶ "Without much

promises B in consideration of such delivery to pay twenty pounds to C, C can have an action of debt or of account or an action on the case on the promise against A. *Starkey v. Mylne*, *Rolle's Abridgment*, Action, Sur. Case (Z), *Qui avert l'action*, pl. 13, p. 32.

¹ *Bourne v. Mason*, 1 Vent. 6, 2 Keb. 454, 457, 527.

² The case which is referred to specifically is, *Sprat v. Agar*, 2 Sid. 115.

³ *Dutton v. Poole*, T. Jones 102, 1 Vent. 318, 332, 1 Freem. 471, T. Raymond 302, 2 Lev. 210, 3 Keb. 786, 814, 830, 836.

⁴ *Dutton v. Poole*, T. Jones 102, 1 Vent. 318, 332, 1 Freem. 471, T. Raymond 302, 2 Lev. 210, 3 Keb. 786, 814, 830, 836.

⁵ *Crow v. Rogers*, 1 Strange 592.

⁶ In support of the theory that the beneficiary could not sue, *Bourne v. Mason*, 1 Vent. 6, 2 Keb. 457, 527, was cited.

In support of the theory that the beneficiary could sue, *Dutton v. Poole*, 1 Vent. 318, 332, 2 Lev. 210, and 1 *Rolle's Abridgment* 32, pl. 13, were cited.

debate the court held the plaintiff was a stranger to the consideration and gave judgment" for the defendant.⁷

While the theory that a beneficiary can sue seems to be accepted in subsequent obiter,⁸ it was held in the next case, in which the question was presented,⁹ that a promise by A to pay B's debt to C, in consideration of B's performing services for A, can not be enforced by C after B has performed by rendering such services on the ground that the declaration "does not show any consideration for the promise moving from the plaintiff to the defendant," and that "this case is precisely like *Crow v. Rogers* (1 Strange 592), and must be governed by it."¹⁰

When the question was next presented,¹¹ the only authorities cited in favor of the right of the beneficiary to sue were *Bourne v. Mason*,¹² and the authorities cited therein, and also *Thomas v. —*.¹³ The court expressed its willingness to overrule the earlier decisions on the theory that they were rendered at a time at which love and affection was regarded as a sufficient consideration and it was not settled that a consideration must move from the promisee.¹⁴ These decisions have settled the English law, and it is now held that the beneficiary has no right of action upon the contract to which he is not a party and for which he does not furnish the consideration, although the contract is expressly made for

⁷ *Crow v. Rogers*, 1 Strange 592.

⁸ "As to the case of *Dutton v. Poole*, 1 Vent. 318, 332, it is a matter of surprise how doubt could have arisen in that case."

See also, *Martyn v. Hind*, Cowp. 437.

⁹ *Price v. Easton*, 4 B. & Ad. 433.

¹⁰ *Price v. Easton*, 4 B. & Ad. 433.

¹¹ *Tweddle v. Atkinson*, 1 B. & S. 393.

¹² 1 Vent. 6, 2 Keb. 457, 527.

¹³ *Styles* 461.

¹⁴ "It is admitted that the plaintiff cannot succeed unless this case is an exception to the modern and well-established doctrine of the action of assumpsit. At the time when the cases which have been cited were decided the action of assumpsit was treated as an action of trespass upon the case, and therefore in the nature

of a tort; and the law was not settled, as it now is, that natural love and affection is not a sufficient consideration for a promise upon which an action may be maintained; nor was it settled that the promisee cannot bring an action unless the consideration for the promise moved from him. The modern cases have, in effect, overruled the old decisions; they show that the consideration must move from the party entitled to sue upon the contract. It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued. It is said that the father in the present case was agent for the son in making the contract, but that argument ought also to make the son liable upon it. I

his benefit.¹⁵ If B's sale, as broker, to A, of an article manufactured by C, amounts to a contract between A and B, restricting A's right to resell such article by fixing the price which he may charge therefor, C can not enforce such contract against A.¹⁶

§ 2381. Minority American rule—Beneficiary denied right of action. The American courts have divided on this question. A minority of them have adopted the final result reached by the English courts, and they have held that a contract between two persons for the benefit of a third confers no right of action upon such third person as against the promisor.¹ In states which enforce this principle, a contract by an applicant for a loan to pay the lender's counsel "his charges for the examination

am prepared to overrule the old decisions, and to hold that, by reason of the principles which now govern the action of assumpsit, the present action is not maintainable." *Tweddle v. Atkinson*, 1 B. & S. 393.

¹⁵ *McGruther v. Pitcher* [1904], 2 Ch. 306.

¹⁶ *McGruther v. Pitcher* [1904], 2 Ch. 306.

¹ *United States. Board of Commerce v. Security Trust Co.*, 225 Fed. 454, 140 C. C. A. 486.

Connecticut. Treat v. Stanton, 14 Conn. 445; *Clapp v. Lawton*, 31 Conn. 95; *Meech v. Ensign*, 49 Conn. 191, 44 Am. Rep. 225; *Baxter v. Camp*, 71 Conn. 245, 71 Am. St. Rep. 169, 42 L. R. A. 514, 41 Atl. 803; *Lamkin v. Mfg. Co.*, 72 Conn. 57, 44 L. R. A. 782, 43 Atl. 593, 1042; *Morgan v. Randolph & Clowes Co.*, 73 Conn. 396, 51 L. R. A. 653, 47 Atl. 658; *Atwood v. Burpee*, 77 Conn. 42, 58 Atl. 237; [following, *Treat v. Stanton*, 14 Conn. 445, 36 Am. St. Rep. 492; *Baxter v. Camp*, 71 Conn. 245, 42 L. R. A. 514, 41 Atl. 803; *Morgan v. Randolph & Clowes Co.*, 73 Conn. 396, 51 L. R. A. 653, 47 Atl. 558].

Georgia. Gunter v. Mooney, 72 Ga. 205; *Harris v. Johnson*, 98 Ga. 434, 25 S. E. 525; *Austell v. Humphries*, 99

Ga. 408, 27 S. E. 736; *Guthrie v. Atlantic Coast Line R. R. Co.*, 119 Ga. 663, 45 S. E. 824; *Cooper v. Claxton*, 122 Ga. 596, 50 S. E. 399.

Massachusetts. Rogers v. Stone Co., 130 Mass. 581, 39 Am. Rep. 478; *Marsden v. Bigelow*, 150 Mass. 45, 5 L. R. A. 43, 22 N. E. 71; *Saunders v. Saunders*, 154 Mass. 337, 28 N. E. 270; *Borden v. Boardman*, 157 Mass. 410, 32 N. E. 469; *De La Vergne Refrigerating Machine Co. v. Brewing Co.*, 175 Mass. 419, 56 N. E. 564; *Williamson v. McGrath*, 180 Mass. 55, 61 N. E. 636.

Michigan. Edwards v. Clement, 81 Mich. 513, 45 N. W. 1107; *Wheeler v. Stewart*, 94 Mich. 445, 54 N. W. 172; *Linnemann v. Moross*, 98 Mich. 178, 39 Am. St. Rep. 528, 57 N. W. 103; *Knights v. Sharp*, 163 Mich. 449, 33 L. R. A. (N.S.) 780, 128 N. W. 786; *Clay Lumber Co. v. Hart's Branch Coal Co.*, 174 Mich. 613, 140 N. W. 912; *Edwards v. Thoman*, 187 Mich. 361, 153 N. W. 806; *Signs v. Bush's Estate*, 199 Mich. 192, 165 N. W. 820.

New Hampshire. Butterfield v. Hartshorn, 7 N. H. 345, 26 Am. Dec. 741; *Chamberlain v. New Hampshire Fire Ins. Co.*, 55 N. H. 249.

Pennsylvania. Sweeney v. Houston, 243 Pa. St. 542, L. R. A. 1915A, 779, 90 Atl. 347.

of the title,"² or a contract on consideration whereby A promises B not to sue C on a note,³ can not be enforced by such third person. A promise by A, who owes B money on a contract of employment,⁴ or as income due him from an estate,⁵ to pay to C the amount thus owing by A to B, or a promise by A, a husband, to B, his wife, to pay C, her son, money loaned by B to A,⁶ can none of them be enforced by C. A promise by A, to whom B has paid funds under a contract with him to pay to C out of such funds a debt due him from B, can not be enforced by C.⁷ A contract by which an executor, A, agrees with the beneficiary, B, that A will collect a policy upon the life of the decedent, which was payable to B, and that he will pay a certain portion of such policy to C, a creditor of the estate, can not be enforced by C.⁸ A promise by a prospective

"It must now be regarded as the settled general rule in this state that where A simply agrees with B upon a valid consideration to assume and pay B's debts and save B harmless therefrom, C, a creditor of B, cannot maintain an action at law against A for his refusal to pay the debt due from B to C." *Morgan v. Clowes Co.*, 73 Conn. 396, 397, 51 L. R. A. 653, 47 Atl. 658.

"The mere fact that one would receive a direct benefit from the performance of a contract to which he is not a party, does not enable him to maintain an action at law upon it; and that that this is a rule which 'should not be departed from except for good reasons' has been stated in our courts in several cases." *Atwood v. Burpee*, 77 Conn. 42, 58 Atl. 237.

In the earlier Connecticut cases, it seems to have been felt that C could bring an action upon a contract for his benefit. *Crocker v. Higgins*, 7 Conn. 342.

In *Coffey v. Shuler*, 112 N. Car. 622, 16 S. E. 911, it was said that a promise for the benefit of a third person cannot be enforced by such third person [citing, *Morehead v. Wriston*, 73 N. Car. 398, 21 Am. Rep. 470]. But *Coffey v. Shuler* is a case in which there was no

consideration for the promise. The principle that a third person may enforce the contract is recognized in *Gorrell v. Water Supply Co.*, 124 N. Car. 328, 70 Am. St. Rep. 598, 46 L. R. A. 513, 32 S. E. 720; *Haun v. Burrell*, 119 N. Car. 544, 26 S. E. 111; *Sams v. Price*, 119 N. Car. 572, 26 S. E. 170.

² *Williamson v. McGrath*, 180 Mass. 55, 61 N. E. 636.

³ *Marsten v. Bigelow*, 150 Mass. 45, 5 L. R. A. 43, 22 N. E. 71 [citing, *Exchange Bank v. Rice*, 107 Mass. 37, 9 Am. Rep. 1].

⁴ *Wheeler v. Stewart*, 94 Mich. 445, 54 N. W. 172.

⁵ *Saunders v. Saunders*, 154 Mass. 337, 28 N. E. 270. The promise was made to the husband and the wife. Substantially the same conclusion has been reached in states which usually allow a third person to enforce a contract for his benefit. *Sullivan v. Sullivan*, 161 N. 554, 56 N. E. 79.

⁶ *Baxter v. Camp*, 71 Conn. 245, 71 Am. St. Rep. 169, 42 L. R. A. 514, 41 Atl. 803.

⁷ *Borden v. Boardman*, 157 Mass. 410, 32 N. E. 469.

⁸ *Atwood v. Burpee*, 77 Conn. 42, 58 Atl. 237.

devisee to testator, in consideration of the devise, to pay a certain sum of money monthly to one to whom such devise had been given by a previous will, can not be enforced by such third person.⁹ Where property is transferred by a partnership to a corporation, in consideration of a promise by the corporation to pay the partnership debts, creditors of the partnership can not enforce such contract;¹⁰ and where B transferred a note to A under A's promise to pay B's debt to C,¹¹ C can not enforce such contract against A. So it has been held that a grantee who promises to pay grantor's debts is liable to the grantor's creditors only in case of express agreement among the three parties.¹²

From the qualifications and exceptions to this rule discussed, in this and the following sections, it will be seen that no hard and fast line can be drawn between the jurisdictions which lay down the general rule that the beneficiary can not sue, but limit this rule by qualifications and honeycomb it with exceptions, and the jurisdictions which lay down the general rule that the beneficiary can sue, but limit and qualify this rule to an even greater extent.

§ 2382. The rule in Georgia. The vacillation of some of the courts has led to peculiar results in the development of this doctrine in some of these jurisdictions.

Under the statute of Georgia, C may sue in equity,¹ or he may bring an action at law wherever the promise is made to him directly;² but in other cases he can not maintain an action at law upon the promise.³ If C has a contract with B, a railway, and B leases its line to A, who assumes all B's liabilities, C can not maintain an action against A.⁴ If B makes a contract with A, by which

⁹ Linneman v. Moross, 98 Mich. 178, 39 Am. St. Rep. 528, 57 N. W. 103.

¹⁰ Morgan v. Clowes Co., 73 Conn. 396, 51 L. R. A. 653, 47 Atl. 658.

¹¹ Austell v. Humphries, 99 Ga. 408, 27 S. E. 736. B had agreed orally with C that he should be paid out of the proceeds of such notes and A knew of such agreement.

¹² Keller v. Ashford, 133 U. S. 610, 33 L. ed. 667; Shepherd v. May, 115 U. S. 505, 29 L. ed. 456. A similar view was expressed in Winters v. Mining Co., 57 Fed. 287, but in this case an action foreclosing the mortgage given

to secure the debt in question had been brought, and subsequently a personal judgment had been sought.

¹ Hawkins v. Central of Georgia R. Co., 119 Ga. 159, 46 S. E. 82.

² Hawkins v. Central R. Co., 119 Ga. 159, 46 S. E. 82.

³ Harris v. Johnson, 98 Ga. 434, 25 S. E. 525; Hawkins v. Central, of Georgia, R. Co., 119 Ga. 159, 46 S. E. 82; Guthrie v. Atlantic Coast Line R. Co., 119 Ga. 663, 46 S. E. 824; Cooper v. Claxton, 122 Ga. 596, 50 S. E. 399.

⁴ Guthrie v. Atlantic Coast Line R. Co., 119 Ga. 663, 46 S. E. 824.

it is agreed that B's son, C, shall render services to A, in return for which A agrees to devise to C half of A's property, C can not enforce such contract against A's estate.⁵

§ 2383. The rule in Massachusetts. In Massachusetts the beneficiary was actually allowed to sue, in several of the earlier cases,¹ and language was used which indicated that C should be permitted to sue whenever A and B intended A's promise for the benefit of C.² In subsequent cases, however, this general language was disapproved, and it was held that as a general rule C could not sue;³ that the cases in which C had been permitted to sue fell within one of the recognized exceptions to the rule; and that the rule would not be extended further than the existing recognized exceptions.⁴ The exceptions to the general rule that the beneficiary could not sue, which were recognized by the courts in these cases,⁵ were as follows: (1) cases in which B has placed money in A's hands for the benefit of C;⁶ (2) cases in which C is a near relation of B's;⁷ and (3) cases in which the assignee of a lease has covenanted to pay the rent which is due to the lessor.⁸ Accordingly, it has been held that if A assumes and agrees to pay a mortgage which is due from his grantor, B, to C, C can not maintain an action against A upon such promise.⁹ If B sends goods to A with a draft in favor of C, and A promises to accept such draft when the bill of lading arrives, C can not maintain an action against A upon such promise.¹⁰ If B, to whom an insurance policy has been assigned when he acquired the

⁵ Cooper v. Claxton, 122 Ga. 596, 50 S. E. 399.

¹ Felton v. Dickinson, 10 Mass. 287; Arnold v. Lyman, 17 Mass. 400; Felch v. Taylor, 30 Mass. (13 Pick.) 133; Brewer v. Dyer, 61 Mass. (7 Cush.) 337; Frost v. Gage, 83 Mass. (1 All.) 262; Putnam v. Field, 103 Mass. 556.

² Carnegie v. Morrison, 43 Mass. (2 Met.) 381; Brewer v. Dyer, 61 Mass. (7 Cush.) 337.

³ Mellen v. Whipple, 67 Mass. (1 Gray) 317; Exchange Bank v. Rice, 107 Mass. 37, 9 Am. Rep. 1.

⁴ "We are disinclined to any extension of that anomalous doctrine beyond the decisions which have hereto-

fore been made." Field v. Crawford, 72 Mass. (6 Gray) 116.

⁵ Mellen v. Whipple, 67 Mass. (1 Gray) 317; Exchange Bank v. Rice, 107 Mass. 37, 9 Am. Rep. 1.

⁶ Carnegie v. Morrison, 43 Mass. (2 Met.) 381; Arnold v. Lyman, 17 Mass. 400; Felch v. Taylor, 30 Mass. (13 Pick.) 133; Frost v. Gage, 83 Mass. (1 All.) 262; Putnam v. Field, 103 Mass. 556.

⁷ Felton v. Dickinson, 10 Mass. 287.

⁸ Brewer v. Dyer, 61 Mass. (7 Cush.) 337.

⁹ Mellen v. Whipple, 67 Mass. (1 Gray) 317.

¹⁰ Exchange Bank v. Rice, 107 Mass. 37, 9 Am. Rep. 1.

realty covered thereby, assigns such policy to the mortgagee, A, under an agreement by which the surplus is to be paid to C, and A collects such policy, it has been held that C could not bring an action against A upon such contract, and that accordingly X could not attach the surplus of such policy in A's hands in an attachment proceeding against C.¹¹

In this form of the rule we have an arbitrary rule modified by a number of arbitrary exceptions quite free from any underlying principle. The inconsistency of the rule in this form has apparently been recognized by the Massachusetts courts in a case in which A promised to B to pay a certain sum of money in trust for B's son, C, in consideration of B's naming such child after A.¹² It was held that C could enforce such promise against A, but rather than explain it as an exception to the general rule growing out of the near relationship between B and C, the court preferred to explain it on the theory that B was the agent of C for the purpose of making such contract and of selecting a name for C.¹³

§ 2384. The rule in Michigan. In Michigan it is said that the beneficiary can sue only upon marriage settlements which involve trusts for the children of the marriage.¹ If a contract is made between a board of commerce and a manufacturing company, for the benefit of a number of persons who have contributed to the fund which the chamber of commerce has raised for such manufacturing company, such beneficiaries can not maintain an action upon such contract.² A contract between A and B, who are husband and wife, by which each agreed to insure his life for the benefit of their children, can not be enforced by the children; and if A changes the beneficiary in such insurance policy after B's death, C has no remedy in law or in equity.³ If A makes a promise to B, that in consideration of B's surrendering A's note to A, A will pay a note which B has given to C, C can not enforce such promise against A;⁴ and if A agrees with his brother, B, that in consideration of

¹¹ *Field v. Crawford*, 72 Mass. (6 Gray) 116.

¹² *Gardner v. Denison*, 217 Mass. 492, 51 L. R. A. (N.S.) 1108, 105 N. E. 359.

¹³ *Gardner v. Denison*, 217 Mass. 492, 51 L. R. A. (N.S.) 1108, 105 N. E. 359.

¹ *Knights v. Sharp*, 163 Mich. 449, 33 L. R. A. (N.S.) 780, 128 N. W. 786 (obiter).

² *Board of Commerce v. Security Trust Co.*, 225 Fed. 454, 140 C. C. A. 486 (Mich.)

³ *Knights v. Sharp*, 163 Mich. 449, 33 L. R. A. (N.S.) 780, 128 N. W. 786.

⁴ *Clay Lumber Co. v. Hart's Branch Coal Co.*, 174 Mich. 613, 140 N. W. 912.

an exchange of realty A will give a bequest to his niece, C, C can not maintain an action upon such contract in the absence of statute.⁵ It is assumed, however, that a provision of the Judicature Act,⁶ to the effect that an action is to be brought by the real party in interest, changes this rule in Michigan, and gives a substantive right to the beneficiary. It is conceded, however, that such a statute is not a mere matter of procedure and that it can not authorize C to sue upon a contract for C's benefit, which was made before such statute was enacted.⁷ If B advances money to A, in consideration of A's promise to pay such money to C, and such promise is evidenced in a note secured by a mortgage, which is payable to C, C may enforce such contract.⁸

§ 2385. The rule in Pennsylvania. In Pennsylvania the general rule seems to be that the beneficiary can not maintain an action upon a contract for his benefit.¹ Such rule is, however, subject to a number of exceptions, the chief of which is that where B puts money into A's hands for the specific purpose of paying such money to C, C may enforce such contract.² If B transfers his interest in

⁵ *Signs v. Bush's Estate*, 199 Mich. 192, 165 N. W. 820.

⁶ Public Acts [1915], No. 314, ch. 12, § 2.

⁷ *Signs v. Bush's Estate*, 199 Mich. 192, 165 N. W. 820.

⁸ *Palmer v. Bray*, 136 Mich. 85, 98 N. W. 849.

¹ *Kountz v. Holthouse*, 85 Pa. St. 235; *Merriman v. Moore*, 90 Pa. St. 78; *Sweeney v. Houston*, 243 Pa. St. 542, L. R. A. 1915A. 779, 90 Atl. 347; *In re Edmundson's Estate*, 259 Pa. St. 420, 103 Atl. 277.

² *Kountz v. Holthouse*, 85 Pa. St. 235 (if C's receipt will discharge A as against B); *Adams v. Kuehn*, 119 Pa. St. 76, 13 Atl. 184; *Delp v. Bartholomay Brewing Co.*, 123 Pa. St. 42, 15 Atl. 871; *Cox v. Philadelphia Pottery Co.*, 214 Pa. St. 373, 63 Atl. 749; *Howes v. Scott*, 224 Pa. St. 7, 73 Atl. 186; *In re Edmundson's Estate*, 259 Pa. St. 420, 2 A. L. R. 1150, 103 Atl. 277. "That rule of the common law is that no one can maintain an action in

his own name upon a contract to which he was not a party. 'This rule is well established in this country, and is recognized by both the state and federal courts. There are, however, exceptions to the rule which, in this state, are as well settled as the rule itself. For nearly three quarters of a century, since the decision in *Blymire v. Boistle*, 6 Watts. 182 (31 Am. Dec. 458), the decisions of this court have uniformly recognized and enforced the exceptions whenever the facts of a case required it.' *Howes v. Scott*, 224 Pa. 7 (73 Atl. 186). These exceptions include contracts where one person agrees with another to pay money to a third, or to deliver some valuable thing, and such third party is the only one interested in the payment or the delivery; or where the promise to pay the debt of a third person rests upon the fact that money or property is placed in the hands of the promisor for that purpose; or where one buys out the stock of a

a partnership to A, in consideration of which A promises B that he will "assume and pay all indebtedness or liability" of B, on account of such partnership transactions, C, who is a creditor of such partnership, can not maintain an action against A upon such promise.³ On the other hand, in the case in which B transferred his business to a corporation, A, in part consideration of which A assumed and agreed to pay all the debts of B which arose out of such business. C, who is one of B's business creditors, may enforce such contract against A.⁴ If B conveys realty to A under a contract by which A agrees to pay to C the amount which C's father, X, has invested in such realty, C may enforce such contract against A.⁵ It is said that the beneficiary can sue if a release would operate as a discharge of the promisor, but not if it would leave the promisor liable

tradesman and undertakes to take the place, fill the contracts, and pay the debts of the vendor. 'These cases, as well as the case of one who receives money or property on the promise to pay or deliver to a third person, although not a party to the contract, may be fairly said to be a party to the consideration on which it rests. In good conscience the title to the money or thing which is the consideration of the promise passes to the beneficiary, and the promisor is turned in effect into a trustee. But when the promise is made to, and in relief of, one to whom the promise is made, upon a consideration moving from him, no particular fund or means of payment being placed in the hands of the promisor out of which the payment is to be made, there is no trust arising in the promisor, and no title passing to the third person. The beneficiary is not the original creditor, who is a stranger to the contract and the consideration, but the original debtor, who is a party to both, and the right of action is in him alone.' *Adams v. Kuehn*, 119 Pa. 76 (13 Atl. 184). In following what was thus said, we sustained a recovery in *Delp v. Bartholomay Brewing Co.*, 123 Pa. 42 (15 Atl. 871), because Delp, the de-

fendant below, 'by the very terms of the agreement, held the property and effects of Bingham & Spencer for the benefit of such of their creditors as had just claims contracted in the course of their business; he assumed the payment of these debts, and the property was put into his hands for this express purpose.' No such cause of action appears in this statement. Nothing is set forth in it except an alleged promise by the defendants to pay an existing indebtedness of the firm of Thos. Sweeney & Company, without any averment that any assets were placed in their hands for that purpose, and, the promise being but for the protection of the promisee, the right of action to enforce it, or to recover damages for the defendants' failure to perform, is in the promisee alone. This has been the undeviating rule from *Blymire v. Boistle*, 6 Watts. 182 (31 Am. Dec. 458), down through all the succeeding cases." *Sweeney v. Houston*, 243 Pa. St. 542, L. R. A. 1915A, 779, 90 Atl. 347.

³*Sweeney v. Houston*, 243 Pa. St. 542, L. R. A. 1915A, 779, 90 Atl. 347.

⁴*Cox v. Philadelphia Pottery Co.*, 214 Pa. St. 373, 63 Atl. 749.

⁵*In re Edmundson's Estate*, 259 Pa. St. 429, 2 A. L. R. 1150, 103 Atl. 277.

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to the promisee.⁶ A bond which is given by A, as surety for the principal contractor, to B, the property owner, and which is conditioned upon "the payment of all subcontractors," can not be enforced by C, who furnished materials to the chief contractor, and who knew of the bond and relied thereon, on the theory that the "manifest purpose of the bond was protection" to B.⁷

§ 2386. The rule in Virginia and West Virginia. In Virginia the rule which was laid down originally was unfavorable to the right of the beneficiary to enforce the contract.¹ This was subsequently modified by a statute which provided that a beneficiary might sue if the contract was intended for his sole benefit. This statute is said to have been enacted in order to prevent the promisor from being exposed to a double liability,² but it has been explained as though it authorized the beneficiary to sue on a contract which was made primarily for his benefit.³ Under such a statute, a creditor can not maintain an action against a grantee who has assumed and agreed to pay debts due from the grantor to the creditor, since such covenant is for the benefit of the grantor as well as for the benefit of the creditor.⁴ On the other hand, the beneficiary of an insurance policy may maintain an action against an insurance company, which has agreed to pay such certificate, together with other obligations, in consideration of the transfer to the promisor of the assets of the insurance company which originally issued such policy.⁵

§ 2387. Majority American rule—Right of beneficiary recognized. The earlier American cases followed the early English rule and allowed recovery if C was closely related to B.¹ The weight of modern authority holds that C may recover from A if the promise is upon consideration, is not under seal, and is made primarily for C's bene-

⁶ Kountz v. Holthouse, 85 Pa. St. 235.

⁷ First M. E. Church v. Isenberg, 246 Pa. St. 221, 92 Atl. 141.

¹ Ross v. Milne, 39 Va. (12 Leigh) 204, 37 Am. Dec. 646; Jones v. Thomas, 62 Va. (21 Gratt.) 96.

² King v. Scott, 76 W. Va. 58, 84 S. E. 954.

³ Johnson v. McClung, 26 W. Va. 659; King v. Scott, 76 W. Va. 58, 84 S. E. 954.

⁴ King v. Scott, 76 W. Va. 58, 84 S. E. 954; McIlvane v. Big Stony Lumber Co., 105 Va. 613, 54 S. E. 473.

⁵ Cosmopolitan Life Association v. Loegel, 104 Va. 619, 52 S. E. 166.

¹ Felton v. Dickinson, 10 Mass. 287.

fit.² The rule which permits the beneficiary to maintain an action

²United States. *Hendrick v. Lindsay*, 93 U. S. 143, 23 L. ed. 855; *Gibson v. Victor Talking Machine Co.*, 232 Fed. 225.

Alabama. *Moore v. First National Bank*, 139 Ala. 595, 36 So. 777.

Arkansas. *Walton v. Proutt*, 117 Ark. 388, L. R. A. 1915D, 917, 174 S. W. 1152; *Crigler v. Sloss*, 124 Ark. 599, 186 S. W. 85.

California. *Buckley v. Gray*, 110 Cal. 339, 52 Am. St. Rep. 88, 31 L. R. A. 862, 42 Pac. 900; *Washer v. Independent Mining & Development Co.*, 142 Cal. 702, 76 Pac. 654.

Colorado. *Hastings v. Pringle*, 37 Colo. 86, 86 Pac. 93; *Best v. Rocky Mountain National Bank*, 37 Colo. 149, 7 L. R. A. (N.S.) 1035, 85 Pac. 1124; *Grimes v. Barndollar*, 58 Colo. 421, 148 Pac. 256.

Florida. *Wright v. Terry*, 23 Fla. 160, 2 So. 6; *Woodbury v. Tampa Waterworks Co.*, 57 Fla. 243, 21 L. R. A. (N.S.) 1034, 49 So. 556; *American Securities Co. v. Goldsberry*, 69 Fla. 104, 1 A. L. R. 15, 67 So. 862.

Illinois. *Lawrence v. Oglesby*, 178 Ill. 122, 52 N. E. 945; *Edwards v. Schillinger*, 245 Ill. 231, 33 L. R. A. (N.S.) 895, 91 N. E. 1048; *Warder, etc., Co. v. Cummins*, 74 Ill. App. 650.

Indiana. *Tinkler v. Swaynie*, 71 Ind. 562; *Rodenbarger v. Bramblett*, 78 Ind. 213; *Warren v. Farmer*, 100 Ind. 593; *Ransdel v. Moore*, 153 Ind. 393, 53 L. R. A. 753, 53 N. E. 767.

Iowa. *Runkle v. Kettering*, 127 Ia. 6, 102 N. W. 142; *A. E. Shorthill Co. v. Bartlett*, 131 Ia. 259, 108 N. W. 308; *Meyer v. Stortenbecker*, — Ia. —, 165 N. W. 456.

Kansas. *West v. Telegraph Co.*, 39 Kan. 93, 7 Am. St. Rep. 530, 17 Pac. 807; *Clay v. Woodrum*, 45 Kan. 116, 25 Pac. 619; *Howell v. Hough*, 46 Kan. 152, 26 Pac. 436; *Ballard v. Home Na-*

tional Bank, 91 Kan. 91, L. R. A. 1916C, 161, 136 Pac. 935; *Goeken v. Bank*, — Kan. —, 179 Pac. 321; *Holderman v. Tedford*, 7 Kan. App. 657, 53 Pac. 887.

Kentucky. *Benge v. Hiatt*, 82 Ky. 666, 56 Am. Rep. 912; *Williamson v. Yager*, 91 Ky. 282, 34 Am. St. Rep. 184, 15 S. W. 660; *Schmidtz v. Ry.*, 101 Ky. 441, 38 L. R. A. 809, 41 S. W. 1015; *Daniels v. Gibson (Ky.)*, 47 S. W. 621; *Ballard v. American Hemp Co. (Ky.)*, 100 S. W. 271, 30 Ky. Law Rep. 1080; *Morrison v. Payton (Ky.)*, 104 S. W. 685, 31 Ky. Law Rep. 992; *Winn v. Schenk (Ky.)*, 110 S. W. 827, 33 Ky. Law Rep. 615; *John J. Radel Co. v. Borches*, 147 Ky. 506, 39 L. R. A. (N.S.) 227, 145 S. W. 155; *Weber-Wolters Dry Goods Co. v. Scott*, 172 Ky. 280, 189 S. W. 223; *Caldwell v. Ryan*, 173 Ky. 233, 190 S. W. 1078; *Citizens' Trust & Guaranty Co. v. Peebles Paving Brick Co.*, 174 Ky. 439, 192 S. W. 508; *Gregory v. Harlan Home Coal Co.*, 182 Ky. 524, 206 S. W. 765; *Bryant v. Jones*, 183 Ky. 298, 209 S. W. 30.

Louisiana. *Sargeant v. Daunoy*, 14 La. 43, 33 Am. Dec. 573.

Maine. *Dearborn v. Parks*, 5 Greenl. (Me.) 81, 17 Am. Dec. 206; *Coffin v. Bradbury*, 89 Me. 476, 36 Atl. 988.

Minnesota. *Maxcy v. Ins. Co.*, 54 Minn. 272, 40 Am. St. Rep. 325, 55 N. W. 1130; *Cooper v. Hayward*, 71 Minn. 374, 70 Am. St. Rep. 330, 74 N. W. 152; *Dickinson County v. Fitterling*, 72 Minn. 483, 75 N. W. 731; *Koski v. Pakkala*, 121 Minn. 450, 47 L. R. A. (N.S.) 183, 141 N. W. 793; *Godley v. Weisman*, 133 Minn. 1, L. R. A. 1917A, 333, 157 N. W. 711.

Mississippi. *Barnes v. Jones*, 111 Miss. 337, 71 So. 573.

Missouri. *State v. Gas Co.*, 102 Mo. 472, 22 Am. St. Rep. 789, 14 S. W.

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against the promisor, has been said to be based on the principle of

974, 15 S. W. 383; *Ellis v. Harrison*, 104 Mo. 270, 16 S. W. 198; *Howsmen v. Water Co.*, 119 Mo. 304, 41 Am. St. Rep. 654, 23 L. R. A. 146, 24 S. W. 784; *Beattie Mfg. Co. v. Clark*, 206 Mo. 89, 14 L. R. A. (N.S.) 822, 106 S. W. 29 (obiter).

Nebraska. *Kaufman v. Bank*, 31 Neb. 661, 48 N. W. 738; *Rohman v. Gaiser*, 53 Neb. 474, 73 N. W. 923; *Butler v. Bruce*, 75 Neb. 322, 106 N. W. 445; *Wright v. Pfrimmer*, 99 Neb. 447, L. R. A. 1917A, 323, 156 N. W. 1060.

Nevada. *Painter v. Kaiser*, 27 Nev. 421, 103 Am. St. Rep. 772, 65 L. R. A. 672, 1 Am. & Eng. Ann. Cas. 765, 76 Pac. 747.

New Jersey. *Whitehead v. Burgess*, 61 N. J. L. 75, 38 Atl. 802; *Edwards v. National Window Glass Jobbers' Association (N.J.)*, 68 Atl. 800; *Holt v. United Security L. Ins. & T. Co.*, 76 N. J. L. 585, 21 L. R. A. (N.S.) 691, 72 Atl. 301.

New Mexico. *Lawrence Coal Co. v. Shanklin*, — N. M. —, 183 Pac. 435.

New York. *Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 N. Y. 178, 80 Am. Dec. 327; *Barker v. Bradley*, 42 N. Y. 316, 1 Am. Rep. 521; *Little v. Banks*, 85 N. Y. 258; *Todd v. Weber*, 95 N. Y. 181, 47 Am. Rep. 20; *Societa Italiana v. Sulzer*, 138 N. Y. 468, 34 N. E. 193; *Buchanan v. Tilden*, 158 N. Y. 109, 70 Am. St. Rep. 454, 44 L. R. A. 170, 52 N. E. 724; *Embler v. Ins. Co.*, 158 N. Y. 431, 44 L. R. A. 512, 53 N. E. 212; *Smyth v. New York*, 203 N. Y. 106, 96 N. E. 409; *Zeiser v. Cohn*, 207 N. Y. 407, 47 L. R. A. (N.S.) 186, 101 N. E. 184; *Baird v. Erie Ry.*, 210 N. Y. 225, 104 N. E. 614; *Bradley v. McDonald*, 218 N. Y. 351, 113 N. E. 340; *De Cicco v. Schweizer*, 221 N. Y. 431, Ann. Cas. 1918C, 816, 117 N. E. 807.

North Carolina. *Faust v. Faust*, 144 N. Car. 383, 57 S. E. 22; *Carolina Hardware Co. v. Raleigh Banking & Trust Co.*, 169 N. Car. 744, 86 S. E. 706; *Springs v. Cole*, 171 N. Car. 418, 88 S. E. 721; *Chandler v. Jones*, 173 N. Car. 427, 92 S. E. 145; *Crumpler v. Hines*, 174 N. Car. 283, 93 S. E. 780.

North Dakota. *American Soda Fountain Co. v. Hogue*, 17 N. D. 375, 17 L. R. A. (N.S.) 1113, 116 N. W. 339; *McDonald v. Finseth*, 32 N. D. 400, L. R. A. 1916D, 149, 155 N. W. 863.

Ohio. *Thompson v. Thompson*, 4 O. S. 333; *Society of Friends v. Haines*, 47 O. S. 423, 25 N. E. 119; *Poe v. Dixon*, 60 O. S. 124, 71 Am. St. Rep. 713, 54 N. E. 86; *Kiley v. Hall*, 96 O. S. 374, L. R. A. 1918B, 961, 117 N. E. 359 (rule recognized but no contract found to exist).

Oklahoma. *Baker-Hanna-Blake Co. v. Paynter-McVicker Grocery Co.*, — Okla. —, 174 Pac. 265.

Oregon. *Hoffman v. Habighorst*, 49 Or. 379, 89 Pac. 952 [rehearing denied, 91 Pac. 20].

Rhode Island. *Wood v. Moriarity*, 15 R. I. 518, 9 Atl. 427; *Waterhouse v. Waterhouse*, 29 R. I. 485, 22 L. R. A. (N.S.) 639, 72 Atl. 642.

South Carolina. *Ancrum v. Camden Water, Light & Ice Co.*, 82 S. Car. 284, 21 L. R. A. (N.S.) 1029, 64 S. E. 151 (rule recognized, but no contract found to exist).

Tennessee. *McCarty v. Blevins*, 11 Tenn. (5 Yerg.) 195, 26 Am. Dec. 262.

Texas. *Western Union Telegraph Co. v. Adams*, 75 Tex. 531, 16 Am. St. Rep. 920, 6 L. R. A. 844, 12 S. W. 657.

Utah. *Thompson v. Cheeseman*, 15 Utah 43, 48 Pac. 477; *Brown v. Markland*, 16 Utah 360, 67 Am. St. Rep. 629, 52 Pac. 597; *Smith v. Bowman*, 32 Utah 33, 9 L. R. A. (N.S.) 889, 88 Pac. 687.

avoiding circuity of action wherever possible.³ The doctrine that the beneficiary can sue has led to many practical difficulties, and while recognized and well established, can hardly be said to be favored. Even the courts that allow him to sue, show "no disposition to extend the doctrine relating to third parties to new and doubtful cases."⁴ Where the beneficiary may sue in his own name, it is not necessary that a novation should be established.⁵ In jurisdictions in which the beneficiary can not sue, the question of novation is of the utmost importance, since the ultimate creditor may enforce the promise of the original debtor if the transaction amounts

Vermont. *Coleman v. Whitney*, 62 Vt. 123, 9 L. R. A. 517, 20 Atl. 322.

Virginia. *Cosmopolitan Life Association v. Loegel*, 104 Va. 619, 52 S. E. 166.

Washington. *Union Machinery & Supply Co. v. Darnell*, 89 Wash. 226, 154 Pac. 183.

West Virginia. *Jenkins v. Chesapeake & O. R. R. Co.*, 61 W. Va. 507, 49 L. R. A. (N.S.) 1166, 57 S. E. 48; *Butts v. Butts*, 81 W. Va. 55, 94 S. E. 360.

Wisconsin. *Grant v. Diebold Safe & Lock Co.*, 77 Wis. 72, 45 N. W. 951; *Larson v. Cook*, 85 Wis. 564, 55 N. W. 703; *Stites v. Thompson*, 98 Wis. 329, 73 N. W. 774; *Tweeddale v. Tweeddale*, 116 Wis. 517, 96 Am. St. Rep. 1003, 61 L. R. A. 509, 93 N. W. 440; *Gilbert Paper Co. v. Whiting Paper Co.*, 123 Wis. 472, 68 L. R. A. 956, 102 N. W. 20; *Smith v. Pfluger*, 126 Wis. 253, 110 Am. St. Rep. 911, 2 L. R. A. (N.S.) 783, 105 N. W. 476; *Fanning v. Murphy*, 126 Wis. 538, 110 Am. St. Rep. 946, 4 L. R. A. (N.S.) 666, 105 N. W. 1056; *R. Connor Co. v. Olson* (Wis.), 115 N. W. 811; *Concrete Steel Co. v. Illinois Surety Co.*, 163 Wis. 41, 157 N. W. 543; *Sedgwick v. Blanchard*, 164 Wis. 421, 160 N. W. 267.

For a discussion of the rights of the beneficiary see. *Privity of Contract*, by Jesse W. Lillienthal, 1 *Harvard Law Review*, 226; *The Right of a Third Person to Sue Upon a Contract Made for His*

Benefit, by Edward Q. Keasbey, 8 *Harvard Law Review* 93; *Contracts for the Benefit of a Third Person*, by Samuel Williston, 15 *Harvard Law Review* 767; *Contracts for the Benefit of a Third Person in the Civil Law*, by Samuel Williston, 16 *Harvard Law Review* 43; *The Equitable Rights and Liabilities of a Stranger to a Contract*, by Harlan F. Stone, 18 *Columbia Law Review* 291; *Contracts for the Benefit of Third Persons*, by Arthur L. Corbin, 27 *Yale Law Jour.* 1008; *The Right of a Third Person to Sue on a Contract Made in His Favor*, by Henry O. Taylor, 15 *American Law Review* 231; *Assumption of Encumbrances by the Purchaser of Land*, 18 *American Law Register* (N.S.) 337, 401, and *Contracts for the Benefit of Third Persons*, 23 *American Law Register* (N.S.) 1.

See also, *Admissibility of Declarations of the Insured Against the Beneficiary*, by Albert M. Kales, 6 *Columbia Law Review* 509.

³ *Barnett v. Pratt*, 37 Neb. 349, 55 N. W. 1050.

⁴ *Montgomery v. Rief*, 15 Utah 496, 50 Pac. 623.

See to the same effect, *Wilson v. Shea*, 29 Cal. App. 788, 157 Pac. 543; *John Horstmann Co. v. Waterman*, 103 Wash. 18, 1 A. L. R. 856, 173 Pac. 733.

⁵ *Smith v. Pfluger*, 126 Wis. 253, 2 L. R. A. (N.S.) 783, 105 N. W. 476.

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to a novation, while he can not enforce it if it is merely a contract made for his benefit.

§ 2388. Privity. The fact that there is, in reality, no privity between the promisor and the beneficiary, still causes trouble and confusion in some jurisdictions. The cases in which it is insisted that privity is necessary, are generally cases in which the court denies the right of the beneficiary to enforce the contract and in which the absence of privity is invoked as a justification for such refusal.¹ Where the right of the beneficiary to recover is recognized, privity is sometimes said to be necessary,² but privity in this sense is regarded as existing whenever the intention of the contract is to confer a benefit upon the third person.³ Where the right of the beneficiary is recognized and the necessity of privity is still insisted upon, it is sometimes said that the law creates the privity between the parties.⁴ The right of the beneficiary to recover is also explained on the theory that the promisor is estopped to deny the privity between the promisor and the beneficiary, if it has received a consideration from the promisee.⁵ The explanation which meets the actual facts of the case is that if the contract is intended for the benefit of a third person, it is not necessary that there should be any privity between the beneficiary and the promisor.⁶

§ 2389. Statutory provision permitting real party in interest to bring action. The right of the beneficiary to maintain an action

¹ Guthrie v. Atlantic Coast Line R. Co., 119 Ga. 663, 46 S. E. 824; Ogles v. Nashville, Chattanooga & St. Louis Ry., 130 Ga. 430, 124 Am. St. Rep. 175, 60 S. E. 1048; Allen & Curry Mfg. Co. v. Shreveport Waterworks Co., 113 La. 1091, 68 L. R. A. 650, 37 So. 980; McIlvane v. Big Stony Lumber Co., 105 Va. 613, 54 S. E. 473; Armour v. Western Const. Co., 36 Wash. 529, 78 Pac. 1106.

See also Guss v. Federal Trust Co., 19 Okla. 138, 91 Pac. 1045.

² Ruohs v. Traders' Fire Ins. Co., 111 Tenn. 405, 102 Am. St. Rep. 790, 78 S. W. 85.

³ Ruohs v. Traders' Fire Ins. Co., 111 Tenn. 405, 102 Am. St. Rep. 790, 78 S. W. 85.

⁴ Washburn v. Interstate Investment Co., 26 Or. 436, 36 Pac. 533, 38 Pac. 620; Tweeddale v. Tweeddale, 116 Wis. 517, 93 N. W. 440; Fanning v. Murphy, 126 Wis. 538, 110 Am. St. Rep. 946, 4 L. R. A. (N.S.) 666, 105 N. W. 1056. "The law invests him with a privity." Washburn v. Interstate Investment Co., 26 Or. 436, 36 Pac. 533, 38 Pac. 620 [quoted in John Horstmann Co. v. Waterman, 18 Wash. 103, 1 A. L. R. 856, 173 Pac. 733].

⁵ Washer v. Independent Mining & Development Co., 142 Cal. 702, 76 Pac. 654.

⁶ Chandler v. Jones, 173 N. Car. 427, 92 S. E. 145; Crumpler v. Hines, 174 N. Car. 283, 93 S. E. 780.

upon the contract to which he is not a party is sometimes referred to the statute which provides that an action may be maintained in the name of the real party in interest.¹ This explanation does not seem to be justified by the development of the law on the subject of the rights of the beneficiary in most jurisdictions. His position has generally been regarded as very different from that of the assignee at common law in its later development. In the latter the assignee was regarded as the real party in interest who was obliged for procedural reasons to maintain an action in the name of his assignor.² The beneficiary has been regarded in some jurisdictions as having no interest in the contract. The entire interest in such jurisdictions has been regarded as belonging to the promisee. Where this view has been entertained, the beneficiary had no right of action either in his own name or in the name of the promisee.³ In jurisdictions in which the beneficiary has been held to have a right in the contract, it has generally been held that he could enforce such right by an action in his own name.⁴ In some jurisdictions the beneficiary may, at his election, sue in his own name or in the name of the promisee for the use of the beneficiary.⁵ A statute which provides that the trustee of an express trust may maintain an action in his own name, and that one in whose name a contract is made for the benefit of another is to be regarded as the trustee of an express trust, does not prevent the beneficiary from bringing an action upon the contract in his own name,⁶ especially if the real consideration belongs to the beneficiary and is furnished on his behalf by the promisee.⁷

The denial of C's right to enforce a contract between A and B, for C's benefit, is not merely a matter of procedure.⁸ C can not maintain an action because he has no interest in the contract, and not because, under the rules of procedure, he must bring an action

¹ *American Soda Fountain Co. v. Hogue*, 17 N. D. 375, 17 L. R. A. (N.S.) 1113, 116 N. W. 339.

² See § 2240.

³ See §§ 2380 et seq.

⁴ See § 2387.

⁵ *Holt v. United Security L. Ins. & T. Co.*, 76 N. J. L. 585, 21 L. R. A. (N.S.) 601, 72 Atl. 301.

⁶ *Best v. Rocky Mountain National Bank*, 37 Colo. 149, 7 L. R. A. (N.S.) 1035, 85 Pac. 1124.

⁷ *Best v. Rocky Mountain National Bank*, 37 Colo. 149, 7 L. R. A. (N.S.) 1035, 85 Pac. 1124.

⁸ *Signs v. Bush's Estate*, 199 Mich. 192, 165 N. W. 820. "It is suggested that by virtue of section 2, ch. 12, of the Judicature Act (Act No. 314, Pub. Acts 1915), this action could now be prosecuted by the claimant, as she is the real party in interest. This section provides: 'Every action shall be prosecuted in the name of the real party in interest,' etc.

in B's name.⁹ Accordingly, a statute which provides that the action is to be brought in the name of the real party in interest, can not confer upon C a right to sue upon a contract for his benefit, which was made before such statute was enacted.¹⁰ It seems to be assumed that under such statute C has a right in contracts which are entered into after such statute is enacted.¹¹ Why such a statute should have such an effect as to future contracts is not made clear. If it deals merely with a question of the party in whose name the action is to be brought, it would seem that it ought not to be regarded as affecting any substantive right.

§ 2390. General principles of contract affecting this type—Formation of contract. The principles which control contracts for the benefit of the promisee often find especial and peculiar application in contracts for the benefit of a third person. In order that the beneficiary may enforce the contract, there must be a valid and enforceable contract between the promisor and the promisee for the benefit of the third person.¹ A statement, "I have agreed with B to take up his papers," does not of itself import a contract for

"This was not in effect at the time that the claim was filed, and the claim was pending when this law went into force. It is urged that the Judicature Act is merely a practice act and that a practice act should be held to apply to cases pending when such act went into effect, and the case of *Little & Co. v. Hazen & Co.*, 185 Mich. 316, 152 N. W. 95, is referred to, to sustain this contention. We there held that where a statute affects the rights of the parties, and not the rights themselves, even though passed subsequent to commencement of suit, it is fully applicable to all pending cases. But the situation before us is not merely a question of applying the remedy to the rights of the parties, but under the law as it existed at the time this claim was filed, the claimant had no rights arising out of the transaction against the defending estate. To hold that the statute here invoked would sustain appellant's contention would give the claimant a right which she

did not possess at the time she filed her claim. If she had had a right or a claim at that time and had pursued an improper remedy, which was subsequently recognized by statute, it would present a similar situation to that referred to in the *Little* case, *supra*." *Signs v. Bush's Estate*, 199 Mich. 192, 165 N. W. 820.

⁹ *Signs v. Bush's Estate*, 199 Mich. 192, 165 N. W. 820.

¹⁰ *Signs v. Bush's Estate*, 199 Mich. 192, 165 N. W. 820.

¹¹ *Signs v. Bush's Estate*, 199 Mich. 192, 165 N. W. 820.

¹ *Illinois. Thompson v. Dearborn*, 107 Ill. 87.

Nebraska. Gammel Book Co. v. Paine, 75 Neb. 683, 106 N. W. 777.

New York. Schwartz v. Cahill, 220 N. Y. 174, 115 N. E. 451.

Ohio. Elyria Savings & Banking Co. v. Walker Bin Co., 92 O. S. 406, L. R. A. 1916D, 433, 111 N. E. 147.

Oklahoma. Hiner v. Washita Valley Bank, 51 Okla. 606, 152 Pac. 112.

the benefit of C, who is B's creditor.² A clause in a deed which recites that the grantee assumes and agrees to pay certain obligations of the grantor, does not impose a personal obligation upon the grantee, if the grantee did not know of such provision or assent thereto.³ One who has purchased realty which is subject to a mortgage, does not become personally liable to the mortgagee in the absence of a contract whereby he agrees to pay such debt either expressly or by fair implication.⁴ If the grantee agrees with his grantor upon the purchase price of the realty free from incumbrances, and by mutual arrangement the grantee then retains the amount of the incumbrances out of the purchase price, such transaction is generally regarded as amounting to a promise by the grantee to the grantor to apply to the payment of the incumbrance the amount thus retained,⁵ and the creditor may maintain an action against the grantee upon such contract.⁶ One who acquires an interest in land subject to certain rent, does not thereby assume a personal obligation for the amount of such rent.⁷ One who has purchased a lot can not enforce building restrictions in the deeds of adjoining lot owners, unless such adjoining lot owners know of a general plan for the use of such adjoining property when he purchases his lot, or unless they know that restrictions are inserted in their deeds for the benefit of adjoining property owners.⁸ The fact that a bank pays a check upon a forged indorsement and stamps it paid, does not amount to such an acceptance of the check as to make the bank liable to the payee or to the true holder thereof.⁹ B leased realty from A, a railway under a contract whereby B released A from all liability for damage by fire. C, not knowing of such provision, stored cotton on B's platform, on such realty, where it was destroyed by fire caused by A's negligence. The pro-

South Carolina. *Tucker v. Gaines*, 86 S. Car. 500, 68 S. E. 670.

Wisconsin. *Krahn v. Goodrich*, 164 Wis. 600, 160 N. W. 1072.

² *Tucker v. Gaines*, 86 S. Car. 500, 68 S. E. 670.

³ *Thompson v. Dearborn*, 107 Ill. 87.

⁴ *Robinson Bank v. Miller*, 153 Ill. 244, 46 Am. St. Rep. 883, 27 L. R. A. 449, 38 N. E. 1078; *Van Eman v. Mosing*, 36 Okla. 555, L. R. A. 1917C, 590, 129 Pac. 2; *Hammond v. Wall*, — Utah —, 171 Pac. 148.

⁵ *Van Eman v. Mosing*, 36 Okla. 555, L. R. A. 1917C, 590, 129 Pac. 2.

⁶ *Van Eman v. Mosing*, 36 Okla. 555, L. R. A. 1917C, 590, 129 Pac. 2; *United States Bond & Mortg. Co. v. Keahey*, 53 Okla. 176, L. R. A. 1917C, 829, 155 Pac. 557.

⁷ *Schwartz v. Cahill*, 220 N. Y. 174, 115 N. E. 451.

⁸ *Kiley v. Hall*, 96 O. S. 374, L. R. A. 1918B, 961, 117 N. E. 359.

⁹ *Elyria Savings & Banking Co. v. Walker Bin Co.*, 92 O. S. 406, L. R. A. 1916D, 433, 111 N. E. 147.

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vision in B's lease was held to be no defense to A in an action brought by C.¹⁰ The fact that B expects that A will do some act for the benefit of C, does not impose any liability on A, unless he has in some manner agreed to assume such liability.¹¹ Thus B transferred his property to a corporation, A, and took stock therein, intending that his debts should be paid out of such property; but there was no agreement to that effect between A and B. B's creditors were not allowed to enforce payment of their debts from A.¹²

Since an agent is bound to carry out the instructions of his principal, and since he owes no duty to the person who was to be benefited by the performance of his original instructions, which can justify him in refusing to obey subsequent instructions, a creditor can not bring an action against an agent in whose hands the principal has placed money with instructions to apply such money to the payment of certain specified obligations.¹³ C can not accept the benefits of the contract between A and B after A has become bankrupt.¹⁴ The characteristic feature of contracts of this class is that the third person benefited by the contract is not a party to it. Accordingly, if the contract is in writing, the fact that it is not delivered to C does not prevent him from enforcing it.¹⁵

§ 2391. Designation of beneficiary. In jurisdictions in which the right of a third person to enforce a contract made for his benefit is not regarded with favor, it is held that a third person can not enforce a contract for his benefit unless he is specifically named.¹ In other jurisdictions which regard this right with greater favor, it is held that one who is indicated in a sufficiently definite way may enforce a contract intended for his benefit, though he is not specifically named.² Since an offer may ordinarily be made to a person to be ascertained in the future,³ a promise by A to B for the benefit

¹⁰ Texas, etc., *Ry. v. Watson*, 190 U. S. 287, 47 L. ed. 1057 [affirming, 112 Fed. 402, 50 C. C. A. 230].

¹¹ *Durlacher v. Frazer*, 8 Wyom. 58, 60 Am. St. Rep. 918, 55 Pac. 306.

¹² *Durlacher v. Frazer*, 8 Wyom. 58, 60 Am. St. Rep. 918, 55 Pac. 306.

¹³ *Title Guarantee & Trust Co. v. Haven*, 214 N. Y. 468, 106 N. E. 819.

¹⁴ *Blake v. Atlantic National Bank*, 33 R. I. 464, 82 Atl. 225.

¹⁵ *Stevens v. Flannagan*, 131 Ind. 122, 30 N. E. 696; *Copeland v. Summers*,

138 Ind. 219, 35 N. E. 514, 37 N. E. 971.

¹ *Harvey v. Milk Co.*, 92 Me. 115, 42 Atl. 342; *Carr v. Bank*, 107 Mass. 45, 9 Am. Rep. 6; *Dow v. Clark*, 73 Mass. (7 Gray) 198.

² *Searles v. Flora*, 225 Ill. 167, 80 N. E. 98; *State v. Gaslight Co.*, 102 Mo. 472, 22 Am. St. Rep. 789, 14 S. W. 974, 15 S. W. 383; *Beattie Mfg. Co. v. Clark*, 208 Mo. 89, 14 L. R. A. (N.S.) 822, 106 S. W. 29.

³ See § 195.

of a third person is not invalid, because such third person is not ascertained when the promise is made.⁴ Thus where A, the owner of a stallion, agreed with B, the owner of a mare, that A would pay to any person who should own the first of the foals of such mare by such stallion, which should trot a mile in two minutes and thirty seconds or less, the sum of seven hundred and fifty dollars, and C bought one of the foals, knowing of such promise, it was held that if the foal owned by C trotted a mile in the prescribed time, C would recover from A.⁵

§ 2392. Acceptance by beneficiary. It is not necessary that the beneficiary should know that the contract was made for his benefit at the time at which it is entered into between the promisor and the promisee.¹ A contract by which a bank agrees with a depositor to pay checks out of certain deposits, may be enforced by the payee of such checks, although he did not know of such contract when he accepted such checks.² As in the case of other contracts, it is generally held that the beneficiary must accept the contract which is made for his benefit before it has been revoked or before it has lapsed, in order that he may enforce it.³ It is not necessary, however, that he should accept the benefits of such contract in any particular form.⁴ His act in maintaining an action upon such contract⁵ is a sufficient assent. No formal assent before the bringing

⁴ *Whitehead v. Burgess*, 61 N. J. L. 75, 38 Atl. 802. (The court expressly treated this as analogous to contracts offering rewards to persons not then known.) *R. Connor Co. v. Olson* (Wis.), 115 N. W. 811.

⁵ *Whitehead v. Burgess*, 61 N. J. L. 75, 38 Atl. 802.

¹ *Ballard v. Home National Bank*, 91 Kan. 91, L. R. A. 1916C, 161, 136 Pac. 935; *Beattie Mfg. Co. v. Clark*, 206 Mo. 89, 14 L. R. A. (N.S.) 822, 106 S. W. 29; *Carolina Hardware Co. v. Raleigh Banking & Trust Co.*, 169 N. Car. 744, 86 S. E. 706 (explained as action against undisclosed principal); *Smith v. Pfluger*, 126 Wis. 253, 110 Am. St. Rep. 911, 2 L. R. A. (N.S.) 783, 105 N. W. 476; *Fanning v. Murphy*, 126 Wis. 538, 110 Am. St. Rep. 946, 4 L. R. A. (N.S.) 666, 105 N. W.

1056; *R. Connor Co. v. Olson* (Wis.), 115 N. W. 811.

² *Ballard v. Home National Bank*, 91 Kan. 91, L. R. A. 1916C, 161, 136 Pac. 935.

³ *Blake v. Atlantic National Bank*, 33 R. I. 464, 82 Atl. 225.

⁴ *Tweeddale v. Tweeddale*, 116 Wis. 517, 96 Am. St. Rep. 1003, 61 L. R. A. 509, 93 N. W. 440; *Gilbert Paper Co. v. Whiting Paper Co.*, 123 Wis. 472, 68 L. R. A. 956, 102 N. W. 20; *Smith v. Pfluger*, 126 Wis. 253, 110 Am. St. Rep. 911, 2 L. R. A. (N.S.) 783, 105 N. W. 476; *Fanning v. Murphy*, 126 Wis. 538, 110 Am. St. Rep. 946, 4 L. R. A. (N.S.) 666, 105 N. W. 1056; *Micek v. Wamka*, 165 Wis. 97, 161 N. W. 367.

⁵ *United States. North Alabama Development Co. v. Orman*, 55 Fed. 18, 5 C. C. A. 22.

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of such action is necessary.⁶ The third person may accept even though he is then an infant.⁷ A agreed with B to convey certain realty to C, B's child, on consideration that A might name C. It was held that C's bearing such name down to the time of the suit is such an acceptance that C may sue A on such promise.⁸ A contract by which the owners of realty, which is sold on foreclosure proceedings, agree that one of such owners shall bid it in for the benefit of all, may be enforced by an infant who is not a party to such contract.⁹ If the beneficiary has assented to the contract when it was entered into, and especially if he has given up some legal right thereunder, his right to enforce the contract is even more clear.¹⁰ If B, the lessor, agrees with A, a contractor, to do certain work upon the leased property, and if the tenant, C, permits the contractors to enter and do such work upon condition that they complete the contract within the time specified, C may enforce a covenant by which the contractors agree to pay a certain sum as liquidated damages in case of delay.¹¹

§ 2393. Beneficiary's rights dependent on validity of original contract, and on terms thereof. If the beneficiary accepts the benefits of the contract, he takes subject to its validity as between the

Indiana. Carnahan v. Tousey, 93 Ind. 561; Copping v. Gregg, 127 Ind. 359, 26 N. E. 903; McCoy v. McCoy, 32 Ind. App. 38, 102 Am. St. Rep. 223, 69 N. E. 193.

Minnesota. Stariha v. Greenwood, 28 Minn. 521, 11 N. W. 76.

New York. Campbell v. Smith, 71 N. Y. 26, 27 Am. Rep. 5.

Wisconsin. Tweeddale v. Tweeddale, 116 Wis. 517, 96 Am. St. Rep. 1003, 61 L. R. A. 509, 93 N. W. 440.

See also, Gilbert Paper Co. v. Whiting Paper Co., 123 Wis. 472, 68 L. R. A. 956, 102 N. W. 20.

⁶Tweeddale v. Tweeddale, 116 Wis. 517, 96 Am. St. Rep. 1003, 61 L. R. A. 509, 93 N. W. 440; Smith v. Pfluger, 126 Wis. 253, 110 Am. St. Rep. 911, 2 L. R. A. (N.S.) 783, 105 N. W. 476; Fanning v. Murphy, 126 Wis. 538, 110 Am. St. Rep. 946, 4 L. R. A. (N.S.) 666, 105 N. W. 1056; Micek v. Wamka, 165 Wis. 97, 161 N. W. 387.

See also, Gilbert Paper Co. v. Whiting Paper Co., 123 Wis. 472, 68 L. R. A. 956, 102 N. W. 20.

⁷Gooden v. Rayl, 85 Ia. 592, 52 N. W. 506; Strong v. Marcy, 33 Kan. 109, 5 Pac. 366; Bengé v. Hiatt, 82 Ky. 666, 56 Am. Rep. 912; Griffin v. Schlenk (Ky.), 102 S. W. 837, 31 Ky. Law Rep. 422; McCarty v. Blevens, 11 Tenn. (5 Yerg.) 195, 26 Am. Dec. 262.

⁸Daily v. Minnick, 117 Ia. 563, 60 L. R. A. 840, 91 N. W. 913.

⁹Griffin v. Schlenk (Ky.), 102 S. W. 837, 31 Ky. Law Rep. 422.

¹⁰Ottumwa Mill & Construction Co. v. Manchester, 139 Ia. 334, 115 N. W. 911.

¹¹Ottumwa Mill & Construction Co. v. Manchester, 139 Ia. 334, 115 N. W. 911. (This is said to be an "implied contract" between the contractor and the tenant.)

original parties thereto, and subject to the terms and conditions of the original contract. The liability of the promisor to the beneficiary is measured by the terms of the contract between the promisor and the promisee; and the liability of the promisor can not exceed the liability imposed upon him by such contract.¹ If B has obtained an option from C, which imposes no liability upon B to make payments, but which provides that B may secure the property by making payments if he wishes to, and B transfers such contract to A under a contract by which A agrees to make such payments, it is held that A is not bound to make such payments to C.² If A has promised to pay B's debts up to a certain amount, and the total amount of B's debts is uncertain, C, one of B's creditors, may sue A, but A may compel the action to be brought for the benefit of all the creditors so that the adjudication rendered will bind all and free A from further liability.³ If A has paid the entire amount of his contract liability to one of the creditors, he may be compelled to pay to the other creditors such sum as they would have received if they had all been made parties and had received proportionate amounts of the sum paid by A.⁴ B conveyed a farm to A under a contract by which A was to support B for life, and should discharge all of B's indebtedness, and that in case he paid the indebtedness by the end of ten years he should pay a certain sum of money to each of B's children, C, Y and Z. Soon afterwards B leased to A all the personal property upon the farm for B's life on condition that A remained on the farm and performed the contract. It was held that the contract between A and B was personal and that the covenant by A to pay such money to C, Y and Z was conditioned upon his electing to perform

¹ **United States.** *Fish v. First National Bank*, 150 Fed. 524, 80 C. C. A. 286 [judgment reversed on rehearing, 157 Fed. 87].

Florida. *American Securities Co. v. Goldsberry*, 69 Fla. 104, 1 A. L. R. 15, 67 So. 862.

Georgia. *Union City Realty & Trust Co. v. Wright*, 145 Ga. 730, 89 S. E. 822

New York. *Schneider v. Ins. Co.*, 123 N. Y. 109, 20 Am. St. Rep. 727, 25 N. E. 321.

Oregon. *United Artisans v. Cronise*, 88 Or. 602, L. R. A. 1918D, 1131, 172 Pac. 109.

Vermont. *Jenness v. Simpson*, 84 Vt. 127, 78 Atl. 886.

Washington. *Rockwell v. Edgecomb*, 72 Wash. 694, 45 L. R. A. (N.S.) 661, 131 Pac. 191.

Wisconsin. *Gimbel Brothers v. McConnell*, 159 Wis. 325, 150 N. W. 495.

² *Rockwell v. Edgecomb*, 72 Wash. 694, 45 L. R. A. (N.S.) 661, 131 Pac. 191.

³ *Bell v. Mendenhall*, 71 Minn. 331, 73 N. W. 1086.

⁴ *Curry v. Homer*, 62 O. S. 233, 56 N. E. 870.

the contract and to pay such indebtedness. Accordingly, since A subsequently elected not to perform, and by agreement with B conveyed such property to B, it was held that C, Y and Z had no cause of action against A upon such promise.⁵

If C can maintain an action upon A's promise, any defense which A could invoke as against B can be invoked against C.⁶ If A is induced to enter into the contract by B's fraud, A may set up such fraud in an action by C,⁷ at least if A did not contemplate action by C in reliance upon such contract.⁸ If A's liability is made subject to the express condition of a notice to him, by the terms of the contract between A and B, C can not enforce such contract without giving such notice.⁹ If a bond given by a public contractor for the benefit of laborers and materialmen, is conditioned upon giving notice, the beneficiaries of such bond can enforce it only if such notice is given in substantial compliance with such provisions.¹⁰ If the mortgagor and the mortgagee have entered into a valid agreement for the extension of time upon the mortgage debt, a subsequent grantee who has assumed and agreed to pay the mortgage debt may take advantage of such extension.¹¹ If the contract between A and B reserves to B the right to change the beneficiary, C can not enforce such contract against A in case B has exercised such option;¹² nor can he enforce such contract after A and B have rescinded it.¹³ By a special contract between B and C,¹⁴ which

⁵ *Krahn v. Goodrich*, 164 Wis. 600, 160 N. W. 1072.

⁶ *Union City Realty & Trust Co. v. Wright*, 145 Ga. 730, 89 S. E. 822; *Ellis v. Harrison*, 104 Mo. 270, 16 S. W. 198; *Dunning v. Leavitt*, 85 N. Y. 30, 39 Am. Rep. 617; *Jenness v. Simpson*, 84 Vt. 127, 78 Atl. 886.

⁷ *Union City Realty & Trust Co. v. Wright*, 145 Ga. 730, 89 S. E. 822; *Jenness v. Simpson*, 84 Vt. 127, 78 Atl. 886.

⁸ *Union City Realty & Trust Co. v. Wright*, 145 Ga. 730, 89 S. E. 822.

⁹ *Knight & Jillson Co. v. Castle*, 172 Ind. 97, 27 L. R. A. (N.S.) 573, 87 N. E. 976. A similar provision has, however, been construed as applicable only to B's right of action against A, and as not requiring C to give such notice.

Forburger Stone Co. v. Lion Bonding & Surety Co., — Neb. —, 170 N. W. 897.

¹⁰ *Rodgers v. Fidelity & Deposit Co.*, 89 Wash. 316, 154 Pac. 444; *Carstens Packing Co. v. Mitchell*, 95 Wash. 72, 163 Pac. 1 (obiter).

¹¹ *American Securities Co. v. Goldsberry*, 69 Fla. 104, 1 A. L. R. 15, 67 So. 862.

¹² *United Artisans v. Cronise*, 88 Or. 602, L. R. A. 1918D, 1131, 172 Pac. 109.

¹³ *Slocum v. Northwestern National Life Ins. Co.*, 135 Wis. 288, 14 L. R. A. (N.S.) 1110, 115 N. W. 796.

¹⁴ *Neary v. Metropolitan Life Insurance Co.*, 92 Conn. 488, L. R. A. 1918F, 306, 103 Atl. 661; *Sipe v. Sipe*, 102 Kan. 742, L. R. A. 1918E, 1029, 173 Pac. 13.

is entered into either when A and B make their contract,¹⁶ or subsequently thereto,¹⁶ B may give up the right of changing the beneficiary which he has reserved by the terms of the contract between himself and A, and in such case A is bound by B's renunciation of such right as long as B has not altered his position in reliance upon the terms of the original contract. B's right of changing the beneficiary must be exercised in accordance with the terms of the contract between A and B.¹⁷ If a beneficial certificate is made payable to one who may be named as beneficiary under statute, the subsequent attempt of the insured to change the payee to one who can not be a beneficiary,¹⁸ such as the estate of the insured,¹⁹ does not destroy the right of the former beneficiary.²⁰

Breach which amounts to a failure of consideration and which is caused by B's default, may be invoked as against C.²¹ A and B entered into a contract by which B was to convey certain realty to A free from all liens, except two specified mortgages, and in consideration of such conveyance A agreed to pay X's claim against B. B was never able to free the realty from the remaining liens, and subsequently, because of his inability to perform, B released A from such contract. It was held that X could not enforce such contract against A, since A's promise to pay X was conditioned upon B's performance.²²

A breach which does not amount to a total failure of consideration and which did not operate as a discharge of the contract between A and B,²³ does not discharge A from liability to C,²⁴ and apparently it does not give to A a cause of action against C, or a right to interpose a set-off or counter-claim.²⁵ If B sells a saw-mill to A, in consideration of which, among other things, A agrees to pay B's outstanding note to X, the fact that B has not paid his workmen and that A is obliged to pay them to prevent

¹⁶ *Neary v. Metropolitan Life Insurance Co.*, 92 Conn. 488, L. R. A. 1918F, 306, 103 Atl. 661.

¹⁶ *Sipe v. Sipe*, 102 Kan. 742, L. R. A. 1918E, 1029, 173 Pac. 13.

¹⁷ *Sturges v. Sturges*, 126 Ky. 80, 12 L. R. A. (N.S.) 1014, 102 S. W. 884.

¹⁸ *Sturges v. Sturges*, 126 Ky. 80, 12 L. R. A. (N.S.) 1014, 102 S. W. 884.

¹⁹ *Sturges v. Sturges*, 126 Ky. 80, 12 L. R. A. (N.S.) 1014, 102 S. W. 884.

²⁰ *Sturges v. Sturges*, 126 Ky. 80, 12 L. R. A. (N.S.) 1014, 102 S. W. 884.

²¹ *Clay v. Woodrum*, 45 Kan. 116, 25 Pac. 619; *Osborne v. Cabell*, 77 Va. 462; *Jenness v. Simpson*, 84 Vt. 127, 78 Atl. 886.

²² *Gimbel Brothers v. McConnell*, 159 Wis. 325, 150 N. W. 495.

²³ See ch. LXXXIV.

²⁴ *Fulmer v. Wightman*, 87 Wis. 573, 58 N. W. 1106.

²⁵ *Fulmer v. Wightman*, 87 Wis. 573, 58 N. W. 1106.

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them from filing a lien upon certain timber, is not a defense to an action by X against A upon such note, unless by the terms of the contract between A and B, A's promise to pay such note was made conditional upon B's payment of the claims of the workmen.²⁶ In case of partial failure of consideration, it has been held, on the other hand, that A may interpose such partial failure as a partial defense.²⁷ If A agrees to pay B's debts to C and D, in consideration of B's conveyance of certain property to A, and such consideration fails in part, the creditors must prorate their claims in proportion to the amount of such failure of consideration.²⁸

§ 2394. Rescission by mutual assent of original parties. The promisor and the promisee may rescind the contract without the consent of the third person at any time before he has assented to it or acted on it.¹ If the promisor agrees to pay something to a third person, to whom the promisee is not indebted, such third person can not enforce this promise after the promisor has settled all his liability by a payment to the promisee.² It can be rescinded so as to bar the rights of the third person, only "before it is brought to his knowledge and he has assented to it and acted on it."³ Until the beneficiary has accepted the contract, he is not a necessary party to a suit by the promisee for rescission.⁴

After the third person has accepted this offer, it seems that the promisor and promisee can not rescind.⁵ In some jurisdictions the

²⁶ *Fulmer v. Wightman*, 87 Wis. 573, 68 N. W. 1106.

²⁷ *Gunn v. McAlpine*, 125 Minn. 343, 147 N. W. 111.

²⁸ *Gunn v. McAlpine*, 125 Minn. 343, 147 N. W. 111.

¹ *Commercial National Bank v. Kirkwood*, 172 Ill. 563, 50 N. E. 219; *Davis v. Calloway*, 30 Ind. 112, 95 Am. Dec. 671; *Trimble v. Strother*, 25 O. S. 378; *Brewer v. Maurer*, 38 O. S. 543, 43 Am. Rep. 436.

² *Townsend v. Rackham*, 143 N. Y. 516, 38 N. E. 731.

³ *Gifford v. Corrigan*, 117 N. Y. 257, 265, 15 Am. St. Rep. 508, 6 L. R. A. 610, 22 N. E. 756.

⁴ *Watson v. Feibel* (La.), 71 So. 585.

⁵ *Illinois*. *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209.

Iowa. *Gilbert v. Sanderson*, 56 Ia. 349, 41 Am. Rep. 103, 2 N. W. 293.

Minnesota. *Gold v. Ogden*, 61 Minn. 88, 63 N. W. 266.

New York. *Gifford v. Corrigan*, 117 N. Y. 257, 15 Am. St. Rep. 508, 6 L. R. A. 610, 22 N. E. 756.

New Jersey. *Laing v. Byrne*, 34 N. J. Eq. 52.

Wisconsin. *Fanning v. Murphy*, 126 Wis. 538, 110 Am. St. Rep. 946, 4 L. R. A. (N.S.) 666, 105 N. W. 1056; *Micek v. Wamka*, 165 Wis. 97, 161 N. W. 367.

Contra, that the promisor and promisee can rescind without reference to any rights of third parties. *Biddel v. Brizzolara*, 64 Cal. 354, 30 Pac. 609.

actual assent of the beneficiary seems to be unnecessary in case the original parties to the contract have attempted to rescind it.⁶ A and C were B's children. A and B entered into a contract by which B agreed that he would convey certain realty to A, in consideration of A's agreement to support B for life, and that B would also convey certain other realty to C. Subsequently B conveyed all of his realty to A upon condition that A would pay a certain sum of money to C within a certain length of time after the date of the deed. It was held that C could enforce the original contract and that he could compel A to convey to C the tract of land which B had originally agreed to convey to C.⁷ If B conveys realty to A under a contract by which A agrees with B to pay certain sums of money to B, C and D, and to give a mortgage to secure the payment of such sums, B's act in satisfying such mortgage of record does not prevent C and D from enforcing such contract,

⁶ *Fanning v. Murphy*, 126 Wis. 538, 110 Am. St. Rep. 946, 4 L. R. A. (N.S.) 666, 105 N. W. 1056; *Wetutzke v. Wetutzke*, 158 Wis. 305, 148 N. W. 1088. "We adhere to the doctrine that where one person, for a consideration moving to him from another, promises to pay to a third person a sum of money, the law immediately operates upon the acts of the parties, establishing the essential of privity between the promisor and the third person requisite to binding contractual relations between them, resulting in the immediate establishment of a new relation of debtor and creditor, regardless of the relations of the third person to the immediate promisee in the transaction; that the liability is as binding between the promisor and the third person as it would be if the consideration for the promise moved from the latter to the former and such promisor made the promise directly to such third person, regardless of whether the latter has any knowledge of the transaction at the time of its occurrence; that the liability being once created by the acts of the immediate parties to the transaction and the operation of the law thereon, neither one nor

both of such parties can thereafter change the situation as regards the third person without his consent. It is plainly illogical to hold that immediately upon the completion of the transaction between the immediate parties thereto, the law operates upon their acts and creates the element of privity between the promisor and the third person, and at the same time to hold that such third person's status as regards the promise may be changed thereafter without his consent. The idea that privity between the promisor and the third person is necessary to render the transaction between the original parties thereto beyond the reach of either of them to revoke it, or both acting together to rescind it, springs from the supposed necessity of contractual relations between the promisor and the third person, binding upon the promisor at law. The moment such essential is established, it seems clear that such third person's right accrues and becomes absolute." *Tweeddale v. Tweeddale*, 116 Wis. 517, 96 Am. St. Rep. 1003, 61 L. R. A. 509, 93 N. W. 440.

⁷ *Sedgwick v. Blanchard*, 164 Wis. 421, 160 N. W. 267.

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although such payments to C and D were intended as gifts to them by B.⁸ If B has made a subscription to pay for opening a street, and subsequently gives to A an option upon his realty under a contract by which A assumes the amount of such subscription, B can not release A from such subscription unless the entire contract between A and B is rescinded and is a substitute for the contract by which B gave such option to A.⁹ A and B entered into a contract for the exchange of realty, which contained a provision to the effect that A should pay a certain sum to C, a broker, as his commission, and that B should pay a certain sum to the same broker as the balance of his commission. It was held that C could enforce such contract against A and B, although the exchange was never in fact carried out and although neither party attempted to enforce the contract of exchange against the other.¹⁰ Where A, a grantee, assumed and agreed to pay a mortgage from his grantor, B, to C, and C has notified A that he holds him liable, and C has brought suit against A, but summons has not yet been served, A can not avoid liability by taking a release from B.¹¹ B conveyed certain realty to his son, A, under a contract by which A agreed to support B for life and to pay certain specified amounts to X and Y. A gave to B a mortgage upon such realty to secure his performance of such contract. Subsequently, by agreement between A and B, A reconveyed such realty to B, in consideration of a payment of a sum of money by B and of a rescission of the original contract. It was held that X, who knew of such rescission and who knew that B had mortgaged such realty to obtain the money with which to pay A, and who made no objection thereto, was estopped to make any claim under the original contract; but that Y, who did not know of such facts, was not estopped from enforcing such contract or from foreclosing the mortgage given by A to B.¹²

§ 2395. Consideration between promisor and promisee. Consideration is as essential in contracts of this type as in others,¹ and, as in others, it may be either a benefit to the promisor or a detriment to the promisee. Carrying this principle further and applying it to contracts of this type, C is, in many jurisdictions, allowed

⁸ *Tweeddale v. Tweeddale*, 116 Wis. 517, 96 Am. St. Rep. 1003, 61 L. R. A. 509, 93 N. W. 440.

⁹ *People's Savings Bank v. Philpott*, 178 Ia. 481, 159 N. W. 981.

¹⁰ *Micek v. Wamka*, 165 Wis. 97, 161 N. W. 367.

¹¹ *Gifford v. Corrigan*, 117 N. Y. 257,

16 Am. St. Rep. 508, 6 L. R. A. 610, 22 N. E. 756.

¹² *Wetutzke v. Wetutzke*, 158 Wis. 305, 148 N. W. 1088.

¹ *McArthur v. Dryden*, 6 N. D. 439, 71 N. W. 125; *Eastman Land & Investment Co. v. Lumber Co.*, 30 Okla. 555, 120 Pac. 276.

isee,² is under either a legal or equitable obligation, or possibly a

in which one of the parties promises to do something for the benefit of such stranger, there being nothing but the promise—no consideration from the stranger, and no duty or obligation to him on the part of the promisee—cannot recover thereon. The same principle was applied in *Brown v. Stillman*, 43 Minn. 126, 45 N. W. 2; *Nelson v. Rogers*, 47 Minn. 103, 49 N. W. 526, and again in *Union R. Storage Co. v. McDermott*, 53 Minn. 407, 55 N. W. 606. There is an obvious distinction between two classes of cases, as a moment's reflection will show. In adopting it this court followed New York and Massachusetts, in *Lawrence v. Fox*, 20 N. Y. 268, and *Mellen v. Whipple*, 1 Gray, 317. The courts of those states, adhering to well-settled principles of the common law, have declined to extend the doctrine to cases not presenting facts showing a privity of some sort between the third person and the promisee. *Lorillard v. Clyde*, 122 N. Y. 498, 10 L. R. A. 113, 25 N. E. 917; *Aetna National Bank v. Fourth National Bank*, 46 N. Y. 82, 7 Am. Rep. 314; *Dow v. Clark*, 73 Mass. (7 Gray) 198; *Flint v. Pierce*, 99 Mass. 68, 96 Am. Dec. 691; *Cottage Street M. E. Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286.

"A careful consideration of the question suggests no reason why we should depart from the rule already laid down by us, or extend it to a case like that at bar; and we adhere to our former decisions. The general subject will be found discussed with learning and ability in 15 *Harvard Law Rev.* 767, by Prof. Williston, where all the cases are collected and referred to. So it may be said to be definitely settled law in this state that a third person for whose benefit a contract is made does not in all cases have a right of action thereon. To entitle him to enforce the promise

there must appear to have been some privity, by contract or otherwise, between the promisee and the beneficiary, some obligation or duty owing from the former to the third person, giving the latter a legal or equitable claim to the benefit of the promise. No such privity or obligation existed in this case. Johnson, to whom the plaintiff agreed to pay the Lyman-Elie! Drug Company mortgage, sustained with reference to that debt no relation whatever to the drug company, and was under no legal or moral obligation to pay it. They were total strangers so far as concerns this particular transaction. And plaintiff and Johnson did not, in entering into the contract, have the interests of the drug company in mind; and there was no purpose to impose upon plaintiff a personal obligation to discharge a debt he did not owe, and for the payment of which his promisee was not liable, any further than was necessary to protect the lien of the mortgage then executed. The sole purpose was indemnity to Johnson, and to protect his mortgage, which was a second lien upon the property. It was said in *Nelson v. Rogers*, supra, in speaking of the promise by the grantee in a conveyance of land to pay an outstanding mortgage, for which the grantor was not personally liable, that 'such a stipulation is presumed to be inserted primarily for the protection of the grantor. And it is only where payment of the debt as a personal obligation is necessary to his protection that the clause is to be construed as intended for the benefit of the mortgagee beyond his right of recourse to the land.' That case states the gist of the rule, and seems to harmonize fully with logic and sound principle." *Kramer v. Gardner*, 104 Minn. 370, 22 L. R. A. (N.S.) 492, 116 N. W. 925.

² *Kansas. Morris v. Mix*, 4 Kan. App. 654, 46 Pac. 58.

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moral obligation to such third person, for the purpose of discharging which obligation the promise is made. Thus where a lessee was making improvements and the contractor gave bond to the lessee for the use of the owner and all persons who may do work on such improvements, conditioned to be void if all just claims were paid, it was held that as the lessee could not be affected by mechanics' liens he had no legal interest in the payment of the claims of materialmen, and hence materialmen could not sue on such bond.³ If a grantee assumes and agrees to pay a lien on the realty conveyed as part of the purchase price, the courts in which this doctrine obtains hold that such grantee is not liable on this covenant to the mortgagee unless the grantor was personally liable for the debts secured by the lien. If the debt is one for which the grantor is not personally liable, the grantee is not personally liable on such covenant.⁴ So where A had, in consideration of a conveyance from X, assumed and agreed to pay B's note to C, given for love and affection, he was held not liable to C.⁵ A promise by one, who has bought a going business with its stock and fixtures, to pay an existing mortgage debt, can not be enforced against the purchaser if the seller was not liable personally on such debt.⁶ A promise by A, as part of a contract by which he buys B's patent, to pay a certain sum of money to C, to whom B is not indebted, can not be enforced by C.⁷ Under the Georgia statute, if the consideration

Minnesota. Union Railway Storage Co. v. McDermott, 53 Minn. 407, 55 N. W. 606; Jefferson v. Asch, 53 Minn. 446, 39 Am. St. Rep. 618, 25 L. R. A. 257, 55 N. W. 604; Kramer v. Gardner, 104 Minn. 370, 22 L. R. A. (N.S.) 492, 116 N. W. 925.

New Jersey. Norwood v. De Hart, 30 N. J. Eq. 412.

New York. Trotter v. Hughes, 12 N. Y. 74, 62 Am. Dec. 137; Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195; Embler v. Ins. Co., 158 N. Y. 431, 44 L. R. A. 612, 53 N. E. 212.

Virginia. Osborne v. Cabell, 77 Va. 462.

³ Jefferson v. Asch, 53 Minn. 446, 39 Am. St. Rep. 618, 25 L. R. A. 257, 55 N. W. 604.

⁴ Georgia State Savings Association v. Dearing, 128 Ark. 149, 193 S. W.

512; Ward v. De Oca, 120 Cal. 102, 52 Pac. 130; New England Trust Co. v. Nash, 5 Kan. App. 739, 46 Pac. 987; Trotter v. Hughes, 12 N. Y. 74, 62 Am. Dec. 137; Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195.

⁵ Wilbur v. Wilbur, 17 R. I. 295, 21 Atl. 497. (B was the father of A and X. C was X's son. The court was urged to hold A liable, on the authority of Urquhart v. Brayton, 12 R. I. 169, and Wood v. Moriarty, 15 R. I. 518, 9 Atl. 427, saying: "We are not prepared to extend the authority of the cases mentioned to a case where no debt is assumed.")

⁶ Kramer v. Gardner, 104 Minn. 370, 22 L. R. A. (N.S.) 492, 116 N. W. 925.

⁷ General Electric Co. v. Jordan, 137 Minn. 107, 162 N. W. 1061.

moves from B to A, and A's promise is to B for the benefit of X, X can not sue, but if the promise is directly to X, he can sue.⁸ Under this statute, C can not recover against a railway company, A, because A fails to perform a contract entered into between A and B, who is C's father, by which A agrees to issue a railway ticket and to deliver it to C, who lives at a considerable distance from the place at which such contract is made.⁹

If it is necessary, in order to hold the grantee personally liable upon his covenant to assume and pay a certain obligation, that his grantor should be personally liable, this requirement is met if one or more of a number of grantors are liable, although other grantors are not liable.¹⁰

Where this view that the promisee must be under some obligation to the beneficiary prevails, the courts do not, of course, make any attempt to give effect to the intention of the parties, or to enforce the terms of a valid contract. In many of the cases, however, the same result would be reached by applying the other rule, which does not require any obligation as between the promisee and the beneficiary, since in many of these cases the benefit was merely incidental, and was not the primary intention of the parties. Even where this view is expressed, an exception is often made in cases in which B intends to make a gift to C. If B furnishes consideration to A for A's promise to perform for the benefit of C, the fact that B intends such contract as a means of making a gift to C, does not prevent C from enforcing such contract.¹¹

Other authorities hold that if a sufficient consideration exists between the promisor and the promisee, the third person for whose benefit the contract is made may sue thereon, whether either party to the contract was under any obligation to him or not.¹² If B enters into such contract with A, in order that B may make a

⁸ *Hawkins v. Central of Georgia Ry.*, 119 Ga. 159, 46 S. E. 82; *Ogles v. Nashville, C. & St. L. Ry. Co.*, 130 Ga. 430, 124 Am. St. Rep. 175, 60 S. E. 1048.

⁹ *Ogles v. Nashville, C. & St. L. Ry. Co.*, 130 Ga. 430, 124 Am. St. Rep. 175, 60 S. E. 1048.

¹⁰ *Washer v. Independent Mining & Development Co.*, 142 Cal. 702, 76 Pac. 654.

¹¹ *Rogers v. Galloway Female College*, 64 Ark. 627, 39 L. R. A. 636, 44

S. W. 454; *Daily v. Minnick*, 117 Ia. 563, 60 L. R. A. 840, 91 N. W. 913; *Mueller v. Batcheler*, 131 Ia. 650, 109 N. W. 186; *In re Edmundson*, 250 Pa. St. 429, 2 A. L. R. 1150, 103 Atl. 277.

¹² *Georgia. Crawford v. Wilson*, 139 Ga. 654, 44 L. R. A. (N.S.) 773, 73 S. E. 30.

Illinois. Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 467; *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209, 1 N. E. 340.

gift to C, full effect is given, in most jurisdictions, to the intention of the parties, and C may recover from A, although without such contract C would have had no legal claim against A or B.¹³ A promise by A, who is C's father, to his prospective son-in-law, B, by which, in consideration of the marriage, A agrees to pay a certain sum of money to C, is a contract which C may enforce.¹⁴ Where this last view is entertained a mortgagee can enforce the mortgage debt against the grantee personally, even if the grantor is not personally liable upon such debt.¹⁵

The same court has often entertained different views at different times with reference to the necessity of personal liability of

Indiana. McCoy v. McCoy, 32 Ind. App. 38, 102 Am. St. Rep. 223, 69 N. E. 193.

Iowa. Marble Savings Bank v. Mesarvey, 101 Ia. 285, 70 N. W. 198.

Kentucky. Bryant v. Jones, 183 Ky. 298, 209 S. W. 30.

Maine. Androscoggin County Savings Bank v. Tracy, 115 Me. 433, 99 Atl. 257.

Missouri. Crone v. Stinde, 156 Mo. 262, 55 S. W. 863, 56 S. W. 907.

New York. Buchanan v. Tilden, 158 N. Y. 109, 70 Am. St. Rep. 454, 44 L. R. A. 170, 52 N. E. 724 (moral duty of promisee to provide for his wife, who was the beneficiary, regarded as consideration); Seaver v. Ransom, 224 N. Y. 233, 2 A. L. R. 1187, 120 N. E. 639 (love and affection as consideration between the promisee and the beneficiary).

North Dakota. American Soda Fountain Co. v. Hogue, 17 N. D. 375, 17 L. R. A. (N.S.) 1113, 116 N. W. 339; McDonald v. Finseth, 32 N. D. 400, 155 N. W. 863.

Oregon. Stevens v. Myers. — Or. —, 2 A. L. R. 1155, 177 Pac. 37.

Utah. Brown v. Markland, 16 Utah 360, 67 Am. St. Rep. 629, 52 Pac. 597; Smith v. Bowman, 32 Utah 33, 9 L. R. A. (N.S.) 889, 88 Pac. 687.

See obiter, apparently contra, in Montgomery v. Rief, 15 Utah 495, 50

Pac. 623; Coleman v. Whitney, 62 Vt. 123, 9 L. R. A. 517, 20 Atl. 322.

Virginia. Casselman's Administratrix v. Gordon, 118 Va. 553, 88 S. E. 58.

Wisconsin. Tweeddale v. Tweeddale, 116 Wis. 517, 96 Am. St. Rep. 1003, 61 L. R. A. 509, 93 N. W. 440; Smith v. Pfluger, 126 Wis. 253, 110 Am. St. Rep. 911, 2 L. R. A. (N.S.) 783, 105 N. W. 476.

¹³ **New York.** De Cicco v. Schweizer, 221 N. Y. 431, Ann. Cas. 1918C, 816, 117 N. E. 807; Seaver v. Ransom, 224 N. Y. 233, 2 A. L. R. 1187, 120 N. E. 639 (beneficiary was niece of promisee).

North Carolina. Faust v. Faust, 144 N. Car. 383, 57 S. E. 22.

Oregon. Stevens v. Myers. — Or. —, 2 A. L. R. 1155, 177 Pac. 37.

Pennsylvania. Edmundson's Estate, 259 Pa. St. 429, 103 Atl. 277.

West Virginia. Butts v. Butts, 81 W. Va. 55, 94 S. E. 360.

Wisconsin. Tweeddale v. Tweeddale, 116 Wis. 517, 96 Am. St. Rep. 1003, 61 L. R. A. 509, 93 N. W. 440.

¹⁴ De Cicco v. Schweizer, 221 N. Y. 431, Ann. Cas. 1918C, 816, 117 N. E. 807.

¹⁵ **Colorado.** Hastings v. Pringle, 37 Colo. 86, 86 Pac. 93.

Illinois. Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 467.

Iowa. Marble Savings Bank v. Mesarvey, 101 Ia. 285, 70 N. W. 198.

the promisee to enable the third person to enforce the contract as against the promisor. Thus in Missouri the right of a mortgagee to sue a grantee who assumed the mortgage debt was at first recognized.¹⁶ This view was in effect though not in form overruled.¹⁷ In turn, the views expressed in the last cases were overruled.¹⁸ Then it was held that the third person could sue only when the promisee was under some legal or equitable obligation to him, which the promise was to discharge.¹⁹ In turn, this last case was overruled and such obligation was held unnecessary.²⁰

§ 2398. Promisor's right to attack validity of obligation between promisee and beneficiary. If A makes a promise to B, to discharge an obligation which B owes to C, in consideration of property or some other thing of value, which B furnishes to A, the question of A's right in an action brought by C against A upon such promise, to interpose a defense which B might have made against C, is frequently presented. Since the right of C to bring an action upon this contract is recognized for the purpose of giving effect to the intention of A and B, the solution of the question as to A's right to interpose such defense against C should turn upon the question of the mutual intention of A and B, as set forth in their contract; and this is the test which is generally adopted by the courts. If A's promise to B is to pay a certain amount of money to C, or to do some specific act for C's benefit, B eventually intended performance of such contract for the benefit of C; and, accordingly, A can not interpose defenses against C which B could have interposed.¹ If A has promised to B to

Missouri. *Crone v. Stinde*, 156 Mo. 262, 55 S. W. 863, 56 S. W. 907.

Nebraska. *Hare v. Murphy*, 45 Neb. 809, 29 L. R. A. 851, 64 N. W. 211.

Virginia. *Casselman's Administratrix v. Gordon*, 118 Va. 553, 88 S. E. 58.

¹⁶ *Heim v. Vogel*, 69 Mo. 529; *Rogers v. Gosnell*, 58 Mo. 589.

¹⁷ *Howsmon v. Water Co.*, 119 Mo. 304, 41 Am. St. Rep. 654, 23 L. R. A. 146, 24 S. W. 784; *Kansas City, etc., Co. v. Thompson*, 120 Mo. 218, 25 S. W. 522.

¹⁸ *St. Louis v. Von Phul*, 133 Mo. 561, 54 Am. St. Rep. 695, 34 S. W. 843.

¹⁹ *Hicks v. Hamilton*, 144 Mo. 495, 66 Am. St. Rep. 431, 46 S. W. 432.

²⁰ "The consideration passing between the two contracting parties by which one of them promises to pay to a third is just as available as if he himself had paid the consideration." *Crone v. Stinde*, 156 Mo. 262, 269, 55 S. W. 863, 56 S. W. 907.

¹ **California.** *Washer v. Independent Mining & Development Co.*, 142 Cal. 702, 76 Pac. 654.

Illinois. *Harts v. Emery*, 184 Ill. 560, 56 N. E. 865.

Kansas. *Green v. Houston*, 22 Kan. 35.

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assume and pay a specific sum of money or a specific existing debt which is described and identified in the contract between A and B, A can not, in an action by C, set up defenses as to the existence, validity or amount of such debt which B might have set up as against C.² In an action by C, A can not set up want of consideration as between B and C,³ nor can he set up the defense of usury as between B and C.⁴ It is said that the grantee, A, can set up usury as a defense against the mortgagee, C, only if the grantor, B, unites with him in such defense or unless he consents upon the record to A's making such defense.⁵ If A and B are partners, and B assigns his interest in the partnership to A, in consideration of A's paying the partnership indebtedness, A can interpose the defense of usury as to the portion of the debt for

Michigan. Crawford v. Edwards, 33 Mich. 354.

Minnesota. Alt v. Banholzer, 36 Minn. 57, 29 N. W. 674.

Nebraska. Hannan v. Rihner, 80 Neb. 521, 114 N. W. 605.

Ohio. Union Bank v. Bell, 14 O. S. 200; Cramer v. Lepper, 26 O. S. 59; Caldwell v. Columbus, 56 O. S. 759, 49 N. E. 1108 [memorandum opinion in both reports; but see case as explained in Walsh v. Sims, 65 O. S. 211, 62 N. E. 120]; Walsh v. Sims, 65 O. S. 211, 62 N. E. 120.

Oklahoma. United States Bond & Mortgage Co. v. Keahey, 53 Okla. 176, L. R. A. 1917C, 829, 155 Pac. 537.

West Virginia. Chenoweth v. National Bldg. Ass'n, 59 W. Va. 653, 53 S. E. 559; Stuckey v. Middle States, etc., Con. Co., 61 W. Va. 74, 123 Am. St. Rep. 977, 8 L. R. A. (N.S.) 814, 55 S. E. 996.

²**California.** Washer v. Independent Mining & Development Co., 142 Cal. 702, 76 Pac. 654.

Illinois. Harts v. Emery, 184 Ill. 560, 56 N. E. 865.

Kansas. Green v. Houston, 22 Kan. 35.

Michigan. Crawford v. Edwards, 33 Mich. 354.

Minnesota. Alt v. Banholzer, 36 Minn. 57, 29 N. W. 674.

Pennsylvania. Industrial Savings & Loan Co. v. Hare, 216 Pa. St. 389, 65 Atl. 1080.

³**Parkinson v. Sherman**, 74 N. Y. 88, 30 Am. Rep. 268.

⁴**Iowa.** Spinney v. Miller, 114 Ia. 210, 89 Am. St. Rep. 351, 86 N. W. 317.

Minnesota. Scanlan v. Grimmer, 71 Minn. 351, 70 Am. St. Rep. 326, 74 N. W. 146.

New York. Hartley v. Harrison, 24 N. Y. 170.

Ohio. Union Bank v. Bell, 14 O. S. 200; Cramer v. Lipper, 26 O. S. 59.

Pennsylvania. Industrial Savings & Loan Co. v. Hare, 216 Pa. St. 389, 65 Atl. 1080.

West Virginia. Harper v. Middle States Loan, Building & Construction Co., 55 W. Va. 149, 46 S. E. 817; Chenoweth v. National Bldg. Assn., 59 W. Va. 653, 53 S. E. 559; Stuckey v. Middle States Loan, Bldg. & Const. Co., 61 W. Va. 74, 123 Am. St. Rep. 977, 8 L. R. A. (N.S.) 814, 55 S. E. 996.

Wisconsin. Thomas v. Mitchell, 27 Wis. 414.

⁵**Harper v. Middle States Loan, Building & Construction Co.**, 55 W. Va. 149, 46 S. E. 817.

which he was originally liable, and as to usury exacted after he assumed the debt; but he can not interpose the defense of usury as to the portion of the debt for which B was originally liable.⁶ A grantee who has assumed and agreed to pay a mortgage can not interpose, as a defense to an action upon such contract by the mortgagee, the fact that the mortgagee might have recovered part of his debt from some source other than the mortgaged realty.⁷ If B assigns to A the amount due to A from X, and in consideration thereof A agrees to pay to C the amount of X's indebtedness to Y, A can not set up as against C the fact that B's indebtedness to C arose out of an illegal transaction.⁸ A can not set up failure of consideration between B and C as a defense against C.⁹ If A, a grantee of certain realty, agrees to pay "all * * * assessments whatsoever created by C, existing in consequence of any improvements of the streets or avenues touching such realty," A can not set up as the public corporation any irregularities in the levy of such assessments which B might have set up.¹⁰ While this result is sometimes explained on the theory of estoppel,¹¹ and while such theory may be invoked where the covenant is contained in a deed which A has accepted from B, the result can be better explained on the theory that since A has promised to B for value to pay a certain amount of money to C, B's liability to C is of no legal effect as between A and C. Even in jurisdictions in which the opposite theory is sometimes adopted, A can not avoid liability to C if the transaction was one by which B entered into such contract with A in order to make a gift to C. The fact that B is under no legal obligation or moral obligation to make such payment to C, is not regarded in most jurisdictions which recognize fully and completely the right of the beneficiaries to sue, as a defense which A may interpose as against C.

The rule that A can not set up as against C a defense which B might have set up, is in force in jurisdictions in which A is

⁶ *Williams v. Eagle Bank*, 172 Ky. 541, 189 S. W. 883.

⁷ *Hannan v. Rihner*, 80 Neb. 521, 114 N. W. 605.

⁸ *Owens v. Davenport*, 39 Mont. 555, 104 Pac. 682.

⁹ *Brannin v. Richardson*, 108 Tex. 112, 185 S. W. 562. (This case is complicated by the fact that the notes which A had assumed to pay were in the

hands of a bona fide holder before maturity.)

¹⁰ *Caldwell v. Columbus*, 56 O. S. 759, 49 N. E. 1108 [memorandum opinion in both reports, see explanation in *Walsh v. Sims*, 65 O. S. 211, 62 N. E. 120].

¹¹ *Caldwell v. Columbus*, 56 O. S. 759, 49 N. E. 1108 [memorandum opinion in both reports, see explanation in *Walsh v. Sims*, 65 O. S. 211, 62 N. E. 120].

personally liable, if he received a consideration from B, whether B was liable personally to C or not;¹² but it is not in force in jurisdictions in which A is liable to C personally, only if B was liable to C personally.¹³

If A has not agreed with B to pay for the property by discharging B's obligation to C, A is not prevented from setting up as against C any defense which B might have set up as against C.¹⁴ If B conveys property to A gratuitously, A may set up usury as against C, who holds a mortgage upon such property.¹⁵ If A has accepted a conveyance from B, which is in form an absolute deed, but which is intended as security for a debt which B owes to A, A is not liable personally to the prior mortgagee, C.¹⁶

If A's promise to B is in legal effect to pay to C whatever is due from B to C, A may set up, as against C, any defense which B might have set up as against C,¹⁷ since A has not agreed to pay a specified sum of money, but has only agreed to discharge whatever obligation B may owe to C. If A enters into a contract with B, by which A is to pay an account which B will owe to C in the future, A is bound to pay the amount which is actually due upon such account.¹⁸ If A assumes whatever amount B may owe to C, A may set up the defense of usury as against C.¹⁹ If A accepts a deed from B, which contains a provision to the effect that "all street assessments and sewer assessments are to be paid by the said purchaser and grantee," and the record does not show that the amount of the assessment was known or that the amount thereof was deducted by the grantee from the purchase price, and if the deed does not identify the assessment specifically, A may set up any defect in such assessments which B could have set up as against C, the public corporation.²⁰

¹² See § 2397.

¹³ See § 2397.

¹⁴ *First National Bank v. Drew*, 226 Ill. 622, 117 Am. St. Rep. 271, 10 L. R. A. (N.S.) 857, 80 N. E. 1082.

¹⁵ *First National Bank v. Drew*, 226 Ill. 622, 117 Am. St. Rep. 271, 10 L. R. A. (N.S.) 857, 80 N. E. 1082.

¹⁶ *Root v. Wright*, 84 N. Y. 72, 38 Am. Rep. 495; *Ahrens v. Kelly*, 88 N. J. Eq. 119, 101 Atl. 571.

¹⁷ *Malanaphy v. Fuller & Johnson Mfg. Co.*, 125 Ia. 719, 106 Am. St. Rep. 332, 101 N. W. 640; *Runkle v. Ketter-*

ing, 127 Ia. 6, 102 N. W. 142; *Cobe v. Summers*, 143 Mich. 117, 106 N. W. 707; *Beals v. Lewis*, 43 O. S. 220, 1 N. E. 641; *Walsh v. Sims*, 65 O. S. 211, 62 N. E. 120.

¹⁸ *Runkle v. Kettering*, 127 Ia. 6, 102 N. W. 142.

¹⁹ *Cobe v. Summers*, 143 Mich. 117, 106 N. W. 707 (A's liability enforced in equity). *Beals v. Lewis*, 43 O. S. 220, 1 N. E. 641.

²⁰ *Walsh v. Sims*, 65 O. S. 211, 62 N. E. 120.

§ 2399. Intention to benefit third person directly necessary. The courts in which C is allowed to enforce the promise against A, do so only when A's promise is primarily intended to benefit C. If the benefit to C is merely incidental, C can not maintain an action against A.¹ A statutory provision to the effect that one for whose benefit a contract is made may enforce such contract,

¹ **United States.** *National Bank v. Grand Lodge*, 98 U. S. 123, 25 L. ed. 75; *Constable v. Steamship Co.*, 154 U. S. 51, 38 L. ed. 903; *Austin v. Seligman*, 18 Fed. 519; *Sayward v. Dexter, etc., Co.*, 72 Fed. 758, 19 C. C. A. 176; *American, etc., Bank v. Ry.*, 76 Fed. 130; *United States Steel Products Co. v. Poole-Dean Co.*, 245 Fed. 533, — C. C. A. —.

Arkansas. *Thomas Mfg. Co. v. Prather*, 65 Ark. 27, 44 S. W. 218; *Dickinson v. McCoppin*, 121 Ark. 414, 181 S. W. 151.

California. *Chung Kee v. Davidson*, 73 Cal. 522, 15 Pac. 100; *Buckley v. Gray*, 110 Cal. 339, 52 Am. St. Rep. 88, 31 L. R. A. 862, 42 Pac. 900.

Colorado. *People v. Hoag*, 54 Colo. 542, 45 L. R. A. (N.S.) 824, 131 Pac. 400.

Connecticut. *Treat v. Stanton*, 14 Conn. 445, 36 Am. Dec. 492.

Florida. *Wright v. Terry*, 23 Fla. 160, 2 So. 6; *Freeman v. Ry.*, 32 Fla. 420, 13 So. 892.

Illinois. *Crandall v. Payne*, 154 Ill. 627, 39 N. E. 601 [affirming, 54 Ill. App. 644]; *Rodhouse v. Chicago & A. Ry. Co.*, 219 Ill. 596, 76 N. E. 836; *Searles v. Flora*, 225 Ill. 167, 80 N. E. 98.

Indiana. *Farlow v. Kemp*, 7 Blackf. (Ind.) 544; *Reynolds v. Ry.*, 143 Ind. 579, 40 N. E. 410.

Iowa. *German State Bank v. Northwestern, etc., Co.*, 104 Ia. 717, 74 N. W. 685.

Kansas. *Burton v. Larkin*, 36 Kan. 246, 59 Am. Rep. 541, 13 Pac. 398.

Kentucky. *Gibson v. Johnson (Ky.)*, 65 S. W. 116; *Hudson v. Cincinnati, N.*

O. & T. P. R. Co., 152 Ky. 711, 45 L. R. A. (N.S.) 184, 154 S. W. 47; *EweH v. Best*, — Ky. —, 198 S. W. 4.

Minnesota. *Greenwood v. Sheldon*, 31 Minn. 254, 17 N. W. 473.

Missouri. *St. Louis v. Wright Contracting Co.*, 202 Mo. 451, 119 Am. St. Rep. 810, 101 S. W. 6; *Beattie Mfg. Co. v. Clark*, 208 Mo. 89, 106 S. W. 29.

Nebraska. *Eaton v. Waterworks Co.*, 37 Neb. 546, 40 Am. St. Rep. 510, 21 L. R. A. 653, 56 N. W. 201; *Frerking v. Thomas*, 64 Neb. 193, 89 N. W. 1005; *Gammel Book Co. v. Paine*, 75 Neb. 683, 106 N. W. 777.

New Jersey. *Styles v. F. R. Long Co.*, 67 N. J. L. 413, 51 Atl. 710 [affirmed in *Styles v. F. R. Long Co.*, 70 N. J. L. 301, 57 Atl. 448]; *Baum v. Somerville Water Co.*, 84 N. J. L. 611, 46 L. R. A. (N.S.) 966, 87 Atl. 140.

New York. *Simson v. Brown*, 68 N. Y. 355; *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195; *Lorillard v. Clyde*, 122 N. Y. 498, 19 Am. St. Rep. 514, 10 L. R. A. 113, 25 N. E. 917; *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. 49; *Berry Harvester Co. v. Machine Co.*, 152 N. Y. 540, 46 N. E. 952.

North Dakota. *Parlin v. Hall*, 2 N. D. 473, 62 N. W. 405.

Ohio. *Vought v. R. R.*, 58 O. S. 123, 50 N. E. 442; *Blunk v. Dennison Water Supply Co.*, 71 O. S. 250, 73 N. E. 210; *Thomas v. Trust Co.*, 81 O. S. 432, 26 L. R. A. (N.S.) 1210, 91 N. E. 183.

Oregon. *Parker v. Jeffery*, 26 Or. 186, 37 Pac. 712; *Washburn v. Investment Co.*, 26 Or. 436, 38 Pac. 620, 36 Pac. 533; *Brower, etc., Lumber Co. v. Miller*, 28 Or. 565, 52 Am. St. Rep. 807, 43 Pac. 659.

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does not apply to one who is benefited incidentally by the performance of the contract if such benefit was not intended directly by the parties thereto.² Under a statute which provides that a third person may sue on a contract only if it appears expressly that it is intended for his benefit, it is said that if the intention to confer a benefit upon such third person appears from a fair construction of the entire contract, the third person may sue, although such intention is not set forth in express words.³ It is said that a contract to pay a debt due to a third person is presumably intended for the benefit of such third person, unless it appears affirmatively that such benefit was not intended.⁴ If B delivers to a carrier, A, property which is consigned to C, the contract between A and B is presumably for the benefit of the consignee, C.⁵

Under some circumstances, A may perform a contract between himself and B in such manner as to injure C by A's negligence. In such cases C may recover from A in tort, without regard to his right to sue on the theory that the contract was made for his benefit.⁶ One to whom a forged telegram has been sent, may maintain an action against the telegraph company for damages

Pennsylvania. *Bymire v. Boistle*, 6 Watts (Pa.) 182, 31 Am. Dec. 458; *First M. E. Church v. Isenberg*, 246 Pa. St. 221, 92 Atl. 141.

South Carolina. *Mack Mfg. Co. v. Massachusetts Bonding & Insurance Co.*, 103 S. Car 55, 87 S. E. 439.

Tennessee. *Ruohs v. Traders' Fire Ins. Co.*, 111 Tenn. 405, 102 Am. St. Rep. 790, 78 S. W. 85.

Utah. *Montgomery v. Rief*, 15 Utah 495, 50 Pac. 623.

Virginia. *Newberry Land Co. v. Newberry*, 95 Va. 119, 27 S. E. 899.

Wisconsin. *Campbell v. Carnegie*, 98 Wis. 99, 73 N. W. 572; *Electric Appliance Co. v. Guaranty Co.*, 110 Wis. 434, 53 L. R. A. 609, 85 N. W. 648. "To entitle him to an action the contract must have been made for his benefit. He must be the party intended to be benefited." *Garnsey v. Rogers*, 47 N. Y. 233, 240, 7 Am. Rep. 440 [quoted in *Montgomery v. Rief*, 15 Utah 495, 501, 50 Pac. 623]. The

"benefit must be the direct result of performance." *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. 49. "It is quite certain that, to enable the third party to enforce such contract, there must have been an intent on the part of the promisor to benefit him, and some duty or obligation to carry out such promise." *Rowe v. Moon*, 115 Wis. 566, 92 N. W. 263.

² *Standard Gas Power Corp. v. New England Casualty Co.*, 90 N. J. L. 570, 101 Atl. 281; *Hinger v. Washita Valley Bank*, 51 Okla. 606, 152 Pac. 112.

³ *Allen & Curry Mfg. Co. v. Shreveport Waterworks Co.*, 113 La. 1091, 68 L. R. A. 650, 37 So. 980.

⁴ *Concrete Steel Co. v. Illinois Surety Co.*, 163 Wis. 41, 157 N. W. 543.

⁵ *Pratt v. Northern Pacific Express Co.*, 13 Ida. 373, 121 Am. St. Rep. 268, 10 L. R. A. (N.S.) 499, 90 Pac. 341.

⁶ *State Bank v. Western Union Telegraph Co.*, 19 N. M. 211, L. R. A. 1915A, 120, 142 Pac. 156.

for negligently accepting and delivering such message.⁷ Circumstances may be such, however, as to impose some duty upon A in favor of C, in order to enable C to maintain an action in tort upon this theory.⁸ If A sells to C goods which are manufactured by B, A is not liable, in the absence of negligence on his part, for damages sustained by reason of the fact that the article is explosive when used in the way in which it is made to be used.⁹ If C, as agent for B, buys food from A, and C subsequently eats of such food and is made ill by reason of the fact that it is unsuitable for such use, C can not maintain an action against A for damages for breach of warranty.¹⁰

§ 2400. Sole and concurrent benefits. The rule that the beneficiary can enforce the contract only if it is intended primarily for his benefit, is sometimes stated in the form that if the contract between A and B is intended for the sole benefit of the parties to such contract, a third person can not enforce it.¹ Some courts go² further and hold that C can sue only when he is the sole beneficiary.³ This principle has been otherwise expressed by saying that the third person may sue only when a release from him would discharge the promisor.⁴

In some jurisdictions in which the right of the beneficiary to enforce the contract is regulated by statute, this rule is carried into the statute and it is provided expressly that the beneficiary can recover if the contract is entered into for his sole benefit.⁴ It is said that the legislature used the word "sole" in such a

⁷ *State Bank v. Western Union Telegraph Co.*, 19 N. M. 211, L. R. A. 1915A, 120, 142 Pac. 156.

⁸ *Gearing v. Berkson*, 223 Mass. 257, L. R. A. 1916D, 1006, 111 N. E. 785; *Clement v. Rommeck*, 149 Mich. 595, 119 Am. St. Rep. 695, 13 L. R. A. (N.S.) 382, 113 N. W. 286.

⁹ *Clement v. Rommeck*, 149 Mich. 595, 119 Am. St. Rep. 695, 13 L. R. A. (N.S.) 382, 113 N. W. 286.

¹⁰ *Gearing v. Berkson*, 223 Mass. 257, L. R. A. 1916D, 1006, 111 N. E. 785.

¹ *Searles v. Flora*, 225 Ill. 167, 80 N. E. 98.

² *Davis v. Waterworks Co.*, 54 Ia. 59, 37 Am. Rep. 185, 6 N. W. 126; *Messen-*

ger v. Votaw, 75 Ia. 225, 39 N. W. 280. The rule allowing third persons to sue is "confined to cases where the person for whose benefit the promise is made has the sole exclusive interest in its performance." *German State Bank v. Light Co.*, 104 Ia. 717, 723, 74 N. W. 685 [quoted in *Chicago, etc., Ry. v. Ottumwa*, 112 Ia. 300, 51 L. R. A. 763, 83 N. W. 1074].

³ *Kountz v. Holthouse*, 85 Pa. St. 235.

⁴ *Newberry Land Co. v. Newberry*, 95 Va. 119, 27 S. E. 899; *McIlvane v. Big Stony Lumber Co.*, 105 Va. 613, 54 S. E. 473; *King v. Scott*, 76 W. Va. 58, 84 S. E. 954.

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statute in order to prevent a double right of action against the promisor in favor of the promisee and also of the beneficiary.⁵ In construing such a statute, the phrase "sole benefit" is assumed to be equivalent to "primarily for the benefit" of the beneficiary who seeks to enforce the contract.⁶ Under such a statute a grantee, who assumes and agrees to pay a lien upon realty, is not liable personally to the holder of the debt secured by such lien, since such creditor may maintain an action against the original grantor, if the latter is the original debtor.⁷ Under such a statute, it has been held that a promise by A to B to assume B's debt to C, in consideration of a conveyance by B to A, is not intended for the sole benefit of C, and accordingly C can not recover from A thereon.⁸ However, a promise by A to assume and pay a lien upon realty which is not a personal obligation of the grantor, B, is said to be intended for the sole benefit of the creditor in whose favor such lien exists.⁹

§ 2401. Specific illustrations of contracts conferring incidental benefit. Among examples of contracts which may give incidental benefit to a third person, but which are not intended by the parties to benefit him primarily, are the following: a contract whereby the prospective vendee of a mine seeks to have liens held by third persons cleared off before he takes title;¹ a promise by one to whom an administrator pays a fund, believing him to be a distributee, to repay a proportionate part of any lawful claim against the estate;² and a contract whereby the lessee of a railway agrees to pay all taxes and assessments.³ A contract between the United States and a state, for the maintenance of a canal, can not be enforced by one who has made use of water furnished from such canal.⁴ A covenant by vendee with his vendor to repair a ditch

⁵ King v. Scott, 76 W. Va. 58, 84 S. E. 954.

⁶ Casselman's Administratrix v. Gordon, 118 Va. 553, 88 S. E. 58.

⁷ King v. Scott, 76 W. Va. 58, 84 S. E. 954.

⁸ McIlvane v. Big Stony Lumber Co., 105 Va. 613, 54 S. E. 473.

⁹ Casselman's Administratrix v. Gordon, 118 Va. 553, 88 S. E. 58.

¹ McDonald v. Bank, 25 Mont. 456, 65 Pac. 806. (The lien holder can not enforce such contract.)

² Norwood v. O'Neal, 112 N. Car. 127, 16 S. E. 759. (The true distributee cannot enforce such promise.)

³ Chicago, etc., Ry. v. Ottumwa, 112 Ia. 300, 51 L. R. A. 763, 83 N. W. 1074. (Neither the city nor the contractor for whose benefit the assessment is levied can sue the lessee.)

⁴ Vought v. R. R., 58 O. S. 123, 50 N. E. 442 [affirmed in Walsh v. R. R., 176 U. S. 469, 44 L. ed. 548].

which has become a substitute for a natural watercourse, can not be enforced by a third person who is incidentally benefited thereby.⁶ If a contractor, under a street improvement contract, gives a bond for the benefit of the laborers and materialmen, an abutting property owner can not enforce such bond, although the performance of the contract for the construction of the street would benefit such property owner.⁶ If levee commissioners make a contract with a railway for raising a certain levee, a property owner who will be benefited by such improvement can not maintain an action upon such contract,⁷ at least unless it is shown that his land would have been assessed for such improvement.⁸ A contract between an employer and an employe, whereby the employer agrees to furnish his employe a physician if the employe is injured in the course of his employment, can not be enforced by a physician whom the employe engages.⁹ A contract between a contractor and an improvement district, which contains a provision for liquidated damages, is not intended for the benefit of engineers whose compensation is agreed upon in the contract between such engineers and the improvement district.¹⁰

Whether a contract between an employer and a labor union is intended for the benefit of the individual employe of such employer, is a question upon which there is a conflict of authority. On the one hand, a contract with a labor union, which provides for appeal in case of discharge, and for payment for time lost in case of reinstatement upon such appeal, is assumed not to be intended for the benefit of the individual employe;¹¹ and accordingly an individual employe can not bring an action because of refusal to grant him an appeal in case of an unjust discharge.¹² On the other hand, it has been held that a contract between an

⁶ *Case v. Hoffman*, 100 Wis. 314, 44 L. R. A. 728, 75 N. W. 945.

⁷ *St. Louis v. Wright Contracting Co.*, 202 Mo. 451, 119 Am. St. Rep. 810, 101 S. W. 6.

⁸ *Rodhouse v. Chicago & A. Ry. Co.*, 219 Ill. 596, 76 N. E. 836.

⁹ *Rodhouse v. Chicago & A. Ry. Co.*, 219 Ill. 596, 76 N. E. 836.

¹⁰ *Thomas Mfg. Co. v. Prather*, 65 Ark. 27, 44 S. W. 218.

¹¹ *Dickinson v. McCoppin*, 121 Ark. 414, 181 S. W. 151.

¹² *Hudson v. Cincinnati, N. O. & T.*

P. R. Co., 152 Ky. 711, 45 L. R. A. (N.S.) 184, 154 S. W. 47.

¹² *Hudson v. Cincinnati, N. O. & T. P. R. Co.*, 152 Ky. 711, 45 L. R. A. (N.S.) 184, 154 S. W. 47.

"In *Burnetta v. Marceline Coal Co.*, 180 Mo. 241, 79 S. W. 136, *Burnetta*, a miner and member of the Miners' Union, entered into the service of the coal company, and, after continuing therein for a short time, voluntarily left the company and sued it for the balance of wages due him. The company admitted the amount charged to

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employer and a labor union, by which the rate of wages for employes is fixed, is intended to be for the benefit of the individual employes;¹³ and an employe who works for a less compensation under a special contract with his employer, in igno-

be owing him, but denied that it was then due. The workman asserted that the union of which he was a member had a contract with the company in which certain pay days were provided for, and that under this contract the amount owing was due. The court there, in disposing of the question as to whether a contract made by a union in respect to rates and regulations enured to the benefit of its members said: "The Miners' Union is not an organization for the purpose of conducting any business enterprise, but is purely one for the protection of labor against the unjust exactions of capital. The members of the union do not labor in coal mines for the organization, but each member works for himself, and whatever compensation he receives is for the benefit of himself and his family. That the Miners' Union, as an organization, can not make a contract for its individual members in respect to the performance of work and the payment for it, in our opinion is too clear for discussion. * * * While it may be true that a labor organization may have rules requiring the employer to designate a certain pay day, and if you employ a member of the organization, or even one who is not a member, and by agreement his services are to be paid on the designated pay days, as established by the rules, it could well be insisted that the contract fixes the time of payment, that is, upon the theory that the individual so contracts, and by no means upon account of his being a member of the organization which has undertaken to contract for him. * * * A contract on the part of an individual that he will perform

certain work under the rules of an organization is not to be inferred from the simple fact that he is a member of the organization. Persons work for themselves, and are free and independent. Agreements imposing conditions can only be enforced when the entire proposition has been stated and by them freely accepted." *Hudson v. Cincinnati, N. O. & T. P. Ry. Co.*, 152 Ky. 711, 45 L. R. A. (N.S.) 184, 154 S. W. 47. (In this case, however, it was said that the agreement between the employer and the labor union lacked consideration and was accordingly not a binding contract.)

¹³ *Gulla v. Barton*, 149 N. Y. S. 952, 164 App. Div. 293. "The union was formed for the benefit and protection of its members, and especially for the purpose of securing to them a reduction in the hours of toil and an increase in wages. The union is based upon the idea that the individual workmen cannot fully protect themselves against their employers, but that by united action they can be better protected in the respects mentioned. It is supported by dues and fees paid by its members, which dues the member pays for the benefit which he expects to realize from the organized action of himself and his co-workers. The agreement referred to was a valid contract, which may be enforced in any proper manner. The renewal of the agreement indicates that it was beneficial to the defendant's firm. The union entered into the contract for the benefit of the plaintiff and the other employees in the defendant's brewery, and for the benefit of all union workmen." *Gulla v. Barton*, 149 N. Y. 952, 164 App. Div. 293.

rance of the contract between the employer and the labor union, may recover the difference between the amount which he received and the amount which the employer had agreed to pay under such contract.¹⁴

If a mortgagor of cattle, with consent of mortgagee, employs a person to take care of such cattle, this does not impose any liability upon mortgagee to pay for such care.¹⁵ Employment of an attorney by a woman to draw her will creates no liability from such attorney to her son, though by gross negligence the will is so drawn as to deprive her son of a provision intended for him.¹⁶ If A is employed by B to prepare an abstract of title, or to give a certificate of title, it is held by the weight of numerical authority that A is not liable to C for negligence in preparing such abstract, even if A knows that B means to use such abstract or certificate to induce C to buy or to make a loan.¹⁷ This result is justified on the theory that there is no privity of contract between the abstractor, A, and the prospective purchaser or mortgagee, C.¹⁸ At the same time the abstractor or the attorney who is examining the title usually knows that B means to use the abstract or the certificate to induce C to purchase or to lend money upon the security of the realty, and he knows that C is in fact to rely upon the accuracy of the abstract or of the certificate. For this reason some courts hold that A is liable to C under such circumstances;¹⁹ and among the jurisdictions which take this view, are some which hold that A, the abstractor, is not liable to C, if it

¹⁴ *Gulla v. Barton*, 149 N. Y. S. 952, 164 App. Div. 293.

¹⁵ *Boston, etc., Co. v. Dickson*, 11 Okla. 680, 69 Pac. 889.

¹⁶ *Buckley v. Gray*, 110 Cal. 339, 52 Am. St. Rep. 88, 31 L. R. A. 862, 42 Pac. 900.

¹⁷ *United States Savings Bank v. Ward*, 100 U. S. 195, 25 L. ed. 621.

Arkansas. *Tapley v. Wright*, 61 Ark. 275, 54 Am. St. Rep. 206, 32 S. W. 1072.

Kansas. *Mallory v. Ferguson*, 50 Kan. 685, 22 L. R. A. 99, 32 Pac. 410.

Missouri. *Zweigardt v. Birdseye*, 57 Mo. App. 462.

Nebraska. *Thomas v. Carson*, 46 Neb. 765, 65 N. W. 899. (No liability seems

to exist in favor of C except by the terms of the statute on this subject.)

Ohio. *Thomas v. Guarantee Title & Trust Co.*, 81 O. S. 432, 26 L. R. A. (N.S.) 1210, 91 N. E. 183.

Tennessee. *Equitable Building & Loan Association v. Bank*, 118 Tenn. 678, 12 L. R. A. (N.S.) 449, 102 S. W. 901.

Washington. *Bremerton Development Co. v. Title Trust Co.*, 67 Wash. 268, 121 Pac. 69.

¹⁸ *Savings Bank v. Ward*, 100 U. S. 195, 25 L. ed. 621.

¹⁹ *Western Loan & Savings Co. v. Silver Bow Abstract Co.*, 31 Mont. 448, 107 Am. St. Rep. 435, 78 Pac. 774; *Economy, etc., Association v. Title Co.*,

is not shown that C is contemplated as the person who is to rely upon such abstract or certificate. If A is employed by B to deliver the abstract to C, A is held liable to C for defects or omissions in the abstract.²⁰ In some jurisdictions the results of the majority rule have appeared to be so unsatisfactory that the rule has been modified by statute, which provides that one who is to be induced to act in reliance upon such abstract may recover against the abstractor.²¹

If a water works company makes a contract with a city to supply a certain amount of water in a given time, to maintain a certain pressure, to keep the water at a certain height in the supply pipe and the like, and by reason of a breach of such covenant loss by fire occurs to the damage of a property owner, the weight of authority holds that he can not maintain an action against the water works company for a breach of such covenant.²² A water company, which is given a license to connect a pipe with

64 N. J. L. 27, 44 Atl. 354; *Stephenson v. Cone*, 24 S. D. 460, 26 L. R. A. (N.S.) 1207, 124 N. W. 439; *Dickle v. Abstract Co.*, 89 Tenn. 431, 24 Am. St. Rep. 616, 14 S. W. 896.

²⁰ *Anderson v. Spriestersbach*, 69 Wash. 393, 42 L. R. A. (N.S.) 176, 125 Pac. 166.

²¹ *Arnold v. Barner*, 91 Kan. 768, 139 Pac. 404; *Gate City Abstract Co. v. Post*, 55 Neb. 742, 76 N. W. 471; *Gregory v. Harper*, 51 Okla. 419, 152 Pac. 70; *Scott v. Jordan*, 55 Okla. 708, 155 Pac. 498.

²² *United States. German-Alliance Ins. Co. v. Home Water Supply Co.*, 226 U. S. 220, 57 L. ed. 195, 42 L. R. A. (N.S.) 1000 [affirming, *German Alliance Ins. Co. v. Home Water Supply Co.*, 174 Fed. 764, 42 L. R. A. (N.S.) 1005]; *Boston Safe Deposit and Trust Co. v. Water Co.*, 94 Fed. 238.

Alabama. *Lovejoy v. Bessemer Waterworks Co.*, 146 Ala. 374, 6 L. R. A. (N.S.) 429, 41 So. 76.

Arkansas. *Collier v. Newport Water, Light & Power Co.*, 100 Ark. 47, Ann. Cas. 1913D, 458, 139 S. W. 635.

California. *Ukiah City v. Ukiah Water & Improvement Co.*, 142 Cal. 173, 100 Am. St. Rep. 107, 64 L. R. A. 231, 76 Pac. 773. (The city can not maintain an action for injury to its property unless the contract is made for protection of such property specifically.)

Connecticut. *Nickerson v. Hydraulic Co.*, 46 Conn. 24, 33 Am. Rep. 1.

Georgia. *Fowler v. Waterworks Co.*, 83 Ga. 219, 20 Am. St. Rep. 313, 9 S. E. 673.

Idaho. *Bush v. Artesian Water Co.*, 4 Ida. 618, 95 Am. St. Rep. 161, 43 Pac. 69.

Indiana. *Fitch v. Water Co.*, 139 Ind. 214, 37 N. E. 982, 47 Am. St. Rep. 258.

Iowa. *Davis v. Waterworks Co.*, 54 Ia. 59, 37 Am. Rep. 185, 6 N. W. 126; *Becker v. Waterworks*, 79 Ia. 419, 18 Am. St. Rep. 377, 44 N. W. 694.

Kansas. *Mott v. Mfg. Co.*, 48 Kan. 12, 30 Am. St. Rep. 267, 15 L. R. A. 375, 28 Pac. 969.

Louisiana. *Allen & Currey Co. v. Shreveport W. W. Co.*, 113 La. 1091, 104 Am. St. Rep. 525, 68 L. R. A. 650, 37 So. 980 [overruling, *Planters' Oil*

an automatic sprinkling system, under a contract which contains an express provision that the water company is free from all claims of damage by reason of failure to supply water, is not liable for an injury by fire which results from a refusal to turn water

Mill v. Monroe, 52 La. Ann. 1243, 27 So. 684].

Missouri. *Howsamon v. Water Co.*, 119 Mo. 304, 41 Am. St. Rep. 654, 23 L. R. A. 146, 24 S. W. 784; *Phoenix Ins. Co. v. Water Co.*, 42 Mo. App. 118.

Nebraska. *Eaton v. Waterworks Co.*, 37 Neb. 546, 40 Am. St. Rep. 510, 21 L. R. A. 653, 56 N. W. 201.

Nevada. *Ferris v. Water Co.*, 16 Nev. 44, 40 Am. Rep. 485.

New Jersey. *Baum v. Somerville Water Co.*, 84 N. J. L. 611, 46 L. R. A. (N.S.) 966, 87 Atl. 140.

Ohio. *Blunk v. Dennison Water Supply Co.*, 71 O. S. 250, 73 N. E. 210; *Akron Waterworks Co. v. Brownless*, 10 Ohio C. C. 620, 5 Ohio C. D. 1.

Pennsylvania. *Beck v. Water Co.* (Pa.). 11 Atl. 300.

South Carolina. *Ancrum v. Camden Water, Light & Ice Co.*, 82 S. Car. 284, 21 L. R. A. (N.S.) 1029, 64 S. E. 151.

Tennessee. *Foster v. Waterworks Co.*, 71 Tenn. (3 Lea) 42.

Texas. *House v. Waterworks Co.*, 88 Tex. 233, 28 L. R. A. 532, 31 S. W. 179.

West Virginia. *Nichol v. Huntington Water Co.*, 53 W. Va. 348, 44 S. E. 290.

Wisconsin. *Hayes v. Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760; *Britton v. Waterworks Co.*, 81 Wis. 48, 29 Am. St. Rep. 856, 51 N. W. 84.

"In many jurisdictions a third person may now sue for the breach of a contract made for his benefit. The rule as to when this can be done varies in the different states. In some he must be the sole beneficiary. In others it must appear that one of the parties owed him a debt or duty, cre-

ating the privity, necessary to enable him to hold the promisor liable. Others make further conditions. But even where the right is most liberally granted it is recognized as an exception to the general principle, which proceeds on the legal and natural presumption, that a contract is only intended for the benefit of those who made it. Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must at least show that it was intended for his direct benefit. For, as said by this court, speaking of the right of bondholders to sue a third party who had made an agreement with the obligor to discharge the bonds, they 'may have had an indirect interest in the performance of the undertakings, but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names.' *Nat. Bk. v. Grand Lodge*, 98 U. S. 123, 124, 25 L. ed. 75; *Hendrick v. Lindsay*, 93 U. S. 143, 149, 23 L. ed. 855; *National Savings Bank v. Ward*, 100 U. S. 195, 202, 205, 25 L. ed. 621.

"Here the city was under no obligation to furnish the manufacturing company with fire protection, and this agreement was not made to pay a debt or discharge a duty to the Spartan Mills, but, like other municipal contracts, was made by Spartanburg in its corporate capacity, for its corporate advantage, and for the benefit of the inhabitants collectively. The interest which each taxpayer had therein was indirect—that incidental benefit only which every citizen has in the performance of every other contract made by and with the govern-

into such sprinkling system under the terms of such contract.²³ So an insurance company which has been obliged to pay an insurance policy on such building, can not maintain an action therefor against the water works company.²⁴ It is said that no liability can be enforced either on the theory of contract or on the theory of tort.²⁵ This conclusion leads to the further result that no action for such loss can be maintained by anyone, since it is clear that the city as such has not suffered by the loss of the property burned. The unsatisfactory character of this result is conceded by courts which feel that they are committed to the rule.²⁶ While the courts may not be bound to make law to fit hard cases, the fact

ment under which he lives, but for the breach of which he has no private right of action." *German-Alliance Ins. Co. v. Home Water Supply Co.*, 226 U. S. 220, 57 L. ed. 195, 42 L. R. A. (N.S.) 1000 [affirming, *German-Alliance Ins. Co. v. Home Water Supply Co.*, 174 Fed. 764, 42 L. R. A. (N.S.) 1005].

See, upon this question, *Liability of Water Companies for Fire Losses*, by Edson R. Sunderland, 3 *Michigan Law Review* 442, and *Liability of Water Companies for Fire Losses—Another View*, by Albert Martin Kales, 3 *Michigan Law Review* 501.

²³ *Jones House Furnishing Company v. Arkansas Water Company*, 112 Ark. 425, 52 L. R. A. (N.S.) 402, 166 S. W. 557.

²⁴ *Phoenix Ins. Co. v. Water Co.*, 42 Mo. App. 118.

²⁵ *German-Alliance Ins. Co. v. Home Water Supply Co.*, 226 U. S. 220, 57 L. ed. 195, 42 L. R. A. (N.S.) 1000 [affirming, *German-Alliance Ins. Co. v. Home Water Supply Co.*, 174 Fed. 764, 42 L. R. A. (N.S.) 1005]; *Baum v. Somerville Water Co.*, 84 N. J. L. 611, 46 L. R. A. (N.S.) 966, 87 Atl. 140; *Nichol v. Huntington Water Co.*, 53 W. Va. 348, 44 S. L. 290.

²⁶ "Much might be urged pro and con as to the proper ground upon which to place non-liability, but we have no

desire to enter upon that field of disputation. It suffices for all practical purposes of this case to say that our own decisions, in which the opinions were written by as able judges as ever occupied this bench, and in which there was no dissent, have rested the conclusion in similar cases involving public contracts upon the declaration that there was a want of privity; and this declaration has likewise been made by many other American courts enjoying the very highest reputation, if, indeed, it has not been made by all the courts of last resort which have reached the same conclusion as that we here announce. If there be those who think the decision should be rested upon the theory that the contracting company has not assumed liability for damage or loss from fire, because liability for such loss was not within the contemplation of the parties to the contract, they must admit the correctness of our holding, although not agreeing to the reason which this court and other courts have chosen to give as the basis of their decisions. When there is agreement as to the result in any case, differences as to the reasons inducing, or that should induce, that result are not vital, nor always important.

"We recognize that the absence of a remedy by suit for damages for a failure by a water company to furnish

that the case is hard ought to cause careful consideration and investigation for the purpose of determining the soundness of the principles which lead to such a result. There is, in fact, a vigorous, though limited, dissent from this rule, and it is held in some jurisdictions that the injured property owner may recover from the water works company.²⁷ In some jurisdictions the liability of the water company is explained on the theory that while its duty arises in contract, its failure to perform its duty through its negligence is a tort for which the injured property owner may recover compensation.²⁸ Accordingly, if a judgment has been rendered

water for fire purposes, according to its contract with a city, leaves the subject 'in an extremely unsatisfactory position,' as stated in the note to *Britton v. Green Bay & Ft. H. Waterworks Co.*, 29 Am. St. Rep. 856, 863, yet, as the learned annotator suggests, 'the only security would seem to be in legislation, or in the incorporation of some suitable provision in future contracts of this description, wherever the taxpayers desire to reserve a personal remedy against the water company.' It is not the function of a court to make law to fit hard cases." *Lovejoy v. Bessemer Waterworks Co.*, 146 Ala. 374, 6 L. R. A. (N.S.) 429, 41 So. 76.

²⁷ *Guardian Trust & Deposit Co. v. Fisher*, 200 U. S. 57, 50 L. ed. 367; *Mugge v. Tampa Waterworks Co.*, 52 Fla. 371, 120 Am. St. Rep. 207, 6 L. R. A. (N.S.) 1171, 42 So. 81; *Paducah Lumber Co. v. Water Supply Co.*, 89 Ky. 340, 25 Am. St. Rep. 536, 7 L. R. A. 77, 12 S. W. 554, 13 S. W. 249; *Graves County Water Co. v. Ligon*, 112 Ky. 775, 66 S. W. 725 [following, *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, 25 Am. St. Rep. 536, 7 L. R. A. 77, 12 S. W. 554, 13 S. W. 249; *Duncan v. Owensboro Water Co. (Ky.)*, 12 S. W. 557, 12 Ky. L. R. 35; *Duncan's Executors v. Owensboro Water Co. (Ky.)*, 15 S. W. 523, 12 Ky. L. R. 824; *Gorrell v. Greensboro Water Supply Co.*, 124 N. Car.

328, 70 Am. St. Rep. 508, 46 L. R. A. 513, 32 S. E. 720]; *Jones v. Durham Water Co.*, 135 N. Car. 553, 47 S. E. 615.

²⁸ *Guardian Trust & Deposit Co. v. Fisher*, 200 U. S. 57, 50 L. ed. 367; *Mugge v. Tampa Waterworks Co.*, 52 Fla. 371, 120 Am. St. Rep. 207, 6 L. R. A. (N.S.) 1171, 42 So. 81; *Fisher v. Greensboro Water Supply Co.*, 128 N. Car. 375, 38 S. E. 912.

"And here we are met with the contention that, independently of contract, there is no duty on the part of the water company to furnish an adequate supply of water; that the city owes no such duty to the citizen, and that contracting with a company to supply water imposes upon the company no higher duty than the city itself owed, and confers upon the citizen no greater right against the company than it had against the city; that the matter is solely one of contract between the city and the company, for any breach of which the only right of action is one *ex contractu* on the part of the city. It is true that a company contracting with a city to construct waterworks and supply water may fail to commence performance. Its contractual obligations are then with the city only, which may recover damages, but merely for breach of contract. There would be no tort, no negligence, in the total failure on the part of the company.

against a water company for negligence in failing to keep a sufficient quantity of water in its storage tank, by reason of which C's house is destroyed,²⁹ such judgment has priority over a pre-existing mortgage, under a statute which gives priority over pre-existing mortgages to judgments in tort.³⁰ In other jurisdictions the right of the property owner to recover from the water company seems to be regarded as a contract right, on the theory that the contract is for his benefit.³¹ Even in jurisdictions in which it is held that the property owner can not maintain an action against a water company or other public utility for damages growing out of the failure of the public utility to continue the performance of the contract which it has undertaken to perform, an individual property owner or taxpayer may maintain an action to compel the public utility to charge only the rates agreed upon between the public corporation and the public utility.³²

A covenant by a grantee to assume and pay an encumbrance is intended for the benefit of the mortgagee or, possibly, for the bene-

It may also be true that no citizen is a party to such a contract, and has no contractual or other right to recover for the failure of the company to act, but if the company proceeds under its contract, constructs and operates its plant, it enters upon a public calling. It occupies the streets of the city, acquires rights and privileges peculiar to itself. It invites the citizens, and if they avail themselves of its conveniences and omit making other and personal arrangements for a supply of water, then the company owes a duty to them in the discharge of its public calling, and a neglect by it in the discharge of the obligations imposed by its charter, or by contract with the city, may be regarded as a breach of absolute duty, and recovery may be had for such neglect. The action, however, is not one for breach of contract, but for negligence in the discharge of such duty to the public, and is an action for a tort." *Guardian Trust Co. v. Fisher*, 200 U. S. 57, 50 L. ed. 367.

²⁹ *Fisher v. Greensboro Water Supply Co.*, 128 N. Car. 375, 38 S. E. 912.

³⁰ *Guardian Trust Co. v. Fisher*, 200 U. S. 57, 50 L. ed. 367.

³¹ *Duncan v. Owensboro Water Co.* (Ky.), 12 S. W. 557, 12 Ky. L. R. 35; *Duncan's Executors v. Owensboro Water Co.* (Ky.), 15 S. W. 523, 12 Ky. L. R. 824; *Graves County Water Co. v. Ligon*, 112 Ky. 775, 66 S. W. 725 [following, *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, 25 Am. St. Rep. 536, 7 L. R. A. 77, 12 S. W. 554, 13 S. W. 249].

This theory seems to be adopted in some of the North Carolina cases. See, *Gorrell v. Greensboro Water Supply Co.*, 124 N. Car. 328, 70 Am. St. Rep. 508, 46 L. R. A. 513, 32 S. E. 720; *Jones v. Durham Water Co.*, 135 N. Car. 553, 47 S. E. 615.

³² *Walton v. Proutt*, 117 Ark. 388, L. R. A. 1915D, 917, 174 S. W. 1152; *Robbins v. Bangor Railway & Electric Co.*, 100 Me. 496, 1 L. R. A. (N.S.) 963, 62 Atl. 136; *Pond v. New Rochelle Water Co.*, 183 N. Y. 330, 1 L. R. A. (N.S.) 958, 76 N. E. 211.

fit of the grantor, but not for the benefit of one who has some other interest therein.³³ B granted property to A, upon which was a mortgage given by B, in which B's wife, C, had joined to release her dower. As part of the purchase price B agreed to pay all encumbrances "by mortgage or otherwise" upon the property conveyed. A did not pay such mortgage debt and the realty was sold on foreclosure proceedings, by which C's dower was lost. C sued A on his covenant for the loss of her dower. It was held that she could not maintain such action, as the covenant was not for her benefit.³⁴ So a contract by a bank with a depositor, evidenced by a certificate of deposit, to pay the amount of the deposit to the depositor if drawn out during her life, and if not, to a designated third person, can not be enforced by such third person,³⁵ and a covenant by the licensee of a patent right to give the inventor opportunities to perfect his invention, can not be enforced by the licensor.³⁶ A contract made by a carrier with a collector of customs, as a condition of permission for the goods to remain at the wharf for forty-eight hours, whereby the carrier agrees to pay to the consignee the value of goods stolen, lost, or burned, can not be enforced by a consignee who holds a bill of lading which provides that the goods shall be at the consignee's risk of fire.³⁷ So where B, a shipper, had a contract with C, a railroad company, to receive and transport certain goods which A, a ship owner, had delivered at a designated wharf under charter with B, A can not maintain an action against C for breach of C's contract with B, whereby A's ship is detained.³⁸ Where two railroads had entered into a contract whereby the first railroad was to have the use of the track of the second railroad, a shipper over the first railroad can not maintain an action against the second railroad for breach of such contract.³⁹ So where A and B agree to form a corporation, and agree that such corporation shall, when formed, "assume" a certain lease "at the present rental," the lessor and lessee under

³³ *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. 49.

³⁴ *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. 49. The "covenant was with the husband alone."

³⁵ *Sullivan v. Sullivan*, 161 N. Y. 554, 56 N. E. 116; *Dutton v. Pool*, 1 Vent. 318 [distinguishing, *Tod v. Weber*, 95 N. Y. 181, 47 Am. St. Rep. 20; *Buchanan v. Tilden*, 158 N. Y. 109,

70 Am. St. Rep. 454, 44 L. R. A. 170, 52 N. E. 724].

³⁶ *Berry Harvester Co. v. Machine Co.*, 152 N. Y. 540, 46 N. E. 952.

³⁷ *Constable v. Steamship Co.*, 154 U. S. 51, 38 L. ed. 903.

³⁸ *Freeman v. Ry.*, 32 Fla. 420, 13 So. 892.

³⁹ *St. Louis, etc., Ry. v. Neel*, 56 Ark. 279, 19 S. W. 963.

such lease not being parties to the contract, the lessor can not enforce such contract against A.⁴⁰ An agreement between stockholders of a corporation and such corporation, whereby the stockholders agree to raise a fund to discharge certain debts of the corporation, is not intended for the benefit of such creditors of the corporation and they can not enforce such contract even in equity.⁴¹ If A, who sells certain stock in a corporation to B, gives a guaranty to B that A will pay all the debts of the corporation, such guaranty is intended for B's benefit exclusively; and the creditors of the corporation can not maintain an action thereon.⁴² So an agreement by A to lend money to B, gives no right in equity to B's creditors to enforce such promise, though B intended to use such money to pay such debts.⁴³ If a street railway company accepts an ordinance requiring it to pave between the tracks, this provision is not intended for the benefit of private citizens who may be benefited thereby incidentally, and they can not sue to enforce such covenant.⁴⁴ A property owner is not liable to a subcontractor if the contract between the property owner and the principal contractor shows no intention to assume such liability, although the performance on the part of the subcontractor enures ultimately to the benefit of the property owner.⁴⁵ A contract between A, the owner of certain realty, and B, the lessee thereof, by which B agrees to expend a certain amount of money on the improvement of the leased premises, and B deposits such amount of money with A, to be used by A in paying for such improvements, such contract is intended exclusively for the benefit of A and persons who have furnished labor or materials in making such improvements, can not maintain an action upon such contract.⁴⁶ If B advances money to C under a contract by which C is to pay such

⁴⁰ *Lorillard v. Clyde*, 122 N. Y. 498, 19 Am. St. Rep. 514, 10 L. R. A. 113, 25 N. E. 917.

⁴¹ *Pettibone v. R. R.*, 148 Mass. 411, 1 L. R. A. 787, 19 N. E. 337.

⁴² *John Horstmann Co. v. Waterman*, 103 Wash. 18, 1 A. L. R. 856, 173 Pac. 733.

⁴³ *Anglo-American, etc., Association v. Campbell*, 13 D. C. App. 581, 43 L. R. A. 622. For a similar case see *Burton v. Larkin*, 36 Kan. 246, 59 Am. Rep. 541, 13 Pac. 398.

⁴⁴ *Fielders v. Ry.*, 68 N. J. L. 343,

96 Am. St. Rep. 552, 50 L. R. A. 455, 53 Atl. 404, 54 Atl. 822 [reversing, 67 N. J. L. 76, 50 Atl. 533].

⁴⁵ *United States Steel Products Co. v. Poole-Dean Co.*, 245 Fed. 533. (The principal contractor can not avoid liability on this theory.) *Loneragan v. San Antonio Loan & Trust Co.*, 101 Tex. 63, 104 S. W. 1061 [rehearing denied, *Loneragan v. San Antonio Loan & Trust Co.*, 101 Tex. 63, 106 S. W. 876].

⁴⁶ *Beatti Mfg. Co. v. Clark*, 208 Mo. 89, 106 S. W. 29.

money over to A to be applied in discharge of certain indebtedness, and C pays such money over to A in accordance with such contract, B can not maintain an action against A if A does not apply such funds in accordance with the provisions of the contract.⁴⁷

§ 2402. Contracts intended to confer benefit—Assumption of debts on consideration of conveyance. In discussing the practical application of the foregoing principles to particular states of fact, we find that the most usual type of this contract exists where B has conveyed property to A and in consideration thereof A promises to B to discharge a debt due from B to C. If B conveys property or pays money to A. and in consideration thereof A promises to discharge a debt due from B to C, C can maintain an action against A.¹

⁴⁷ *Ewell v. Best*, — Ky. —, 198 S. W. 4.

¹ *United States. Blackmore v. Parkes*, 81 Fed. 899, 26 C. C. A. 670; *Barker v. Car Co.*, 124 Fed. 655.

Alabama. *North Alabama Development Co. v. Short* (Ala.), 13 So. 385; *Aultman v. Fletcher*, 110 Ala. 452, 18 So. 215.

California. *Meyer v. Parsons*, 129 Cal. 653, 62 Pac. 216; *Tavis v. Savage*, 130 Cal. 411, 62 Pac. 611; *Washer v. Independent Mining & Development Co.*, 142 Cal. 702, 76 Pac. 654.

Colorado. *Hastings v. Pringle*, 37 Colo. 86, 86 Pac. 93.

Florida. *American Lead Pencil Co. v. Wolfe*, 30 Fla. 360, 11 So. 488.

Idaho. *Smith v. Caldwell*, 6 Ida. 436, 55 Pac. 1065.

Illinois. *Commercial National Bank v. Kirkwood*, 172 Ill. 563, 50 N. E. 219 [reversing, 68 Ill. App. 116]; *Scudder v. Carter*, 43 Ill. App. 252.

Indiana. *Bateman v. Butler*, 124 Ind. 223, 24 N. E. 989; *William Deering v. Armstrong*, 14 Ind. App. 44, 42 N. E. 372; *Oldenburg v. Baird*, 26 Ind. App. 379, 58 N. E. 1073.

Kentucky. *Mudd v. Caries*, 104 Ky. 719, 47 S. W. 1080; *Blakeley v. Adams*, 113 Ky. 392, 68 S. W. 393.

Maine. *Watson v. Perrigo*, 87 Me. 202, 32 Atl. 876; *Coffin v. Bradbury*, 89 Me. 476, 36 Atl. 988.

Minnesota. *Maxfield v. Schwartz*, 43 Minn. 221, 45 N. W. 429; *Lovejoy v. Howe*, 65 Minn. 353, 57 N. W. 57.

Mississippi. *Barnes v. Jones*, 111 Miss. 337, 71 So. 573.

Missouri. *Salmon Falls Bank v. Leyser*, 116 Mo. 51, 22 S. W. 504; *Stato v. Ry.*, 126 Mo. 328, 28 S. W. 1074; *Porter v. Woods*, 138 Mo. 539, 39 S. W. 794.

Nebraska. *Barnett v. Pratt*, 37 Neb. 349, 55 N. W. 1050.

Nevada. *Wills v. Bank*, 23 Nev. 59, 42 Pac. 490.

New York. *Thorp v. Coal Co.*, 48 N. Y. 253; *Zeiser v. Cohn*, 207 N. Y. 407, 47 L. R. A. (N.S.) 186, 101 N. E. 184.

Oklahoma. *Sanderson v. Turner*, — Okla. —, 2 A. L. R. 347, 174 Pac. 763.

Oregon. *Strong v. Kamm*, 13 Or. 172, 9 Pac. 331; *Feldman v. McGuire*, 34 Or. 309, 55 Pac. 872.

Pennsylvania. *Townsend v. Long*, 77 Pa. St. 143, 18 Am. Rep. 436; *Sargent v. Johns*, 206 Pa. St. 386, 55 Atl. 1051; *Cox v. Philadelphia Pottery Co.*, 214 Pa. St. 373, 63 Atl. 749.

Rhode Island. *Urquhart v. Brayton*, 12 R. I. 169; *Wood v. Moriarty*, 15 R. I. 518, 9 Atl. 427.

4249 CONTRACTS FOR BENEFIT OF THIRD PERSON § 2402

One of the most common cases of this class exists where A, the grantee, assumes and agrees to pay a debt secured by a mortgage on the realty conveyed to him.² So if a mortgagee retains out of the loan made by him to the mortgagor enough to pay a prior

Texas. *Morris v. Gaines*, 82 Tex. 255, 17 S. W. 538; *Mathonican v. Scott*, 87 Tex. 398, 28 S. W. 1063.

Vermont. *Keyes v. Allen*, 65 Vt. 667, 27 Atl. 319.

Virginia. *Skinker v. Armstrong*, 86 Va. 1011, 11 S. E. 977; *Moore v. Triplett*, 96 Va. 603, 70 Am. St. Rep. 882, 32 S. E. 50; *Cosmopolitan Life Association v. Loegel*, 104 Va. 619, 52 S. E. 166.

Washington. *Gilmore v. Box Factory*, 20 Wash. 703, 56 Pac. 934; *Dimmick v. Collins*, 24 Wash. 78, 63 Pac. 1101.

Wisconsin. *Bassett v. Hughes*, 43 Wis. 319; *Fulmer v. Wightman*, 87 Wis. 573, 58 N. W. 1106; *Green v. Hadfield*, 89 Wis. 138, 61 N. W. 310; *Lessel v. Zillmer*, 105 Wis. 334, 81 N. W. 403; *Fanning v. Murphy*, 126 Wis. 538, 110 Am. St. Rep. 946, 4 L. R. A. (N.S.) 666, 105 N. W. 1056.

²**United States.** *Keller v. Ashford*, 133 U. S. 610, 33 L. ed. 667; *Johns v. Wilson*, 180 U. S. 440, 45 L. ed. 613; *North Alabama Development Co. v. Orman*, 55 Fed. 18, 5 C. C. A. 22; *Central Trust Co. v. Coal Co.*, 95 Fed. 391.

Colorado. *Stuyvesant v. Western Mortgage Co.*, 22 Colo. 28, 43 Pac. 144; *Hastings v. Pringle*, 37 Colo. 86, 86 Pac. 93; *Mulvany v. Gross*, 1 Colo. App. 112, 27 Pac. 878.

Connecticut. *Tuttle v. Armstead*, 53 Conn. 175, 22 Atl. 677.

Illinois. *Fish v. Glover*, 154 Ill. 86, 39 N. E. 1081; *Webster v. Fleming*, 178 Ill. 140, 52 N. E. 975; *Harts v. Emery*, 184 Ill. 560, 56 N. E. 865.

Indiana. *Lowe v. Hamilton*, 132 Ind. 406, 31 N. E. 1117; *Stuckman v. Roose*, 147 Ind. 402, 46 N. E. 680.

Iowa. *Marble Savings Bank v.*

Mearvey, 101 Ia. 285, 70 N. W. 198; *Beeson v. Green*, 103 Ia. 406, 72 N. W. 555.

Kansas. *Stevenson v. Elliott*, 53 Kan. 550, 36 Pac. 980.

Maine. *Flint v. Land Co.*, 89 Me. 420, 36 Atl. 634; *Cumberland National Bank v. St. Clair*, 93 Me. 35, 44 Atl. 123.

Minnesota. *Hine v. Myrick*, 60 Minn. 518, 62 N. W. 1125.

Missouri. *Pratt v. Conway*, 148 Mo. 291, 71 Am. St. Rep. 602, 49 S. W. 1028.

Nebraska. *Reynolds v. Dietz*, 39 Neb. 180, 58 N. W. 89; *Kendall v. Garneau*, 55 Neb. 403, 75 N. W. 852.

New Jersey. *Green v. Stone*, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 34 Atl. 1099 [reversing, 32 Atl. 706; *Wager v. Link*, 134 N. Y. 122, 31 N. E. 213].

New York. *New York Life Ins. Co. v. Aitkin*, 125 N. Y. 660, 26 N. E. 732.

North Dakota. *Moore v. Booker*, 4 N. D. 543, 62 N. W. 607.

Ohio. *Thompson v. Thompson*, 4 O. S. 333; *Society of Friends v. Haines*, 47 O. S. 423, 25 N. E. 119; *Poe v. Dixon*, 60 O. S. 133; 71 Am. St. Rep. 713, 54 N. E. 86.

Oregon. *Windle v. Hughes*, 40 Or. 1, 65 Pac. 1058.

Pennsylvania. *Merriman v. Moore*, 90 Pa. St. 78; *Blood v. Levick Co.*, 177 Pa. St. 606, 55 Am. St. Rep. 741, 35 Atl. 871.

Rhode Island. *Mechanics' Savings Bank v. Goff*, 13 R. I. 516, 43 Am. Rep. 42.

Tennessee. *O'Conner v. O'Conner*, 88 Tenn. 76, 7 L. R. A. 33, 12 S. W. 447.

Texas. *Beitel v. Dobbin* (Tex. Civ. App.), 44 S. W. 299.

Utah. *Thompson v. Cheesman*, 15 Utah 43, 48 Pac. 477.

mortgage, and promises mortgagor to pay such prior mortgage debt, the assignee of such debt may maintain an action against the second mortgagee on such promise.³

This rule is not confined to mortgages. If a grantee assumes and agrees to pay other debts of his grantor's, which are liens on the property conveyed, such as vendor's liens,⁴ judgment liens,⁵ or legacies charged on the realty conveyed,⁶ and retains enough from the purchase price to pay such debts, the owner of such debts may maintain an action against the grantee. Furthermore, this principle is not limited to conveyances of realty. If B transfers personalty to A, in consideration of which A promises to pay B's debt to C, which is a lien on the personalty conveyed, C may enforce payment against A.⁷ If B, who has subscribed for stock in a corporation, C, assigns such stock to A, in consideration of A's promise to pay the amount of B's subscription, C may enforce such liability against A, even if A would not have been liable in the absence of such contract.⁸ If B conveys goods to his creditor, A, in reliance upon A's promise to pay B's remaining creditors, C, who is one of such creditors, may enforce such promise against A.⁹ So if B conveys his interest in a business to A, in consideration whereof A agrees to pay B's debts to C, arising out of such business, C can maintain an action against A on such contract.¹⁰ If a bank, B, transfers all of its assets to A, in consideration of A's agreeing to pay all of B's liabilities, C, who is

Wisconsin. *Enos v. Sanger*, 96 Wis. 150, 65 Am. St. Rep. 38, 70 N. W. 1069; *Morgan v. Lake View Co.*, 97 Wis. 275, 72 N. W. 872; *Carpenter v. Meachem*, 111 Wis. 60, 86 N. W. 552.

If land has been conveyed under an implied covenant on the part of the grantee to assume a mortgage debt, and subsequently such land is conveyed by the grantee to the grantor under a similar covenant, the grantor can not enforce the first covenant against the grantee. *Sanderson v. Turner*, —Okla. —, 2 A. L. R. 347, 174 Pac. 763.

³ *Porter v. Ourada*, 51 Neb. 510, 71 N. W. 52.

⁴ *Saunders v. McClintock*, 46 Mo. App. 216; *Johnson v. Elmen*, 94 Tex.

168, 86 Am. St. Rep. 845, 52 L. R. A. 162, 59 S. W. 253; *Strain v. Walton*, 11 Tex. Civ. App. 624, 34 S. W. 293.

⁵ *Emmitt v. Brophy*, 42 O. S. 82; *Kehoe v. Patton*, 23 R. I. 360, 50 Atl. 655.

⁶ *Bird v. Stout*, 40 W. Va. 43, 20 S. E. 852.

⁷ *Moore v. First National Bank*, 38 Colo. 336, 120 Am. St. Rep. 120, 10 L. R. A. (N.S.) 260, 88 Pac. 385; *Springe v. Cole*, 171 N. Car. 418, 88 S. E. 721; *Kollock v. Parcher*, 52 Wis. 393, 9 N. W. 67.

⁸ *Edwards v. Schillinger*, 245 Ill. 231, 33 L. R. A. (N.S.) 895, 91 N. E. 1048.

⁹ *Weber-Wolters Dry Goods Co. v. Scott*, 172 Ky. 280, 189 S. W. 223.

¹⁰ *Arkansas National Trust & Credit Co. v. Polk*, 123 Ark. 24, 183 S. W. 195.

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one of B's creditors, may maintain an action against A upon such promise.¹¹ Where one corporation bought the business of another, agreeing therefor to issue certificates of its own stock to the stockholders of the vendor corporation, a stockholder of the vendor may sue on such contract for specific performance.¹² By analogy it has been held that the United States, as the successor of Spain, became liable upon concession for submarine cables granted by Spain, while Spain was sovereign of territory which it subsequently ceded to the United States.¹³ It is chiefly in connection with promises by a grantee to discharge mortgages and liens that the question has been raised whether such contract is enforceable if the grantor is not personally liable on such debt.¹⁴ If money is deposited by a lessee with a lessor to pay for certain improvements to be made upon the leased premises, the party making such improvements may maintain an action against the lessor.¹⁵ On the other hand, an agreement between bondholders who have formed a new company and bought the railroad under foreclosure proceedings to set aside a sum to pay small outstanding claims against the railroad, can not be enforced by one who had constructed a station for the old company and had not been paid therefor.¹⁶ The payee of a bank check may sue on a contract between a bank and the vendee of stock, to pay a check drawn on such bank by the vendee in favor of the vendor for the purchase price of such stock, where the bank receives the proceeds of the

Illinois. Rothermell v. Coal Co., 79 Ill. App. 667.

Indiana. Dickson v. Conde, 148 Ind. 279, 46 N. E. 998.

Iowa. Malanaphy v. Fuller & Johnson Mfg. Co., 125 Ia. 719, 106 Am. St. Rep. 332, 101 N. W. 640.

Minnesota. Lovejoy v. Howe, 55 Minn. 353, 57 N. W. 57.

Missouri. Schufeldt v. Smith, 139 Mo. 367, 40 S. W. 887.

Ohio. Conner v. Bramble, 6 Ohio N. P. 195.

Pennsylvania. Cox v. Philadelphia Pottery Co., 214 Pa. St. 373, 63 Atl. 749.

Virginia. Cosmopolitan Life Association v. Loegel, 104 Va. 619, 52 S. E. 166.

Wisconsin. J. & H. Clasgens Co. v. Silber, 93 Wis. 579, 67 N. W. 1122

Lenz v. Ry., 111 Wis. 198, 86 N. W. 607.

¹¹ Moore v. First National Bank, 38 Colo. 336, 120 Am. St. Rep. 120, 10 L. R. A. (N.S.) 260, 88 Pac. 385.

¹² Fletcher v. Telephone Co., 55 N. J. Eq. 47, 35 Atl. 903.

¹³ Eastern Extension Telegraph Co. v. United States, 231 U. S. 326, 58 L. ed. 250.

¹⁴ For a discussion of this subject see §§ 1311, 2397.

¹⁵ Beattie Mfg. Co. v. Gerradi, 166 Mo. 142, 65 S. W. 1035.

¹⁶ Mayer v. R. R., 132 Ind. 88, 31 N. E. 567. (Some stress was here laid on the fact that such sum might have been already expended in paying off prior claims.)

resale of such stock amounting to more than the check.¹⁷ If a grantee agrees in the deed to himself, that a surety of his grantor's shall have a lien on the realty conveyed to indemnify him, such surety may enforce such deed.¹⁸ Under a statute which authorizes the beneficiary to recover only upon a contract which is entered into between two other persons for his sole benefit, a lienholder can not maintain a personal action against a grantee, who has assumed and agreed to pay the liens upon the realty thus conveyed,¹⁹ since such contract is made for the benefit of the grantor as well as for the benefit of the lienholder.²⁰

§ 2403. Doctrine not limited to assumption of debts on consideration of conveyance. A serious question which arises in jurisdictions in which the beneficiary is recognized as having a right to enforce a contract for his benefit is whether the doctrine that a third party may sue is confined to cases like the foregoing, where the promisee transfers property to the promisor to induce him to make such promise, or whether it applies to other classes of cases. In some jurisdictions it is held that a promise by A to B, on consideration to pay B's debts to C, is not enforceable unless A has in his hands funds or property transferred by B to him, out of which such debt was to be paid. Thus where A agreed with B, a corporation, to discharge B's debt to C, in consideration whereof A was to receive B's stock at par in payment of such advances, C can not enforce such promise against A.¹ In most jurisdictions in which the right of the beneficiary to enforce the contract is recognized, his right is not limited to cases in which property is put into A's hands by B, in order to secure the payment of money

¹⁷ Hawley v. Bank, 97 Ia. 187, 66 N. W. 152.

¹⁸ Blakeley v. Adams, 113 Ky. 392, 68 S. W. 393.

¹⁹ King v. Scott, 76 W. Va. 58, 84 S. E. 954.

²⁰ King v. Scott, 76 W. Va. 58, 84 S. E. 954.

¹ Washburn v. Investment Co., 26 Or. 436, 36 Pac. 533, 38 Pac. 620. The court said: "The contract is not made for the direct benefit of the creditor, but of the promisee to enable him to obtain money with which to discharge

his liability, and if enforceable at all is enforceable by him. The creditors are, of course, indirectly interested in its performance, for if the contract is complied with, their claims will be paid, and this may be said of any executory contract whereby a debtor expects to receive money with which to pay his debts; but it has never been held, to our knowledge, that such an interest is sufficient to entitle a stranger to maintain an action to enforce the stipulations of the contract."

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to A's creditor, or other beneficiaries.² A contract on valuable consideration between A and B, whereby A agrees to support C, can be enforced by C, as a contract whereby A agrees with B, his brother-in-law, to support B's wife, C,³ or a contract by A with B, his father-in-law, to support his sister-in-law, C.⁴ A contract by which B agrees to convey certain realty to his son, A, in consideration of future support, and B also agrees to convey certain realty to B's daughter, C, may be enforced by C.⁵ Restrictive covenants in conveyances of realty may be enforced by adjoining property owners, when they are inserted in such conveyances, in accordance with a general plan, and when they are thus intended for the mutual benefit of the respective property owners.⁶ If B, who is the lessor of a mine, has entered into a contract by which C is to have the exclusive right of selling coal from such mine in a certain town, and B subsequently leases such mine to A by a lease which contains a covenant to the effect that C shall have such right, C may enforce such covenant against A.⁷ If B, the owner of realty, conveys a right of way to a railway, A, under a contract by which certain switch privileges are secured, at certain specified rates, to B, or to parties other than B, who might operate furnaces upon such realty, another party operating such furnaces may maintain an action against the railway upon such covenant;⁸ and he may have reformation against A to show the intention of the parties to benefit such third person in case the contract, as originally drawn, does not show such intention.⁹ If B, a wholesale dealer in certain

² **California.** *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 37 L. R. A. (N.S.) 5, 117 Pac. 677; *D. Ghirardelli Co. v. Hunsicker*, 164 Cal. 355, 128 Pac. 1041.

Kentucky. *Gregory v. Harlan Home Coal Co.*, 182 Ky. 524, 206 S. W. 765.

Nebraska. *Wright v. Pfrimmer*, 99 Neb. 447, L. R. A. 1917A, 323, 156 N. W. 1060.

New York. *Little v. Banks*, 85 N. Y. 258; *Korn v. Campbell*, 192 N. Y. 490, 37 L. R. A. (N.S.) 1, 85 N. E. 687; *Baird v. Erie Ry. Co.*, 210 N. Y. 225, 104 N. E. 614.

North Carolina. *Withers v. Poe*, 167 N. Car. 372, 83 S. E. 614.

³ *Coleman v. Whitney*, 62 Vt. 123, 9 L. R. A. 517, 20 Atl. 322.

⁴ *Eitscheid v. Baker*, 112 Wis. 129, 88 N. W. 52.

⁵ *Sedgwick v. Blanchard*, 164 Wis. 421, 160 N. W. 267.

⁶ *Berryman v. Hotel Savoy Co.*, 160 Cal. 559, 37 L. R. A. (N.S.) 5, 117 Pac. 677; *Wright v. Pfrimmer*, 99 Neb. 447, L. R. A. 1917A, 323, 156 N. W. 1060; *Korn v. Campbell*, 192 N. Y. 490, 37 L. R. A. (N.S.) 1, 85 N. E. 687.

⁷ *Gregory v. Harlan Home Coal Co.*, 182 Ky. 524, 206 S. W. 765.

⁸ *Baird v. Erie Ry. Co.*, 210 N. Y. 225, 104 N. E. 614.

⁹ *Baird v. Erie Ry. Co.*, 210 N. Y. 225, 104 N. E. 614.

commodities, sells such commodities to A, a retailer, under a contract fixing the price at which A shall sell such commodities, and such contract is intended for the benefit of the manufacturer, C. C may enforce such covenant by injunction against A, if such covenant is not monopolistic in character.¹⁰

If one insurance company reinsures with another, such other company is directly liable to beneficiaries under policies issued by the first company, if it has assumed and agreed to pay losses under such policies.¹¹ A covenant by a lessee to his lessor, that he will sell no beer upon the premises leased, except that manufactured by a specified brewing company, may be enforced by such brewing company by an injunction in equity;¹² a covenant between a landlord and a third person, who thereby agrees to maintain a fence on the landlord's property, may be enforced by a tenant to whom the landlord has leased such property;¹³ and a contract between the stockholders of a corporation, whereby one of them agrees to surrender his stock to the corporation to avoid paying an assessment levied thereon, may be enforced by the corporation.¹⁴ The creditors of an insolvent corporation may enforce a contract between its directors and its stockholders,¹⁵ or between its different stockholders,¹⁶ by which the directors or stockholders agree to pay debts due from such corporation. If A and B, the creditors of an estate, enter into a contract, by which A agrees to pay the debts and the expenses of administration, in consideration of B's acknowledging payment of a judgment against the estate, and in consideration of the conveyance of certain tracts of land by the heirs to A and B, C, the administrator of the estate, may enforce such contract against A.¹⁷ If A agrees with B to make certain payments to C, in consideration of B's withdrawing opposition to

¹⁰ *D. Ghirardelli Co. v. Hunsicker*, 164 Cal. 355, 128 Pac. 1041.

¹¹ *Whitney v. Ins. Co. (Cal.)*, 56 Pac. 50; *Bartlett v. Ins. Co.*, 77 Ia. 155, 41 N. W. 601; *Barnes v. Ins. Co.*, 56 Minn. 38, 45 Am. St. Rep. 438, 57 N. W. 314; *Ruohs v. Traders' Fire Ins. Co.*, 111 Tenn. 405, 102 Am. St. Rep. 790, 78 S. W. 85.

¹² *Devol v. McIntosh*, 23 Ind. 529; *Tinker v. Swaynie*, 71 Ind. 562; *Rodenbarger v. Bramblett*, 78 Ind. 213; *Warren v. Farmer*, 100 Ind. 593; *Ferris v. Brewing Co.*, 155 Ind. 539, 52 L. R. A.

305, 48 N. E. 701 [citing, *Ransdel v. Moore*, 153 Ind. 393, 405, 53 L. R. A. 753, 63 N. E. 767].

¹³ *Lake Erie, etc., Ry. v. Power*, 16 Ind. App. 179, 43 N. E. 959.

¹⁴ *Hill v. Mining Co.*, 124 Mo. 153, 46 Am. St. Rep. 429, 25 S. W. 926, 32 S. W. 111.

¹⁵ *Caldwell v. Ryan*, 173 Ky. 233, 190 S. W. 1078.

¹⁶ *Withers v. Poe*, 167 N. Car. 372, 83 S. E. 614.

¹⁷ *Stewart v. Rogers*, 71 Kan. 53, 80 Pac. 58.

a will and permitting A to be appointed executor, C may recover upon such contract.¹⁸ Among other examples of contracts which are intended primarily for the benefit of a third person, are the following: a contract between A and B, whereby A agrees to pay B's attorney, C;¹⁹ a contract by A, C's husband, whereby A is to furnish B with money to aid in contesting X's will, and B agreeing to pay C a large sum of money in the event of success;²⁰ a contract between a father and his prospective son-in-law, by which the father agrees to make certain annual payments to his daughter;²¹ a contract between brothers and sisters, to whom realty has descended in common, that the land shall be held in joint tenancy and on the death of the survivor it shall pass to the child of one of the brothers;²² a covenant in a fire insurance policy that the loss, if any, is payable to C as his interest may appear;²³ a contract between the father and the mother of an illegitimate child, where the mother surrenders the custody of the child, in consideration whereof the father agrees to support the child, to educate him, and to convey certain property to him,²⁴ and a bond given by a subagent of an insurance company to a general agent, containing a clause that the insurance company may sue thereon.²⁵

¹⁸ *Painter v. Kaiser*, 27 Nev. 421, 103 Am. St. Rep. 772, 65 L. R. A. 672, 76 Pac. 747.

¹⁹ *Tyler v. Mayre*, 95 Cal. 160, 27 Pac. 160, 30 Pac. 196.

²⁰ *Buchanan v. Tilden*, 158 N. Y. 109, 70 Am. St. Rep. 454, 44 L. R. A. 170, 52 N. E. 724. In this case there were peculiar facts on which the court laid great stress. B was X's heir. C was the adopted daughter of X's brother. The court said: "Plaintiff, in equity and good conscience, as an adopted child of Moses Y. Tilden, was entitled to come in and share with the other heirs and next of kin the large fund that had been freed from the provisions of the will. When this equitable right or interest is coupled with the relation of husband and wife, we have presented a situation that affords ample consideration for the contract sued upon—a situation that distinguishes this action from any of the cases where

the party suing upon a promise rests exclusively upon a debt of duty owed him by the promisee. Another general feature of this case, to which we think the court below has failed to give due prominence, is the extent of the legal and moral obligation resting upon a husband to support and provide for his wife."

²¹ *De Cicco v. Schweizer*, 221 N. Y. 431, Ann. Cas. 1918C, 816, 117 N. E. 807.

²² *Murphy v. Whitney*, 140 N. Y. 541, 24 L. R. A. 123, 35 N. E. 930. (Such child can enforce such contract.)

²³ Hence C can sue the insurance company. *West Coast Lumber Co. v. Ins. Co.*, 98 Cal. 502, 33 Pac. 256; *Cone v. Ins. Co.*, 60 N. Y. 619.

²⁴ *Benge v. Hiatt*, 82 Ky. 666, 56 Am. Rep. 912.

²⁵ *New York Life Ins. Co. v. Hamlin*, 100 Wis. 17, 75 N. W. 421. So a rent bond taken by a court for the rent of

Under a contract between an express company and an employe, whereby he agrees to exempt the express company from certain forms of liability, and the contract provides that this provision shall inure to the benefit of the railroad company, the railroad may use such provision as a defense, even if it had no knowledge thereof before action was brought to enforce such liability.²⁶ A conveyance by B to Y, is a consideration for a promise by A, who is Y's father, to pay a sum of money to C, who is B's child, may be enforced by C.²⁷

If A, a property owner, enters into a contract with B, whereby B agrees to construct a building upon A's realty, and A agrees to pay for the labor and material employed in the construction of such building, such contract is regarded as intended for the benefit of those who furnish labor or material in the performance of such contract, and such persons may enforce such promise against A.²⁸ The intention to benefit the subcontractor or materialman is especially clear where A agrees to retain from the contract price an amount sufficient to pay the claims of the subcontractors or materialmen.²⁹ A contract by A, who publishes the reports of a court, whereby he agrees to furnish such reports to book dealers at specified prices, is intended for the benefit of the book dealers, and such contract may be enforced by them.³⁰ A contract between B, who is a member of the family of the decedent, and an undertaker, A, by which A agrees to furnish carriages, is intended for the benefit of the passengers who are to be transported, and such contract creates a contract between A and such passengers.³¹ A contract between a railway, A, and a county, B, by which A agrees to maintain a car to transport to B's pest-house persons suffering from certain contagious diseases, in consideration of B's maintaining a pest-house, is a contract intended in part for the benefit of those who are to be thus transported, and one of such persons may

land not under its control may be enforced by the person establishing the ownership of such land, as upon a ratification of the act of an unauthorized agent. *Parish v. Ross*, 98 Ky. 318, 25 S. W. 266.

²⁶ *Peterson v. Ry.*, 119 Wis. 197, 96 N. W. 532.

²⁷ *Faust v. Faust*, 144 N. Car. 383, 57 S. E. 22.

²⁸ *Bates v. Birmingham Paint & Glass Co.*, 143 Ala. 198, 38 So. 845; *A. E.*

Shorthill Co. v. Bartlett, 131 Ia. 259, 108 N. W. 308; *Morrison v. Payton* (Ky.), 104 S. W. 685, 31 Ky. Law Rep. 992; *Carolina Hardware Co. v. Raleigh Banking & Trust Co.*, 169 N. Car. 744, 86 S. E. 706.

²⁹ *Bates v. Birmingham Paint & Glass Co.*, 143 Ala. 198, 38 So. 845.

³⁰ *Little v. Banks*, 85 N. Y. 258.

³¹ *John J. Radel Co. v. Borches*, 147 Ky. 506, 39 L. R. A. (N.S.) 227, 145 S. W. 155.

maintain an action against A, either on the contract in assumpsit, or for breach of duty in tort.³²

§ 2404. Contracts of indemnity. A contract whereby A agrees to indemnify B against loss is usually held not to give any right of action against A to parties holding claims whereby B will be subjected to loss for which he may have indemnity from A.¹ Thus persons injured can not have an action on a promise by a vendor of stock to protect vendee against debts owed by the corporation to third parties,² nor on a covenant by the lessee of a railway to save the lessor harmless from damages arising out of past accidents,³ nor on a covenant by contractors to indemnify the owner of the building against loss by injury to others.⁴ So a promise by one person on consideration to save another "harmless" from his obligations and liabilities does not enure to the benefit of creditors of the promisee.⁵ If an insurance company, A, insures B against liability as employer, an employe, C, who obtains a judgment against B on a liability of the sort covered by the insurance, can not maintain an action against A, even if B is insolvent.⁶ So an employe who has been injured by the negligence of his employer, causing the explosion of a steam boiler, and who has sued such employer, can not maintain an action against an insurance company which had agreed to indemnify the employer against such losses.⁷ If, however, the contract is to pay whatever damages the insured might be liable for, and not merely to indemnify him for

³² *Jenkins v. Chesapeake & O. R. Co.*, 61 W. Va. 597, 49 L. R. A. (N.S.) 1166, 57 S. E. 48.

¹ *Iowa. German State Bank v. Northwestern, etc., Co.*, 104 Ia. 717, 74 N. W. 685.

Michigan. Union National Bank v. Rich, 106 Mich. 319, 58 Am. St. Rep. 481, 64 N. W. 339.

New York. French v. Vix, 143 N. Y. 90, 37 N. E. 612; *Reynolds v. Van Beuren*, 155 N. Y. 120, 42 L. R. A. 129, 49 N. E. 763; *Wolf v. Tract Society*, 164 N. Y. 30, 51 L. R. A. 241, 58 N. E. 31.

Ohio. Cleveland Metal Roofing & Ceiling Co. v. Gaspard, 89 O. S. 185, L. R. A. 1915A, 768, 106 N. E. 9.

Texas. Taylor v. Dunn, 80 Tex. 652, 26 Am. St. Rep. 773, 16 S. W. 732.

Washington. Armour v. Western Const. Co., 36 Wash. 529, 78 Pac. 1106.

² *German State Bank v. Light Co.*, 104 Ia. 717, 74 N. W. 685.

³ *Hill v. Ry. Co.*, 82 Mo. App. 188.

⁴ *Wolf v. Tract Society*, 164 N. Y. 30, 51 L. R. A. 241, 58 N. E. 31.

⁵ *State v. Ry.*, 125 Mo. 596, 26 S. W. 1074.

⁶ *Frye v. Electric Co.*, 97 Me. 241, 94 Am. St. Rep. 500, 54 Atl. 395; *Bain v. Atkins*, 181 Mass. 240, 92 Am. St. Rep. 411, 57 L. R. A. 791, 63 N. E. 414; *Travelers' Ins. Co. v. Moses*, 63 N. J. Eq. 260, 92 Am. St. Rep. 663, 49 Atl. 720.

⁷ *Embler v. Ins. Co.*, 158 N. Y. 431, 44 L. R. A. 512, 53 N. E. 212.

whatever he may be obliged to pay, the employe is allowed to recover directly against the insurance company where the employer is insolvent.⁶

§ 2405. Right of third person to enforce contract in equity.

The right of a third person to enforce a contract made for his benefit, was recognized in equity at an early date,¹ and has been constantly enforced in most jurisdictions.² It may be here observed that on this point the English cases are not harmonious. The cases in which the third person is allowed to sue may be explained as cases of trust. If A has received property from B, under a promise to pay B's debt to C, and such debt is less than the value of the property, it is not always apparent whether A is personally liable for the whole debt or whether his liability is measured by the value of the property in his hands. It has been said that as a general rule A is not personally liable to third persons on such contracts.³ The American authorities recognize the right of the third person to sue in equity, with substantial unanimity. Thus where A, an attorney, agreed with an Indian nation to collect a claim for them for a certain percentage, out of which he agreed to adjust claims of "all parties who have rendered service heretofore in the prosecution of said claim," it was held that another attorney who had rendered such service could maintain a suit in equity against A.⁴ So where B conveys realty to A, and as part of the consideration

⁶ *Fenton v. Casualty Co.*, 36 Or. 283, 48 L. R. A. 770, 56 Pac. 1096. See, to the same effect, *Ross v. Ins. Co.*, 56 N. J. Eq. 41, 38 Atl. 22.

¹ *Gregory v. Williams*, 3 Mer. 582; *Miller v. Billingsley*, 41 Ind. 489. In Tennessee the court assumes that in equity a third person could sue on a contract for his benefit; and by analogy, extended the equity rule to actions at law, saying: "It may be that this distinction between a remedy at law or in equity ought not to be longer maintained." *Moore v. Stovall*, 70 Tenn. (2 Lea) 543, 544.

² *United States. McKee v. Lamon*, 159 U. S. 317, 40 L. ed. 165; *Blackmore v. Parkes*, 81 Fed. 899, 26 C. C. A. 670. *Indiana. Davis v. Calloway*, 30 Ind. 112, 95 Am. Dec. 671.

Iowa. Thompson v. Bertram, 14 Ia. 476.

Maine. Harvey v. Milk Co., 92 Me. 115, 42 Atl. 342.

Michigan. Crawford v. Edwards, 33 Mich. 354; *Palmer v. Bray*, 136 Mich. 85, 98 N. W. 849.

New Jersey. Edwards v. National Window Glass Jobbers' Association, — N. J. —, 68 Atl. 800.

Pennsylvania. Zell's Appeal, 111 Pa. St. 532, 6 Atl. 107.

Tennessee. O'Connor v. O'Connor, 88 Tenn. 76, 7 L. R. A. 33, 12 S. W. 447.

³ *Colyear v. Mulgrave*, 2 Keen 81.

⁴ "A court of equity is the proper tribunal for the adjustment of their respective claims." *McKee v. Lamon*, 159 U. S. 317, 40 L. ed. 165.

therefor A agrees to pay B's debts, A is liable in equity personally to B's creditors.⁵ A common example of this principle is found where a grantee assumes and agrees to pay a mortgage which is a lien on such premises.⁶ Occasionally a case appears in which the grantee is held not liable at law to the grantor's creditors, though possibly liable in equity to the extent of the property conveyed.⁷ So in some jurisdictions where the party to be benefited is not named specifically, he may sue in equity though not at law.⁸ Whatever the original divergence between equity and the law on this point, the development of principles of equity within modern law has made the present attitude of the law on this question substantially the same as that of equity in most jurisdictions. Perfect simplicity and uniformity of statement on this point is prevented by the attitude of those courts which hold that a grantee who assumes his grantor's debt is liable to his grantor's creditors in equity upon principles assumed to be analogous to subrogation.⁹ The right of the mortgagee to hold the grantee personally liable is said to require two other concurrent rights: first, the mortgagee must have the right to collect any deficiency from the mortgagor; and second, the mortgagor must have the right to be reimbursed by the grantee.¹⁰ The co-existence of these rights gives the mortgagee a right to proceed directly against the grantee.¹¹ As far as expressions of opinion go, this principle is thoroughly settled in these states.¹² The doctrine of equitable subrogation as a basis for

⁵ *Blackmore v. Parkes*, 81 Fed. 899, 26 C. C. A. 670.

⁶ *Thompson v. Bertram*, 14 Ia. 476; *Crawford v. Edwards*, 33 Mich. 354; *O'Connor v. O'Connor*, 88 Tenn. 76, 7 L. R. A. 33, 12 S. W. 447.

⁷ *Capital Traction Co. v. Offutt*, 17 D. C. App. 292, 53 L. R. A. 390.

⁸ *Harvey v. Milk Co.*, 92 Me. 115, 42 Atl. 342.

⁹ *United States v. Keller v. Ashford*, 133 U. S. 610, 33 L. ed. 667.

Michigan. *Crawford v. Edwards*, 33 Mich. 354; *Booth v. Ins. Co.*, 43 Mich. 299, 5 N. W. 381; *Corning v. Burton*, 102 Mich. 86, 96, 62 N. W. 1040.

New Jersey. *Crowell v. St. Barnabas*, 27 N. J. Eq. 650; *Biddle v. Pugh*, 59 N. J. Eq. 480, 45 Atl. 626.

New York. *Burr v. Beers*, 24 N. Y.

179, 80 Am. Dec. 327; *Garnsey v. Rogers*, 47 N. Y. 233, 7 Am. Rep. 440.

Virginia. *Osborne v. Cabell*, 77 Va. 462.

¹⁰ *Green v. Stone*, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 34 Atl. 1099 [reversing, 32 Atl. 706]; *Biddle v. Pugh*, 59 N. J. Eq. 480, 45 Atl. 626.

¹¹ *Crowell v. St. Barnabas*, 27 N. J. Eq. 650. The mortgagee's right to sue exists "to avoid circuitry of action" and "not because of any right originally in the mortgagee." *Biddle v. Pugh*, 59 N. J. Eq. 480, 45 Atl. 626.

¹² "By a well-settled doctrine of equity the mortgagee as a creditor may by way of subrogation have the benefit of all collateral obligations which a person standing in the situation of a surety for another holds for his indem-

the liability of third persons is of very doubtful value in most jurisdictions. The results obtained from its application are generally the same as those resulting from the common-law rule that the promisor is personally liable to a third person for whose benefit the promise is made. The same results could have been reached under the common-law rule held by the majority of American courts; not that they always are so reached by the courts, but that they can be reached under the general rule. Furthermore, this common-law rule is in force in most of the states in which this equitable doctrine obtains. It seems to lead only to confusion to retain both doctrines side by side when the common-law doctrine can from its nature apply equally well to equity cases, and when it includes all the cases included by the equity rule, and more. The retention of the equity rule has therefore been criticized.¹³ In states which do not recognize the right of the third person to sue at common law, the equitable doctrine is, of course, important, as being the only means of enforcing the grantee's liability. Thus in Michigan the grantee is personally liable in equity, on principles of subrogation,¹⁴ though he is not liable at law.¹⁵ This doctrine has been extended to allow a creditor to enforce in equity a bond of indemnity against encumbrances, of which his claim is one.¹⁶ The courts which hold to the doctrine of subrogation as the basis of the right of the third person to sue, do not agree whether the right is independent of the right to foreclose or only collateral to it.

nity." *Green v. Stone*, 54 N. J. Eq. 387, 390, 55 Am. St. Rep. 577, 34 Atl. 1099 [reversing (N. J. Eq.), 32 Atl. 706]. The creditor's right to recover rests on "a well-known rule in equity that a creditor is entitled to the benefit of any obligations or securities given by his debtor to one who has become surety of his debtor for the payment of the debt." *Hopkins v. Warner*, 109 Cal. 133, 136, 41 Pac. 868 [quoted in *Ward v. De Oca*, 120 Cal. 102, 105, 52 Pac. 130]. Or on the "familiar principle that the creditor is entitled by way of equitable subrogation to all the securities held by a surety of the principal debtor." *Osborne v. Cabell*, 77 Va. 462, 467.

¹³ "In *Thorp v. Keokuk Coal Co.*, 48 N. Y. 258, the court said that it saw

no reason for invoking the doctrine of equitable subrogation, or resting upon it in such a case. When the law has absorbed, in a broader equity, the narrower one enforced in chancery, the form and measure of the latter ceases to be of consequence. One does not seek to trace the river after it has lost itself in the lake." *Gifford v. Corrigan*, 117 N. Y. 257, 264, 15 Am. St. Rep. 508, 6 L. R. A. 610, 22 N. E. 756.

¹⁴ *Crawford v. Edwards*, 33 Mich. 864; *Booth v. Ins. Co.*, 43 Mich. 299, 5 N. W. 381; *Corning v. Burton*, 102 Mich. 86, 96, 62 N. W. 1040, 1041; *Palmer v. Bray*, 136 Mich. 85, 98 N. W. 849.

¹⁵ *Hicks v. McGarry*, 38 Mich. 667.

¹⁶ *Smith v. Peace*, 69 Tenn. (1 Lea) 586.

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some holding that the mortgagee can sue the grantee in equity without resorting to foreclosure;¹⁷ others that he can sue only after a sale of the realty and a report of a deficiency, and then, of course, only for the deficiency.¹⁸ It has been invoked as a basis for holding that the promisor is not liable if his grantee was not personally liable;¹⁹ that failure of such third person to perform the contract between himself and the promisee would discharge the promisor;²⁰ that if the grantor does not see fit to interpose a defense to his liability to the mortgagee, his grantee who has assumed the debt can not interpose such defense;²¹ that a payment of interest on the mortgage debt, made by the grantee, prevents limitations from running;²² or for allowing reformation in a proper case and thereby eliminating a covenant to assume and pay a debt of the grantor's.²³

§ 2406. Right of third person to sue on bonds. The principles discussed in the preceding sections with reference to the necessity of an intention to benefit the third person directly have been applied to actions upon bonds. If a contractor who is erecting a building or other improvement enters into a contract with, or gives bond to, the owner of the realty upon which such improvement is erected, to pay all claims of persons furnishing material or labor in the erection of such improvements, many authorities hold that persons who furnish such material and labor may maintain an action on such bond.¹ C had agreed with B, a county, for which

¹⁷ *Pruden v. Williams*, 26 N. J. Eq. 210; *Green v. Stone*, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 34 Atl. 1099 [reversing (N. J. Eq.) 32 Atl. 706].

¹⁸ *Mickle v. Maxfield*, 42 Mich. 304, 3 N. W. 961.

¹⁹ *Ward v. De Oca*, 120 Cal. 102, 52 Pac. 130; *Trotter v. Hughes*, 12 N. Y. 74, 62 Am. Dec. 137; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650. In accordance with this view are the obiters in *Biddle v. Pugh*, 59 N. J. Eq. 480, 45 Atl. 626.

²⁰ *Osborne v. Cabell*, 77 Va. 462.

²¹ *Comstock v. Smith*, 26 Mich. 307; *Crawford v. Edwards*, 33 Mich. 354.

²² *Biddle v. Pugh*, 59 N. J. Eq. 480, 45 Atl. 626.

²³ *Bull v. Titworth*, 29 N. J. Eq. 73.

¹ *Iowa*. *Jordan v. Kavanaugh*, 63 Ia. 152, 18 N. W. 851; *Baker v. Bryan*, 64 Ia. 561, 21 N. W. 83; *Wells v. Kavanaugh*, 70 Ia. 519, 30 N. W. 871.

Kansas. *American Surety Co. v. Cement Co.*, 9 Kan. App. 8, 57 Pac. 237.

Kentucky. *Citizens' Trust & Guaranty Co. v. Peebles Paving Brick Co.*, 174 Ky. 489, 192 S. W. 508.

Michigan. *Knapp v. Swaney*, 56 Mich. 345, 53 Am. Rep. 397, 23 N. W. 162.

Minnesota. *Sepp v. McCann*, 47 Minn. 364, 50 N. W. 246.

Missouri. *Board, etc., v. Woods*, 77 Mo. 197; *St. Louis v. Von Phul*, 133

he was doing certain work, to look to the other contractors on the same piece of work for all damages due to their delays. A, knowing of C's covenant, agreed with B to construct certain iron work in a certain time so as not to delay C. A broke this covenant. It was held that C could recover from A for such breach.² Some courts, however, deny the right of persons who furnish material or labor,³ to maintain an action on a bond given by the builder to the party for whom he is constructing the improvement. This result is justified by some courts on the theory that the contract was primarily for the benefit of the promisee and not for the benefit of the parties who furnished material or labor.⁴ In some jurisdictions the right to enforce bonds is denied, on the ground of want

Mo. 561, 54 Am. St. Rep. 695, 34 S. W. 843; *Devers v. Howard*, 144 Mo. 671, 46 S. W. 625; *School District v. Livers*, 147 Mo. 580, 40 S. W. 507.

Nebraska. *Sample v. Hale*, 34 Neb. 220, 51 N. W. 837; *Lyman v. Lincoln*, 38 Neb. 794, 67 N. W. 531; *Kaufman v. Cooper*, 46 Neb. 644, 65 N. W. 796; *Forburger Stone Co. v. Lion Bonding & Surety Co.*, — Neb. —, 170 N. W. 897.

Washington. *State v. Liebes*, 19 Wash. 589, 54 Pac. 26 [distinguishing, *Breen v. Kelly*, 45 Minn. 352, 47 N. W. 1067, and also, *Clough v. Spokane*, 7 Wash. 279, 34 Pac. 934, and *State v. Cheetham*, 17 Wash. 131, 49 Pac. 227 (the last case on the ground that the special board in question could not create any liability against the fund other than to the contractor because of the limited power given to it by the legislature); overruling; *Sears v. Williams*, 9 Wash. 482, 37 Pac. 665, minority opinion; 39 Pac. 280, minority opinion; rehearing denied, 38 Pac. 135].

Wisconsin. *Concrete Steel Co. v. Illinois Surety Co.*, 163 Wis. 41, 157 N. W. 543.

² *Grant v. Lock Co.*, 77 Wis. 72, 45 N. W. 951.

³ **Colorado.** *International Trust Co. v. Keefe Manufacturing & Investment Co.*, 40 Colo. 440, 18 L. R. A. (N.S.) 455,

91 Pac. 915. (At any rate, such action can not be maintained if the property owner has accepted the building before the subcontractor knows of the bond or accepts it.)

Indiana. *State v. McCray*, 5 Ind. App. 350, 32 N. E. 341.

Kentucky. *Spradling v. McNess* (Ky.), 43 S. W. 765.

Minnesota. *Jefferson v. Asch*, 53 Minn. 446, 39 Am. St. Rep. 618, 25 L. R. A. 257, 55 N. W. 604.

Ohio. *Cleveland Metal Roofing & Ceiling Co. v. Gaspard*, 89 O. S. 185, L. R. A. 1915A, 768, 106 N. E. 9.

Oregon. *Parker v. Jeffrey*, 26 Or. 186, 37 Pac. 712; *Brower, etc., Lumber Co. v. Miller*, 28 Or. 565, 52 Am. St. Rep. 807, 43 Pac. 650.

Pennsylvania. *First M. E. Church v. Isenberg*, 246 Pa. St. 221, 92 Atl. 141.

Texas. *Santleben v. Cement Co.*, (Tex. Civ. App.), 25 S. W. 143; *Jones Lumber Co. v. Villegas*, 8 Tex. Civ. App. 689, 28 S. W. 538.

Utah. *Montgomery v. Rief*, 15 Utah 495, 50 Pac. 623.

Washington. *Armour v. Western Const. Co.*, 36 Wash. 529, 78 Pac. 1106.

Wisconsin. *Electric Appliance Co. v. Guaranty Co.*, 110 Wis. 434, 53 L. R. A. 609, 85 N. W. 648.

⁴ *Cleveland Metal Roofing & Ceiling Co. v. Gaspard*, 89 O. S. 185, L. R. A.

of privity.⁵ A covenant in a bond to pay for labor and material furnished to the obligor to enable him to perform his contract with the obligee, is sufficient to enable third persons furnishing material to maintain an action thereon.⁶ A became surety for Y on his bond to B, which provided: "The condition of this obligation is such that if the principal shall faithfully perform the contract on his part, and satisfy all claims and demands incurred for the same, and fully indemnify and save harmless the owner from all cost and damage which he may suffer by reason of failure so to do, and shall fully reimburse and repay the owner all outlay and expense which the owner may incur in making good any such default, then this obligation shall be null and void; otherwise it shall remain in full force and effect." By other provisions of the building contract to secure the performance of which such bond was given, B agreed to provide all materials. It was held that X, who had a claim against B for materials which were used by B in the performance of such contract, could bring an action upon such bond against B and A to recover for the value of the materials thus furnished, on the theory that "if the contract be to pay a debt due to a third person presumably, it is for his benefit, unless it appears that the contract was not so intended."⁷ The same rule applies where the contract between the city and the contractor provides that the city shall make no payment under the contract until all claims for labor and material shall have been adjusted, the city being authorized to apply money due under the contract to the payment of such claims,⁸ and even where the contractors' bond merely is conditioned that they "shall file with the board of public works, receipts of claims from all persons furnishing them with material and labor in the construction of such engine houses."⁹ In other jurisdictions such covenants are held not to enure to the

1915A, 768, 106 N. E. 9; *Armour v. Western Const. Co.*, 36 Wash. 529, 78 Pac. 1106. It is said that the "manifest purpose of the bond was protection" to the promisee, that is, to the property owner. *First M. E. Church v. Isenberg*, 246 Pa. St. 221, 92 Atl. 141.

⁵ *Armour v. Western Const. Co.*, 36 Wash. 529, 78 Pac. 1106.

⁶ *American Surety Co. v. Cement Co.*, 9 Kan. App. 8, 57 Pac. 237; *Citizens'*

Trust & Guaranty Co. v. Peebles Paving Brick Co., 174 Ky. 439, 192 S. W. 508; *Devers v. Howard*, 144 Mo. 671, 46 S. W. 625; *Kaufmann v. Cooper*, 46 Neb. 644, 65 N. W. 796.

⁷ *Concrete Steel Co. v. Illinois Surety Co.*, 163 Wis. 41, 157 N. W. 543.

⁸ *State v. Liebes*, 19 Wash. 589, 54 Pac. 26.

⁹ *Lyman v. Lincoln*, 36 Neb. 794, 67 N. W. 531.

benefit of the third person.¹⁰ Other courts base their decision on the ground that the promisor is not liable unless the promisee has put funds in his hands to pay to the third persons,¹¹ or some other legal liability exists from the promisee to third persons.¹²

The principle which has been applied to bonds given under special statute,¹³ has been applied to bonds which are not controlled by statute, and it has been held that such a bond is a dual contract, being in part for the benefit of the property owner, and in part being an agreement for the benefit of the laborers and materialmen to provide for their payment.¹⁴ A provision in a contractor's bond, to the effect that the contractor is to "pay for all the material" used on the building, is treated as being for the benefit of the materialmen.¹⁵ If A has given a bond to a railroad for the payment of provisions supplied to a contractor, who is working for the railroad, C, who furnishes such provisions, can not enforce such bond.¹⁶

§ 2407. Bonds controlled by special statute. A different question arises where a bond is given in compliance with a statute which names the obligee and prescribes for whose benefit such bond is given and who may sue thereon. Under statutes allowing suit by the party aggrieved, such party may sue in his own name, without reference to the obligee.¹ Where the bond is made payable to

¹⁰ In Wisconsin a promise to turn over a building to the city free of all claims and to give receipts for claims against such building does not enure to the benefit of a party who furnishes material. *Electric Appliance Co. v. Guaranty Co.*, 110 Wis. 434, 53 L. R. A. 609, 85 N. W. 648. This rule applies where the owner is not to pay the contractor until he is satisfied that there are no mechanics' liens on the building. *Campbell v. Carnegie*, 98 Wis. 99, 73 N. W. 572. To the same effect see, *Holly Mfg. Co. v. Water Co.*, 48 Fed. 879; *Parker v. Jeffrey*, 26 Or. 186, 37 Pac. 712; *Montgomery v. Rief*, 15 Utah 495, 50 Pac. 623.

¹¹ *Parker v. Jeffrey*, 26 Or. 186, 37 Pac. 712; *Washburn v. Investment Co.*, 26 Or. 436, 36 Pac. 533, 38 Pac. 620.

¹² *Jefferson v. Asch*, 53 Minn. 446, 39 Am. St. Rep. 618, 25 L. R. A. 257, 55 N. W. 604. See § 2397.

¹³ See § 2407.

¹⁴ *Forburger Stone Co. v. Lion Bonding & Surety Co.*, — Neb. —, 170 N. W. 897.

¹⁵ *Forburger Stone Co. v. Lion Bonding & Surety Co.*, — Neb. —, 170 N. W. 897.

¹⁶ *Armour v. Western Const. Co.*, 36 Wash. 529, 78 Pac. 1106.

¹ *United States v. Washington Corporation v. Young*, 23 U. S. (10 Wheat.) 406, 6 L. ed. 352; *Equitable Surety Co. v. McMillan*, 234 U. S. 448, 58 L. ed. 1394; *Williams v. Simons*, 70 Fed. 40, 16 C. C. A. 628; *Union Guaranty & Trust Co. v. Robinson*, 79 Fed. 420.

California. Hubert v. Mendheim, 64 Cal. 213, 30 Pac. 633.

the state, the county may sue on a bond for the release of personalty seized for taxes,² or on the bond of a defaulting tax-collector,³ since the county is in the first instance liable for the collection of taxes. So the beneficiaries of insurance policies may sue on a bond given by the insurer to the state,⁴ or the United States may sue on a sheriff's bond for the escape of a federal prisoner.⁵ Any person injured by breach of a liquor dealer's bond, payable to the state, may sue thereon.⁶ So claimants of property attached may sue on an indemnity bond given to the sheriff.⁷ Persons to whom an examination and inspection of ballots is referred on an election contest, may sue on contestant's bond;⁸ an assignee in insolvency may sue in his official capacity on a bond given by the debtors on appeal from a decision adjudging them insolvent;⁹ officers entitled to costs may sue on a supersedeas bond given to the adversary party, conditioned to pay to him the "value of the use and occupation of the property" in litigation, and "to pay all costs";¹⁰ and a judgment creditor may sue in his own name on a supersedeas bond made payable by mistake to the clerk.¹¹ If an officer, whose duty it is to collect taxes by making a levy on personalty in the first instance, does not do so, and thereby causes the tax to be collected out of realty, to the damage of a mortgagee thereof, such mortgagee has been allowed to maintain an action on the bond of such officer.¹² A bond given by a county clerk is not intended for

Minnesota. *St. Paul v. Butler*, 30 Minn. 459, 16 N. W. 362; *Morton v. Power*, 33 Minn. 521, 24 N. W. 194; *Koski v. Pakkala*, 121 Minn. 450, 47 L. R. A. (N.S.) 183, 141 N. W. 793.

Ohio. *Curry v. Homer*, 62 O. S. 233, 56 N. E. 870.

Oregon. *Crook County v. Bushnell*, 15 Or. 169, 13 Pac. 886; *Hume v. Kelly*, 28 Or. 398, 43 Pac. 380.

Tennessee. *Governor v. Allen*, 27 Tenn. (8 Humph.) 176, 47 Am. Dec. 601.

²*Curry v. Gila County*, 6 Ariz. 48, 53 Pac. 4 [citing, *Mendocino County v. Lamar*, 30 Cal. 628]; *Sacramento County Supers. v. Bird*, 31 Cal. 67; *Mendocino County v. Morris*, 32 Cal. 145.

³*Hume v. Kelly*, 28 Or. 398, 43 Pac. 380.

⁴*Union Guaranty & Trust Co. v. Robinson*, 79 Fed. 420.

⁵*State v. Hill*, 60 Fed. 1005, 24 L. R. A. 170.

⁶*Koski v. Pakkala*, 121 Minn. 450, 47 L. R. A. (N.S.) 183, 141 N. W. 793; *McGuire v. Glass*, 4 Tex. Civ. App. 78, 15 S. W. 127.

⁷*Williams v. Simons*, 70 Fed. 40, 16 C. C. A. 628.

⁸*Moede v. Haines*, 66 Minn. 419, 69 N. W. 216 [denying the authority of, *Dallas v. Savings Co.*, 158 Pa. St. 444, 27 Atl. 1055].

⁹*Court of Insolvency v. Meldon*, 69 Vt. 510, 38 Atl. 167.

¹⁰*Curry v. Homer*, 62 O. S. 233, 56 N. E. 870.

¹¹*Babcock v. Carter*, 117 Ala. 575, 67 Am. St. Rep. 193, 23 So. 487.

¹²*Raynsford v. Phelps*, 43 Mich. 342, 38 Am. Rep. 189, 5 N. W. 403. (In this case the officer made a false return of "no goods.")

the benefit of the publishers of newspapers in which he is required to print official notices, and such publishers can not recover on such bond for the failure of such official to publish notices which he is required by law to publish.¹³ B was a member of a firm of which C and Y were partners. Judgment was rendered against the firm of B, C & Y, and execution was levied upon B's property. B sought to enjoin the collection of such judgment and in such injunction proceedings B gave an appeal bond upon which A was surety, the condition of which was that if a judgment denying such injunction should be affirmed, A would pay the judgment rendered against B, C & Y. The order denying the injunction was affirmed, and A paid such judgment, took an assignment thereof, and sought to enforce it by levying upon C's property. It was held that A could enforce such judgment by levying upon C's property, since A's act in becoming surety upon such appeal bond was not intended for C's benefit, although it conferred incidental and consequential benefit upon it, and accordingly C could not take advantage of the contract between A and B.¹⁴

§ 2408. Bonds to protect laborers and materialmen on public improvements. In a number of jurisdictions, statutes have been passed which provide that public contractors must furnish bond to secure payment to persons who furnish them with labor, materials, and the like. The federal statute on this subject¹ may be taken as a fair type of such legislation. Similar statutes are to be found

Contra, *State v. Harris*, 89 Ind. 363, 46 Am. Rep. 169.

¹³ *People v. Hoag*, 54 Colo. 542, 45 L. R. A. (N.S.) 824, 131 Pac. 400.

¹⁴ *Rowe v. Moon*, 115 Wis. 566, 92 N. W. 263.

¹ "That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall prompt-

ly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full

with reference to public buildings in many states.² Statutes of this sort were enacted with reference to public buildings, on the theory that a mechanic's lien could not be taken upon a public building, and that while such lien might therefore be sufficient protection for laborers or materialmen in private contracts, they should be protected in some other way in case of public contracts. Under this statute, persons who have furnished labor or material in the construction of the work provided for in the contract, may

amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby authorized to bring suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution. Provided, That where suit is instituted by any of such creditors on the bond of the contractor, it shall not be commenced until after the complete performance and final settlement of said contract, and not later. And provided further, That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto with-

in one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability. Provided further, That in all suits instituted under the provisions of this Act, such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the state or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor." 33 Stats. at L., p. 811, c. 778 (Act of February 24, 1905), amending 28 Stats. at L., p. 278, c. 280 (Act of August 13, 1894).

² For Federal legislation concerning the construction of public buildings in the District of Columbia, see 30 Stats. at L., p. 906, c. 218 (Act of February 28, 1899).

maintain an action upon the bond of the contractor.³ The sureties upon a bond which is executed in compliance with such statute, are liable for materials which are furnished for the performance of the contract.⁴ This includes claims for quarrying stone,⁵ and claims for rental of cars, track and equipment,⁶ and for the expense of loading the plant and for freight therefor.⁷ Such bond includes the cost of apparatus which is to be used up in the performance of the work,⁸ but it does not include the cost of machinery which is meant to be used on a number of different contracts, although it may in fact be worn out by use under the contract in question:⁹ nor does it include the cost of general repairs.¹⁰ If the contract provides for excavation, one who furnishes explosives to use in blasting may recover upon such bond.¹¹ If the contractor purchases material in good faith from a wholesale dealer, he is not liable on his bond to one from whom such wholesale dealer had

³ Guaranty Co. v. Pressed Brick Co., 191 U. S. 416, 48 L. ed. 242; Hill v. American Surety Co., 200 U. S. 197, 50 L. ed. 437; Mankin v. Ludowici-Celadon Co., 215 U. S. 535, 54 L. ed. 315; Title Guaranty & Trust Co. v. Crane Co., 219 U. S. 24, 55 L. ed. 72; United States Fidelity Co. v. Bartlett, 231 U. S. 237, 58 L. ed. 200; Equitable Surety Co. v. McMillan, 234 U. S. 448, 58 L. ed. 1394; A. Bryant Co. v. N. Y. Steam Fitting Co., 235 U. S. 327, 59 L. ed. 253; Illinois Surety Co. v. Peeler, 240 U. S. 214, 240 L. ed. 609; Illinois Surety Co. v. John Davis Co., 244 U. S. 376, 61 L. ed. 1206 [affirming judgment, United States v. Illinois Surety Co., 226 Fed. 653, 141 C. C. A. 409]; George H. Sampson Co. v. Commonwealth, 202 Mass. 326, 88 N. E. 911; McCarthy Co. v. Rendle, 222 Mass. 405, 111 N. E. 39; Bay City v. Sandberg, 83 Or. 268, 163 Pac. 444.

⁴ United States v. Brent, 236 Fed. 771; McCarthy Co. v. Rendle, 222 Mass. 405, 111 N. E. 39; Bay City v. Sandberg, 83 Or. 268, 163 Pac. 444.

⁵ United States Fidelity Co. v. Bartlett, 231 U. S. 237, 58 L. ed. 200.

⁶ Title Guaranty & Trust Co. v. Crane

Co., 219 U. S. 24, 55 L. ed. 72; Illinois Surety Co. v. John Davis Co., 244 U. S. 376, 61 L. ed. 1206 [affirming judgment, United States v. Illinois Surety Co., 226 Fed. 653, 141 C. C. A. 409].

⁷ Title Guaranty & Trust Co. v. Crane Co., 219 U. S. 24, 55 L. ed. 72; Illinois Surety Co. v. John Davis Co., 244 U. S. 376, 61 L. ed. 1206 [affirming judgment, United States v. Illinois Surety Co., 226 Fed. 653, 141 C. C. A. 409].

A different result was reached in an action upon a bond given under the Wisconsin statute, and it was held that such bond did not cover freight for materials used in the construction of a public building. Wisconsin Brick Co. v. National Surety Co., 164 Wis. 585, 160 N. W. 1044.

⁸ National Surety Co. v. United States, 228 Fed. 577, 143 C. C. A. 99. Such as drills. National Surety Co. v. United States, 228 Fed. 577, 143 C. C. A. 99.

⁹ National Surety Co. v. United States, 228 Fed. 577, 143 C. C. A. 99.

¹⁰ National Surety Co. v. United States, 228 Fed. 577, 143 C. C. A. 99.

¹¹ George H. Sampson Co. v. Commonwealth, 202 Mass. 326, 88 N. E. 911.

purchased such material, although the person who furnishes such material has not been paid therefor.¹² One who furnishes provisions to the contractor's boarding-house, can not enforce such bond,¹³ at least unless he can show that he is a subcontractor.¹⁴ One who has furnished feed for animals employed in the performance of such contract, can not recover on such bond.¹⁵ A superintendent of construction furnishes labor, within the meaning of this statute, and may enforce such bond.¹⁶ Interest will be allowed upon such bond if allowance is in accordance with the law of the state where the bond is given.¹⁷ If, by statute, notice must be given as a condition precedent to an action upon such bond, no action can be maintained without a substantial compliance with such provisions.¹⁸ The general rule that a contract of suretyship is to be construed strictly, has no application to bonds which are given in compliance with such statutes.¹⁹ Since the statute contemplates complete indemnity to the beneficiaries, the bonds should be construed so as to give effect to such intention.²⁰ The fact that the contractor is unable to perform the contract, and that such contract is performed for him first by a committee of his creditors, and subsequently by a corporation formed for that purpose, and finally by his receiver in bankruptcy, does not relieve the surety.²¹ One who has advanced money to a public contractor, which is to be used in paying for labor and materials, can not enforce such bond on the theory that he has furnished labor or materials.²²

¹² *Concrete Steel Co. v. Rowles Co.*, 101 Neb. 400, 163 N. W. 323.

¹³ *National Surety Co. v. United States*, 228 Fed. 577, 143 C. C. A. 99; *Carstens Packing Co. v. Mitchell*, 95 Wash. 72, 163 Pac. 1.

¹⁴ *Carstens Packing Co. v. Mitchell*, 95 Wash. 72, 163 Pac. 1.

¹⁵ *United States v. Lowrance*, 236 Fed. 1006.

¹⁶ *Bankers' Surety Co. v. Maxwell*, 222 Fed. 797, 138 C. C. A. 345.

¹⁷ *Illinois Surety Co. v. Davis Co.*, 244 U. S. 376, 61 L. ed. 1206 [affirming judgment, *United States v. Illinois Surety Co.*, 226 Fed. 653, 141 C. C. A. 409].

See also, *Fidelity & Deposit Co. v. United States*, 229 Fed. 127, 143 C. C. A. 403; *George H. Sampson Co. v. Com-*

monwealth, 202 Mass. 326, 88 N. E. 911.

¹⁸ *Rodgers v. Fidelity & Deposit Co.*, 89 Wash. 316, 154 Pac. 444; *Carstens Packing Co. v. Mitchell*, 95 Wash. 72, 163 Pac. 1.

¹⁹ *Illinois Surety Co. v. Davis Co.*, 244 U. S. 376, 61 L. ed. 1206 [affirming judgment, *United States v. Illinois Surety Co.*, 226 Fed. 653, 141 C. C. A. 409]; *Columbia County v. Consolidated Contract Co.*, 83 Or. 251, 163 Pac. 438.

²⁰ *Columbia County v. Consolidated Contract Co.*, 83 Or. 251, 163 Pac. 438.

²¹ *Illinois Surety Co. v. John Davis Co.*, 244 U. S. 376, 61 L. ed. 1206 [affirming judgment, *United States v. Illinois Surety Co.*, 226 Fed. 653].

²² *People's National Bank v. Corsee*, 133 Tenn. 720, 182 S. W. 917.

Abutting property owners can not enforce a bond which is given under such statute for the benefit of laborers and materialmen.²³

If a bond purports to be an indemnity bond for the benefit of the promisee, a third person can not enforce such bond because of the provisions of a statute which purport to give such third person a right of action upon such a bond, if such provision is unconstitutional,²⁴ as where such provision is not fairly expressed in the title of the act, in violation of a mandatory constitutional provision.²⁵

Even under a constitutional statute requiring a bond to protect laborers and materialmen, it is held that sureties can not be held liable on a bond which does not, by its terms, purport to provide for paying such claims.²⁶ A provision in the contract, by which the contractor agrees to furnish material, can not impose upon the sureties on his bond the duty of paying for material which he has purchased, if the bond does not purport to include such liability.²⁷

§ 2409. Right of third person to enforce sealed instrument.

Whether a contract under seal, if intended for the benefit of a third party, may be enforced by him, is a question upon which there is a divergence of opinion in jurisdictions where a third person can enforce a simple contract for his benefit. The original common-law rule was that no action could be maintained on an indenture except by the parties thereto,¹ but a third person could

²³ *St. Louis v. Wright Contracting Co.*, 202 Mo. 451, 119 Am. St. Rep. 810, 101 S. W. 6.

²⁴ *Armour v. Western Const. Co.*, 36 Wash. 529, 78 Pac. 1106.

²⁵ *Armour v. Western Const. Co.*, 36 Wash. 529, 78 Pac. 1106. (The title of the statute referred to liens for labor and materialmen; but the provision of the statute which was involved in this case extended to provisions which were supplied to contractors.)

²⁶ *Babcock v. American Surety Co.*, 236 Fed. 340, 149 C. C. A. 472.

²⁷ *Babcock v. American Surety Co.*, 236 Fed. 340, 149 C. C. A. 472.

¹ *Alabama*. *Huckabee v. May*, 14 Ala. 263.

Indiana. *Haskete v. Flint*, 5 Blackf. (Ind.) 69, 33 Am. Dec. 452.

Maine. *Farmington v. Hobert*, 74 Me. 416.

New Hampshire. *How v. How*, 1 N. H. 49.

New Jersey. *Loeb v. Barris*, 50 N. J. L. 382, 13 Atl. 502.

New York. *Jenricus v. Englert*, 137 N. Y. 488, 33 N. E. 550.

Pennsylvania. *De Bolle v. Pennsylvania Ins. Co.*, 4 Whart. (Pa.) 68, 33 Am. Dec. 38.

Rhode Island. *Woonsocket Rubber Co. v. Banigan*, 21 R. I. 146, 42 Atl. 512.

Vermont. *Fairchild v. Ins. Association*, 51 Vt. 613.

The same view has been expressed in *Illinois*. *Harms v. McCormick*, 139 Ill. 104, 22 N. E. 511; but this has been held incorrect in *Webster v. Fleming*, 178 Ill. 140, 52 N. E. 975; *Gridley v.*

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maintain an action on a deed-poll against the party executing it, if he could sue on a simple contract.² The modern rule, influenced in part by statutes allowing a sealed instrument to be treated for purposes of bringing actions as if it were unsealed, allows third persons to sue on sealed contracts wherever they could sue on simple contracts.³ Where a third person can not sue on a simple contract for his benefit, he can not, of course, sue on a sealed contract.⁴

§ 2410. Right of promisee to enforce contract. Whether the promisee may bring an action on a contract made by him for the benefit of another, is a question on which there is some difference of opinion. In some jurisdictions the original promisee may maintain an action for the breach of such a contract. Thus A agreed with B to care for B's infant daughter, C, as his own. Instead of so doing he had her committed to the county asylum for common paupers. It was held that B could sue on such contract.¹ So where a city makes a contract with a gas company, requiring it not to charge private consumers more than a specified rate, it is held that in case of breach the city, though not a consumer, may have an injunction and may recover nominal damages.² Under statutes

Bayless, 43 Ill. App. 503; Home Library Association v. Witherow, 50 Ill. App. 117.

² Fellows v. Gilman, 4 Wend. (N. Y.) 414.

³ Illinois. Webster v. Fleming, 178 Ill. 140, 52 N. E. 975.

Missouri. Rogers v. Gosnell, 51 Mo. 466.

New York. Coster v. Albany, 43 N. Y. 399.

Ohio. Emmitt v. Brophy, 42 O. S. 82.

Oregon. Hughes v. Navigation Co., 11 Or. 437, 5 Pac. 206.

Wisconsin. McDowell v. Laev, 35 Wis. 171; Bassett v. Hughes, 43 Wis. 319; Stites v. Thompson, 98 Wis. 329, 73 N. W. 774.

"The cases in which one not a party to a contract may sue upon a promise in it for his benefit were at one time limited to contracts not under seal, and this court in stating the law on the subject in Follansbee v. Johnson, 28

Minn. 311, 9 N. W. 882, expressed that limitation; but the distinction in this respect between contracts by specialty and simple contracts has not in the later authorities been adhered to and may now be regarded as abandoned." Jefferson v. Asch, 53 Minn. 446, 448, 39 Am. St. Rep. 618, 25 L. R. A. 257, 55 N. W. 604.

⁴ Huntington v. Knox, 61 Mass. (7 Cush.) 371; Flynn v. Ins. Co., 115 Mass. 449.

¹ Vancleave v. Clark, 118 Ind. 61, 3 L. R. A. 519, 20 N. E. 527.

The grantor may maintain an action for breach of an agreement by the grantee to discharge a mortgage debt for which the grantor is personally liable. Keller v. Ashford, 133 U. S. 610, 33 L. ed. 667.

² Muncie Natural Gas Co. v. Muncie, 160 Ind. 97, 60 L. R. A. 822, 66 N. E. 436.

authorizing a party in whose name a contract is made with another to sue thereon in his own name, the obligee of such bonds may sue thereon. Thus a contestee to whom a bond in an election contest is made payable,³ or a sheriff to whom a forthcoming bond is made payable,⁴ may sue in his own name. On the other hand, it has been held that the covenant in a deed, by which grantee assumes and agrees to pay the mortgage debt of grantor, is a written promise to the creditor, not to the grantor.⁵ Recovery in quasi-contract has been allowed. Thus B furnished board and lodging to A. under an oral contract by which A was to pay therefor by transferring certain realty to B's children. The contract could not be enforced by reason of the Statute of Frauds. It was held that B could recover a reasonable compensation for such board from A.⁶

³Hilliard v. Brown, 103 Ala. 318, 15 So. 605.

⁴Clark v. Horn, 99 Ga. 165, 25 S. E. 203; Romero v. Wagner, 3 N. M. 167, 3 Pac. 50.

⁵It is an implied contract to pay the grantor whatever he may be obliged to pay thereon; and the statute of limitations applicable to written contracts

does not control. Poe v. Dixon, 60 O. S. 124, 71 Am. St. Rep. 713, 54 N. E. 86.

See also, Fanning v. Murphy, 126 Wis. 538, 105 N. W. 1056.

⁶Gay v. Mooney, 67 N. J. L. 687, 52 Atl. 1131 [affirming without opinion, Gay v. Mooney, 67 N. J. L. 27, 50 Atl. 596].

CHAPTER LXXIV

DUTIES OF THIRD PERSONS WITH REFERENCE TO CONTRACT

I. CONTRACTUAL OBLIGATIONS

§ 2411. Contractual obligations imposed on third persons.

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I

CONTRACTUAL OBLIGATIONS

§ 2411. Contractual obligations imposed on third persons. The bulk of contract law deals with the relations between the parties to the contract. We have considered the question of the power of one party to a contract to transfer his rights to a third person by assignment so that such third person may enforce the contract against the other party thereto.¹ We have also discussed the extent to which two parties may by contract confer contractual rights upon a third party so that he may enforce such contract as against the promisor.² There remains for consideration the question of the liability, if any, which a contract imposes upon third persons and of the extent, if any, to which they are bound to refrain from interfering therewith.

Since the fundamental notion of a contract is that it is an obligation that arises out of agreement,³ and since a party can not be bound by an offer to which he did not assent,⁴ it necessarily follows that A and B can not, by a contract between themselves, impose obligations of a contractual nature upon X.⁵ If X performs services which in their nature are entire, under a contract with A and B, X is not bound by a contract between A and B, that each shall pay half of the compensation for such services.⁶ If X enters into a contract with B, the owner of a saw-mill, to saw certain lumber, A's rights are not affected by the fact that B had a contract with X for the use of such mill, if A did not know of such contract.⁷ If A and B, who are stockholders in a corporation,

¹ See ch. LXXI.

² See ch. LXXIII.

³ See §§ 41 and 70.

⁴ See ch. V.

⁵ **England.** Durnford v. Messiter, 5 Maule & S. 446; Schmaline v. Thomlinson, 6 Taunt. 147.

Arkansas. Rice-Brown Lumber Co. v. Fleetwood, — Ark. —, 203 S. W. 692.

California. Galusha v. Fraser, — Cal. —, 174 Pac. 311.

Iowa. Stead v. Sampson (Ia.), 155 N. W. 978; Chase v. Evans, 178 Ia. 885, 3 A. L. R. 1071, 160 N. W. 346.

Kentucky. Ewell v. Best, 177 Ky.

673, 198 S. W. 4; Haldeman v. Haldeman, 176 Ky. 635, 197 S. W. 376.

Maine. Brown v. Chesterville, 63 Me. 241.

Massachusetts. Knowlton v. Parsons, 198 Mass. 439, 84 N. E. 798.

Oklahoma. Guss v. Federal Trust Co., 19 Okla. 138, 91 Pac. 1045.

Washington. Banks v. Eastern Railway & Lumber Co., 46 Wash. 610, 11 L. R. A. (N.S.) 485, 90 Pac. 1048.

Wisconsin. Rossman v. Townsend, 17 Wis. 95, 84 Am. Dec. 733.

⁶ Knowlton v. Parsons, 198 Mass. 439, 84 N. E. 798.

⁷ Rice-Brown Lumber Co. v. Fleetwood, — Ark. —, 203 S. W. 692.

enter into a contract for the management and control thereof, another stockholder, X, is not bound by such contract,⁸ even if he knows thereof. If B enters into a contract to buy certain goods from X, which he is to resell to A, and if the contract between B and X provides that A shall give bond for payment for such goods, A and B can not waive such provision.⁹ If A enters into a contract with B, by which A agrees to buy certain land from B, and B agrees that certain improvements shall be constructed upon adjoining realty, and if B has made a contract with X, by which X is to construct such improvements, the contract between A and B can not confer upon A a right to enforce such contract as against X.¹⁰ If X is indebted to B, and A pays such debt to B voluntarily, so that the transaction is payment and not assignment, A can not recover such debt from X.¹¹ If A has entered into a contract with B for the purchase of goods,¹² or for the performance of services,¹³ and in order to perform such contract B enters into a contract with X, such contract between B and X can not confer upon X any right as against A.¹⁴ If A lends money to pay a certain specified debt which B owes to X, and B pays such money to X, to be applied upon such debt, the fact that X applies such money to another debt does not give to A a right of action against X.¹⁵ If A assumes to act on behalf of X, and enters into a contract with B, such contract imposes no liability unless A had authority to represent X in such transaction.¹⁶

If B is indebted to X, and by a contract between A and B, A assumes and agrees to pay such debt, X may recover such debt from A in most of the jurisdictions in the United States,¹⁷ and it

If A had known of such contract, his conduct might have been an interference therewith. See §§ 2412 et seq.

⁸ *Haldeman v. Haldeman*, 176 Ky. 635, 197 S. W. 376.

⁹ *Browning v. North Missouri Cent. Ry. Co. (Mo.)*, 188 S. W. 143.

¹⁰ *Galusha v. Fraser*, — Cal. —, 174 Pac. 311.

¹¹ *Durnford v. Messiter*, 5 Maule & S. 446; *South Scituate v. Hanover*, 75 Mass. (9 Gray) 420; *Breneman's Appeal*, 121 Pa. St. 641. On the question of voluntary payments for the benefit of third persons, see § 1520.

The same principle applies where A voluntarily renders services for the

benefit of X without any contract with X, either express or implied, and in the absence of special circumstances which might justify the rendition of services on the ground of decency, humanity and the like. See § 1516.

¹² *Rossmann v. Townsend*, 17 Wis. 95, 84 Am. Dec. 733.

¹³ *Schmalzing v. Thomlinson*, 6 Taunt. 147.

¹⁴ See on this subject § 1439.

¹⁵ *Ewell v. Best*, 177 Ky. 673, 198 S. W. 4.

¹⁶ *Stead v. Sampson (Ia.)*, 155 N. W. 978. See on this question § 1762.

¹⁷ See ch. LXXIII.

is generally held that in the absence of an express agreement to the effect that B should become a mere surety for A, B remains primarily liable to X upon the original obligation and that X may recover such debt from either A or B.¹⁸ In some jurisdictions it is said that as a result of such transaction the original debtor becomes the surety, and the person who has assumed the debt becomes the principal debtor.¹⁹ In any event, if the contract between A and B provided expressly that B should become a surety, and X, with knowledge of such contract, elected to hold A as debtor, X would probably be regarded as having accepted the entire contract, including the provision by which B was to become a surety.²⁰

The only serious conflict of authority which has arisen upon this question is found in cases in which A and B have become jointly indebted to X as principal debtors, and subsequently by arrangement between themselves it is agreed that B shall be the principal debtor and A shall merely be surety. The most common case of this sort is found in partnerships in which one of the partners has retired and in which the remaining partner has assumed and agreed to pay the obligations of the firm. Since X, under his original contract, was entitled to hold A and B as primary debtors, no reason appears for allowing a subsequent agreement between A and B to alter X's right as against either; and, accordingly, it is held in a number of jurisdictions that X is not bound by such arrangement, and that as between X on the one side, and A and B on the other, the original debtors remain principal debtors,²¹ as

¹⁸ *Moore v. First National Bank*, 139 Ala. 595, 36 So. 777; *Butler v. Bruce*, 75 Neb. 322, 106 N. W. 445; *Denison University v. Manning*, 65 O. S. 138, 61 N. E. 706.

If the mortgagee does not assent to such arrangement he does not become a surety. *Shepherd v. May*, 115 U. S. 505, 29 L. ed. 456.

¹⁹ *Malanaphy v. Fuller & Johnson Mfg. Co.*, 125 Ia. 719, 106 Am. St. Rep. 332, 101 N. W. 640; *Regan v. Williams*, 185 Mo. 620, 105 Am. St. Rep. 600, 84 S. W. 959.

²⁰ See on this question *Meridian Life & Trust Co. v. Eaton*, 41 Ind. App. 118, 82 N. E. 480 [denying rehearing, 81 N. E. 667].

²¹ *North Dakota*. *Dean v. Collins*, 15 N. D. 535, 9 L. R. A. (N.S.) 49, 108 N. W. 242.

Ohio. *Rawson v. Taylor*, 30 O. S. 389, 27 Am. Rep. 464.

Tennessee. *Bryan v. Henderson*, 88 Tenn. 23, 12 S. W. 338; *Clinchfield Fuel Co. v. Lundy*, 130 Tenn. 135, L. R. A. 1915B, 418, 169 S. W. 563.

Texas. *A. F. Shapleigh Hardware Co. v. Wells*, 90 Tex. 110, 59 Am. St. Rep. 733, 37 S. W. 411.

Wisconsin. *First National Bank v. Finck*, 100 Wis. 446, 76 N. W. 608.

Contra, see *Stein v. Benedict*, 83 Wis. 603, 53 N. W. 891; *Brill v. Hoile*, 53 Wis. 537, 11 N. W. 42; *Gates v. Hughes*, 44 Wis. 332.

long as X has not accepted such offer on the part of A and B for some valuable consideration. In other jurisdictions, however, it has been held that when X receives notice of such arrangement between A and B, he is bound thereby, whether he assents to such arrangements or not, and whether he receives any consideration for assenting thereto or not.²² A number of the American cases which have taken this view have followed the supposed authority of an early English case,²³ in which it was contended by counsel that the creditor had assented to the arrangement whereby one of the original principal debtors became surety and in which the court assumed that such principal debtor was a surety without any discussion of the question. It was accordingly held in England in a subsequent case that such arrangement between A and B was not binding upon X, unless X had assented thereto and that mere notice of such arrangement was insufficient.²⁴ In this case the earlier case²⁵ was explained on the theory that by new contract upon sufficient consideration X agreed that the retiring partner should be a surety for the former debt. In a subsequent case, however,²⁶ the House of Lords repudiated the reasoning of the later case,²⁷ and held that X was bound upon receiving notice of such arrangement between A and B. It was suggested that the case was substantially the same as one in which A was surety and B was principal, but B did not communicate such fact to X, and in which X learned of such intent on A's part subsequently; in which case it was said that X would be bound by notice of A's intention to assume the liability of a surety so that any subsequent act on the part of X, which would have discharged a surety, would operate to discharge B. It is to be regretted that this anomaly is to survive in England or in any American courts.

A different question is presented in which A and B have entered into a contract of which X has notice and in which X seeks to

²² **England.** Rouse v. Bradford Banking Co. [1894], A. C. 586.

Georgia. Preston v. Garrard, 120 Ga. 689, 102 Am. St. Rep. 125, 49 S. E. 118.

Oklahoma. Johnson v. Jones, 39 Okla. 323, 48 L. R. A. (N.S.) 547, 135 Pac. 12.

New York. Colgrove v. Tallman, 67 N. Y. 95, 23 Am. Rep. 90.

Wisconsin. Stein v. Benedict, 83 Wis. 603, 53 N. W. 891.

²³ Oakeley v. Pasheller, 4 Clark & F.

207 [for opinion of court below see, Oakeley v. Pasheller, 10 Bligh (N. S.) 548].

²⁴ Swire v. Redman, L. R. 1 Q. B. 536.

²⁵ Oakeley v. Pasheller, 4 Clark & F. 207 [for opinion of court below see, Oakeley v. Pasheller, 10 Bligh (N. S.) 548].

²⁶ Rouse v. Bradford Banking Co. [1894], A. C. 586.

²⁷ Swire v. Redman, L. R. 1, Q. B. 536.

claim rights under a contract with B, which, if granted to him, will act as a breach of such contract to A's injury.²⁸ If A, the owner of certain realty, has entered into a contract with B, a contractor, for the construction of a building, by the terms of which it is provided that no liens under such contract shall be taken upon such building, a subcontractor who has a knowledge of such contract is bound by the terms thereof.²⁹ In questions of this sort, however, the contract between A and B does not impose any liability upon X, but X is precluded from asserting rights against A in violation of the terms of such contract, because such contract is either by fair implication a part of the contract between X and B,³⁰ or else X, by his contract with B, has attempted to interfere with the performance between A and B.³¹ If A has agreed to furnish services to B under a contract which leaves A free to select the means of furnishing such services, B and C can not compel A to employ C to furnish such services by a contract between themselves to which A does not assent.³²

II

INTERFERENCE WITH CONTRACT

§ 2412. Interference with contract—General nature of problem.

Whether the fact that two persons have made a contract imposes upon third persons the duty to refrain from interfering with it, is a question which is entirely different from the question whether the contract can impose contractual duties upon such third person. As between the parties thereto, a contract is a personal obligation, a right in personam. As between the parties to the contract and third person, is a contract to be regarded as a personal right, a right in rem, which third persons are bound to respect like other property rights? Is the right of a person to make contracts in the future a right which other persons are bound to respect and the violation of which is an actionable wrong? These questions are, of course, questions of tort law, and not of contract law. They are

²⁸ *Bates Machine Co. v. Trenton, etc.*, R. R. Co., 70 N. J. L. 684, 103 Am. St. Rep. 811, 58 Atl. 935.

²⁹ *Bates Machine Co. v. Trenton, etc.*, R. R. Co., 70 N. J. L. 684, 103 Am. St. Rep. 811, 58 Atl. 935.

³⁰ See § 2046.

³¹ See §§ 2412 et seq.

³² *Banks v. Eastern Railway & Lumber Co.*, 46 Wash. 610, 11 L. R. A. (N.S.) 485, 90 Pac. 1048.

discussed in connection with contracts only to complete the statement of the place of contract in law.¹

It was once said that this was "a subject which is likely to be one of the most important and difficult which will confront the courts during the next quarter of a century."² Almost a quarter of a century has elapsed since the court made this prediction, and the number of cases which have been presented for judicial decision, together with the amount of legislation on the subject, have justified the prediction. If the court had predicted that the question would be settled and that its fundamental principles would be determined during the next quarter of a century, the prediction would be far from being justified. The importance and magnitude of the conflicting interests, and the difficulty of laying down rules which, on the one hand, will permit free competition, and which, on the other hand, will preserve the rights of parties under their existing contracts, and the right to make contracts in the future, have prevented that harmony of judicial decision which is always so desirable and which is especially desirable in these cases in view of the enormous interests involved.³

The subject of interference with contract must be considered with reference to the nature of the wrongful act and to the necessity of malice. Is any wrongful interference with an existing contract or with the right to make contracts in the future an action-

¹ It is said, however, that "where one intentionally and maliciously induces another to breach his contract, he thereby becomes himself a party to the breach and liable for damages." *Wissmath Packing Co. v. Mississippi River Power Co.*, 179 Ia. 1309, L. R. A. 1917F. 790, 162 N. W. 846.

On the general subject of interference with contract, see *Interference with Contracts and Business in New York*, by E. W. Huffcut, 18 *Harvard Law Review*, 423; *Principles of Liability for Interference with Profession or Calling Trade*, by Sarat Chandra Basak, 27 *Law Quarterly Review*, 290, 399, 28 *Law Quarterly Review*, 52; *Interference with Contract Relations*, by Ernest Wilson Huffcut, 37 *American Law Register (N.S.)*, 273; *Wrongful Interference by Third Parties*

with the Rights of Employers and Employed, by Wm. L. Hodge, 28 *American Law Review*, 47, and *An Analysis of the Legal Value of a Labor Union Contract*, by Frank W. Grinnell, 41 *American Law Review*, 197.

² *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 231, 40 Am. St. Rep. 319, 21 L. R. A. 337, 55 N. W. 1119.

³ These cases are said to present "an apparent conflict or antimony between two rights that are equally regarded by the law, the right of the plaintiffs to be protected in the legitimate exercise of their trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others." *Martell v. White*, 185 Mass. 255, 102 Am. St. Rep. 341, 64 L. R. A. 260, 69 N. E. 1085.

able tort, or is it only cases of interference which are malicious that are actionable?

The nature of the contract as to its subject-matter must also be considered. The contract may be one of employment as a servant in the limited sense of the term, or it may be a contract of employment, but not as a servant in the limited sense of the term, or it may be a contract of any other lawful subject-matter.

In considering this subject, it is also necessary to deal with the nature of the contract as to the time at which it takes effect, and the time for which it is to continue. The contract may be an existing contract for a definite period of time, or it may be an existing contract for an indefinite period of time, which is in effect subject to termination by either party at will, or the right which is involved may be the right of one party to make contracts in the future with which the adversary party is interfering.

The subject must also be considered with reference to the means which is employed to interfere with the contract. The interference may be by persuading a person to break a contract or by forcing him to break it, in which may be included making it impossible for him to perform it.

The subject must also be considered with reference to the number of persons who interfere with the performance of an existing contract, or with the formation of future contracts. For some purposes, interference by a single individual stands on a different footing from interference by a large number of persons.

§ 2413. Wrongful nature of interference. It is axiomatic that an act does not amount to a tort unless it is at least wrongful. One who without negligence does an act which he has a right to do, does not thereby incur liability as a wrongdoer. If X does something which he has a legal right to do, the fact that the consequence of this rightful act is B's breach or termination of his contract with A, does not give to A a right of action against X.¹

¹ Haines v. Welker, 182 Ia. 431, 165 N. W. 1027; Banks v. Eastern Railway & Lumber Co., 46 Wash. 610, 11 L. R. A. (N.S.) 485, 90 Pac. 1048.

If A gives a valid assignment of his wages to X, knowing that A's employer, B, will discharge A, if he learns of such assignment. X's act in presenting such assignment to B and thereby caus-

ing A's discharge, does not give to A a right of action against X. Haines v. Welker, 182 Ia. 431, 165 N. W. 1027.

"In an amendment to petition the appellee asserts that his discharge was caused because he made such assignment. And we think that this allegation is proved. But it does not follow that this makes the defendants re-

But while this principle is recognized in the cases generally, including those on this topic, the application of so general and vague a principle to facts treated of in this chapter, on which the law is so unsettled, results in considerable conflict. Interference with an existing contract is almost always wrongful.² If the interference is intended to injure the party who loses the benefit of the contract or to benefit the party who interferes, it is ordinarily

sponsible for loss occasioned by such discharge. In effect, the position of appellee on this head is that he executed this assignment because it was demanded as security; that both plaintiff and defendant knew that if such an assignment became known to the employer plaintiff would be discharged; that the assignment being of exempt wages was void because the wife of plaintiff did not join therein; that when the defendants transferred their notes they transferred therewith the said assignment; that as part of the plan involved in the transfer such assignment was brought to the notice of the employer; and that therefore the plaintiff was discharged. It might be said that the rule of the employer concerning discharge because of an assignment of wages refers only to a valid assignment, and that when plaintiff claims the assignment was void he meets his own case and demonstrates that such assignment as was made did not cause his discharge. But we do not care to place ourselves upon that ground in view of the fact that, valid or void, the employer thought it sufficient cause for discharge. We confine the decision to the question whether the execution of a valid assignment, and the bringing of the same to the notice of the employer by the defendants, gave the plaintiff a right of action for loss due to the ensuing discharge. The plaintiff was at liberty to borrow or not to borrow. This carried with it the right to refuse making the as-

signment. He chose to make it. He knew that he gave it to secure his debt; he gave it so that the debt might be satisfied out of the wages assigned. He knew this could not be effected without advising the employer of the existence of the assignment. Had the assignment been presented, though no transfer of the notes had been made, and though no suit had been instituted in Nebraska, its effect upon his employment would have been just what it was in the actual case. So that, in the last analysis, the claim of the plaintiff at this point is that, because he gave a security which might lose him his employment if brought to the knowledge of his employer, the one who took the assignment is responsible for loss caused because the employer became advised of such assignment. It was no wrong to take the assignment; it was no wrong to advise the employer of its existence. If it was wrong, it was as much the act of the plaintiff as of the defendant, and he may not recover on this account under the maxim *volenti non fit injuria*." *Haines v. Welker*, 182 Ia. 431, 165 N. W. 1027.

See, *Unfair Methods of Competition*, by Gilbert H. Montague, 25 *Yale Law Journal*, 20.

See also, *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946.

² The act of procuring a breach of a contract is held to be of itself unlawful. *Schwenn v. Schwenn*, 166 Wis. 420, 2 A. L. R. 281, 166 N. W. 171.

See §§ 2423 et seq.

wrongful.³ Yet even in cases of this sort it has been held that the refusal of members of a trades-union to work for an employer unless he discharged employes who were members of a rival union, was not wrongful.⁴ This principle, where recognized, is referred to the doctrine of the right of competition.

If employes ask advice of others as to the line of conduct to be pursued by them for their own interests, the parties giving such advice are not liable to the employers for damages, even if as a result thereof the workmen discontinue work.⁵ Where the workmen, coal miners, were paid on a sliding scale, their wages varying with the price of coal; and the workmen, believing that the wholesalers who bought the coal from the employers of such workmen were using unfair means to force the price down, consulted their organization, and were advised to stop work on certain specified dates, as a demonstration to prevent such conduct in forcing down the price. It will be observed that this was not strictly a strike, although work was discontinued, and it was done to influence the conduct not of the employers, but of other persons. It was held that if the advice to stop work on certain days was given honestly, without malice, though the persons giving it knew of the existing contracts of the miners with their employers, such facts constitute lawful justification and excuse.⁶

§ 2414. Malice as element of wrong. Whether interference with contract is actionable whenever it is wrongful, or whether it is actionable only when it is malicious, is a question upon which there is some conflict in obiter. It is often said that interference with contract is actionable only if it is malicious.¹ If X interferes

³ See §§ 2414 et seq.

⁴ *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230; *National Protective Union v. Cumming*, 170 N. Y. 315, 88 Am. St. Rep. 648, 58 L. R. A. 135, 63 N. E. 369.

⁵ *Glamorgan Coal Co. v. South Wales Miners' Federation* [1903], 1 K. B. 118.

⁶ *Glamorgan Coal Co. v. South Wales Miners' Federation* [1903], 1 K. B. 118.

¹ *England. Quinn v. Leatham* [1901], A. C. 495.

Alabama. Brooks v. Ingram, 186 Ala. 106, 65 So. 138.

California. J. F. Parkinson Co. v. Santa Clara County Building Trades Council, 154 Cal. 581, 21 L. R. A. (N.S.) 550, 98 Pac. 1027.

New Hampshire. Moody v. Perley, — N. H. —, 95 Atl. 1047.

Maryland. Willner v. Silverman, 109 Md. 341, 24 L. R. A. (N.S.) 895, 71 Atl. 962.

Minnesota. Tuttle v. Buck, 107 Minn. 145, 131 Am. St. Rep. 446, 22 L. R. A. (N.S.) 509, 119 N. W. 946.

See, *Malice and Unlawful Interference*, by Ernst Freund, 11 *Harvard Law Review*, 449.

with an existing contract between A and B, in order to injure A, A clearly has a right of action against X.² If X desires to seek revenge against A, because A left X's employment, and X notifies A's employer, B, that X will not deal with B if B continues to employ A, and X thus secures A's discharge, X is liable to A. If the interference with an existing contract is wanton and malicious, it is actionable, whether the object of the person who interferes with such contract is to injure one of the parties thereto or to advance his own interests.³

The term "malice," in connection with interference with contract, frequently means nothing more than the doing of the wrongful act of interference without legal justification.⁴ Actual ill-will toward the injured party is not an essential feature of malice in this sense.⁵ In an action to recover damages for unlawful interference with contract, it is not necessary to prove a conspiracy or malice, even if both are alleged.⁶ It is sufficient to prove the unlawful interference with an existing contract.⁷ If X has caused B to break his contract with A by the performance of some wrongful act, the fact that X's purpose in doing such wrongful act was not primarily to cause B to break his contract with A, but to produce some other and different result, does not prevent X from being liable to A in damages.⁸ The fact that X intends to benefit himself by inducing B to break his contract with A, does not prevent A from recovering damages from X for the injury thus caused.⁹ The fact that X has induced B to break his contract with A, in order to benefit X financially, and without any active ill will toward A, does not prevent A from recovering damages from X for such breach.¹⁰ If B has a contract to buy goods from A, and X, knowing of such contract, offers B goods at a lower rate in order to induce him to break his contract with A, A may recover

² *Jones v. Leslie* 61 Wash. 107, 48 L. R. A. (N.S.) 893, 112 Pac. 81.

³ *Thacker Coal & Coke Co. v. Burke*, 59 W. Va. 253, 5 L. R. A. (N.S.) 1091, 53 S. E. 161.

⁴ *Wyeman v. Deady*, 79 Conn. 414, 118 Am. St. Rep. 152, 65 Atl. 129; *Brennan v. United Hatters, etc.*, 73 N. J. L. 729, 118 Am. St. Rep. 727, 9 L. R. A. (N.S.) 254, 65 Atl. 163.

⁵ *Peek v. Northern Pacific Ry.*, 51 Mont. 295, L. R. A. 1916B, 835, 152 Pac. 421.

⁶ *Wyeman v. Deady*, 79 Conn. 414, 118 Am. St. Rep. 152, 65 Atl. 129.

⁷ *Wyeman v. Deady*, 79 Conn. 414, 118 Am. St. Rep. 152, 65 Atl. 129.

⁸ *Sandlin v. Coyle*, 143 La. 121, L. R. A. 1918D, 389, 78 So. 261.

⁹ *S. C. Posner Co. v. Jackson*, 223 N. Y. 325, 119 N. E. 573.

¹⁰ *Cumberland Glass Mfg. Co. v. De Witt*, 120 Md. 381, Ann. Cas. 1915A, 702, 87 Atl. 927.

damages from X for such breach.¹¹ If a false statement is made with the intention of interfering with the business of another, and such other is injured thereby, the fact that such statement was made with the primary intention of advancing the interests of the person who made it, does not prevent the injured person from recovering damages.¹² If X makes unlawful threats against B,¹³ and thereby causes B to abandon his lease, X is liable to A, even if X made such threats for some other purpose,¹⁴ such as for the purpose of compelling B to pay money to X, which X claimed that B owed to him.¹⁵

Absence of justifiable cause for the wrongful act is spoken of as malice, although the phrase "without just cause" is said to be a description rather than a definition.¹⁶ Interference with contract

¹¹ *Cumberland Glass Mfg. Co. v. De Witt*, 120 Md. 381, Ann. Cas. 1915A, 702, 87 Atl. 927.

¹² *Martineau v. Foley*, 231 Mass. 220, 1 A. L. R. 1145, 120 N. E. 445.

¹³ *Sandlin v. Coyle*, 143 La. 121, L. R. A. 1918D, 389, 78 So. 261; *Twitchell v. Glenwood-Inglewood Co.*, 131 Minn. 375, 155 N. W. 621.

¹⁴ *Sandlin v. Coyle*, 143 La. 121, L. R. A. 1918D, 389, 78 So. 261.

¹⁵ *Sandlin v. Coyle*, 143 La. 121, L. R. A. 1918D, 389, 78 So. 261.

¹⁶ "The defendants did knowingly and for their own ends induce the commission of an actionable wrong, and they employed illegal means to bring it about. Such conduct would be actionable in an individual and incapable of justification, a fortiori where the defendants acted in concert. These considerations seem to me to exclude from discussion in this case the illustrations given in argument of what might in given circumstances be 'just cause,' or, in other words, suffice to negative malice. There was no relation between the defendants and either of the parties in this case at all analogous to those existing in the instances put of father and child, or doctor and patient, which I leave for solution when the case arises. The defendants have no

higher immunity from legal obligations than any other members of the community, and if they have legal rights they can enforce them by legal means only. It is not at all necessary in this case to embark upon the question whether 'without just cause' is a complete equivalent for what was meant in the common law by malice. I am inclined to think that, though in many cases adequate as a description, it is not co-extensive with it, nor do I think that in civil actions any more than in criminal it will be possible to eliminate motives from the discussion. See the weighty observations of Lord Brampton on this point in *Quinn v. Leathem* [1901], A. C. 495. It is, however, very desirable to guard against the notion that if the act done be illegal 'just cause' may still be averred to purge the wrong. For instance, where illegal means have been used to bring about the breach of a contract to the detriment of a party thereto, 'just cause' can not come into the discussion at all. The use of illegal means evidenced malice, and in this connection malice was not equivalent to 'without just cause.' The cause of intervention might be just, but the means used to enforce it might be illegal. The common-law action threw the burden of proof on

is said to be actionable when it is done "maliciously or without justifiable cause."¹⁷

§ 2415. Justification for interference with contract. Interference with the contractual relations of another is said to be an actionable wrong unless there is adequate justification therefor.¹ While such a statement of the law may be correct, it is so vague as to be of little help, since it does not indicate what sufficient justification is. Interference with an existing contract is not justifiable because of the fact that the party who interferes wrongfully with the contract of another does so in order to advance his own interests, and not primarily for the purpose of injuring the adversary party.² The fact that X interferes in a contract between A and B, because X is a competitor of A's, and wishes to secure X's employe, B, who has professional knowledge and skill in the business;³ or the fact that X needs laborers and secures them by getting laborers such as B, to break their contracts with A;⁴ or

the plaintiff. It was not enough for him to show that the defendant had brought about the breach of a contract between a third party and the plaintiff. He had to show that it was done maliciously, and the burden of proving malice lay upon him. It was not a case of a *prima facie* cause of action based on the fact that a breach of contract had been brought about to the detriment of the plaintiff, party thereto, by a stranger to the contract. The common law did not lightly extend rights arising out of contracts to and against persons not parties thereto, owing to the absence of privity (see the cases collected in the notes to *Pasley v. Freeman*, *Smith's Leading Cases*, 10th ed. 64). Some nexus had to be established between the plaintiff and the stranger, and this was found in malice. Unless the plaintiff could show this he failed to bring the stranger into such relations with him as to ground a cause of action, and, therefore, the burden was upon the plaintiff to prove a cause of action, not upon the defendant to justify. I think some

confusion has crept into the discussions on this matter through want of sufficient regard to these elementary points." *Read v. Friendly Society of Operative Stonemasons* [1902], 2 K. B. 732.

¹⁷ *Wheeler-Stenzel Co. v. American Window Glass Co.*, 202 Mass. 471, L. R. A. 1915F, 1076, 89 N. E. 28.

¹ *South Wales Miners' Federation v. Glamorgan Coal Co.* [1905], A. C. 239; *Read v. Friendly Society of Operative Stonemasons* [1902], 2 K. B. 732.

² *Read v. Friendly Society of Operative Stonemasons* [1902], 2 K. B. 732; *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556, 16 L. R. A. (N.S.) 746, 69 Atl. 405; *Beekman v. Marsters*, 195 Mass. 205, 122 Am. St. Rep. 232, 11 L. R. A. (N.S.) 201, 80 N. E. 817; *Oxner v. Seaboard Air Line Ry. Co.*, — S. Car. —, 96 S. E. 559.

³ *Beekman v. Marsters*, 195 Mass. 205, 122 Am. St. Rep. 232, 11 L. R. A. (N.S.) 201, 80 N. E. 817.

⁴ *Oxner v. Seaboard Air Line Ry. Co.*, — S. Car. —, 96 S. E. 559.

the fact that A compels B to break a contract to furnish A with certain goods in order that X may furnish such goods himself,⁵ does not prevent X from being liable to A.

§ 2416. Interference by act which in itself is tort. If X has committed a tort against A, the result of which is B's breach of contract with A, A may recover damages from X for such breach of contract in an action to recover for such tort.¹ If X has made statements concerning A which amount to slander, and the result of such slander is B's breach of his contract with A, A may recover damages from X due to such breach.²

§ 2417. Propriety of purpose—Competition. If the interference with the formation of future contracts is the result of legitimate competition, and consists in offering lower rates, better facilities, a higher grade product, and the like, no wrongful act has been committed, and no action lies, no matter how great the damage may be.¹ Even where a combination to wreck a business for the purpose of injuring the owner thereof, is a tort,² it is held that a combination between a wholesale oil company and certain oil producers, by which the wholesale company induced the producers to ship by a pipe line controlled by such oil company, the oil company refusing to buy oil unless it is shipped by that line, does not give the right of action in tort to another pipe line from which a great amount of business has thus been diverted.³ For like rea-

⁵ *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 536, 16 L. R. A. (N. S.) 746, 69 Atl. 405.

¹ *Max v. Kahn*, — N. J. —, 102 Atl. 737.

² *Max v. Kahn*, — N. J. —, 102 Atl. 737.

¹ *England. Mogul S. S. Co. v. McGregor* [1892], App. Cas. 25 [affirming, L. R. 23 Q. B. 598].

Louisiana. Lewis v. Huie-Hodge Lumber Co., 121 La. 658, 46 So. 685; *Gilly v. Hirsh*, 122 La. 966, 20 L. R. A. (N.S.) 972, 48 So. 422.

Minnesota. Victor Talking Machine Co. v. Lucker, 128 Minn. 171, 150 N. W. 790.

Pennsylvania. Cote v. Murphy, 159

Pa. St. 420, 39 Am. St. Rep. 686, 23 L. R. A. 135, 28 Atl. 190.

West Virginia. West Virginia Transportation Co. v. Oil Co., 50 W. Va. 611, 88 Am. St. Rep. 895, 56 L. R. A. 804, 40 S. E. 591.

² "If one wantonly or maliciously, whether for his own benefit or not, induce a person to violate his contract with a third person to the injury of that third person, it is actionable." From syllabus of *West Virginia Transportation Co. v. Oil Co.*, 50 W. Va. 611, 88 Am. St. Rep. 895, 56 L. R. A. 804, 40 S. E. 591.

³ *West Virginia Transportation Co. v. Oil Co.*, 50 W. Va. 611, 88 Am. St. Rep. 895, 56 L. R. A. 804, 40 S. E. 591.

sons, a strike for the purpose of compelling the employer to award the whole of a given class of work to the strikers, instead of dividing it between two competing organizations, is not wrongful.⁴ At

⁴"We are brought to the question of the legality of the strike in the case at bar, namely, a strike of bricklayers and masons to get the work of pointing, or to put it more accurately, a combination by the defendants, who are bricklayers and masons, to refuse to lay bricks and stone where the pointing of them is given to others. The defendants, in effect, say, we want the work of pointing the bricks and stone laid by us, and you must give us all or none of the work.

"The case is a case of competition between the defendant unions and the individual plaintiff for the work of pointing. The work of pointing for which these two sets of workmen are competing is work which the contractors are obliged to have. One peculiarity of the case therefore is that the fight here is necessarily a triangular one. It necessarily involves the two sets of competing workmen and the contractor, and is not confined to the two parties to the contract, as is the case where workmen strike to get better wages from their employer or other conditions which are better for them. In this respect the case is like *Mogul S. S. Co. v. McGregor*, L. R. 23, Q. B. Div. 598; on appeal [1892], A. C. 25.

"The right which the defendant unions claim to exercise in carrying their point in the course of this competition is a trade advantage, namely, that they have labor which the contractors want, or, if you please, can not get elsewhere; and they insist upon using this trade advantage to get additional work, namely, the work of pointing the bricks and stone which they lay. It is somewhat like the advantage which the owner of back land has when he has bought the front lot. He

is not bound to sell them separately. To be sure the right of an individual owner to sell both or none is not decisive of the right of a labor union to combine to refuse to lay bricks or stone unless they are given the job of pointing the bricks laid by them. There are things which an individual can do which a combination of individuals can not do. But, having regard to the right on which the defendants' organization as a labor union rests, the correlative duty owed by it to others, and the limitation of the defendants' rights coming from the increased power of organization, we are of opinion that it was within the rights of these unions to compete for the work of doing the pointing and, in the exercise of their right of competition, to refuse to lay bricks and set stones unless they were given the work of pointing them when laid. See, in this connection, *Plant v. Woods*, 176 Mass. 492, 502, 51 L. R. A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; *Berry v. Donovan*, 188 Mass. 353, 357, 108 Am. St. Rep. 499, 74 N. E. 603.

"The result to which that conclusion brings us in the case at bar ought not to be passed by without consideration.

"The result is harsh on the contractors, who prefer to give the work to the pointers because (1) the pointers do it by contract (in which case the contractors escape the liability incident to the relation of employer and employe); because (2) the contractors think that the pointers do the work better, and if not well done the buildings may be permanently injured by acid; and finally (3) because they get from the pointers better work with less liability at a smaller cost. Again, so far as the pointers (who can not lay

the same time, wrecking the business of another by unreasonable rate-cutting has been held to be actionable.⁶

§ 2418. Prior illegal conduct of injured party. The fact that the party who is injured by the wrongful act of an association was at one time a member thereof, does not prevent him from maintaining an action against the association to recover damages for its wrongful act.¹ The fact that the person who is prevented by a labor union from obtaining employment was himself once a member of the union, and that he joined such union to secure a part

brick or stone) are concerned, the result is disastrous. But all that the labor unions have done is to say, you must employ us for all the work or none of it. They have not said that if you employ the pointers you must pay us a fine, as they did in *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287. They have not undertaken to forbid the contractors employing pointers, as they did in *Plant v. Woods*, 176 Mass. 492, 31 L. R. A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011. So far as the labor unions are concerned, the contractors can employ pointers if they choose; but, if the contractors choose to give the work of pointing the bricks and stones to others, the unions take the stand that the contractors will have to get some one else to lay them. The effect of this in the case at bar appears to be that the contractors are forced against their will to give the work of pointing to the masons and bricklayers. But the fact that the contractors are forced to do what they do not want to do is not decisive of the legality of the labor unions' acts. That is true wherever a strike is successful. The contractors doubtless would have liked it better if there had been no competition between the bricklayers and masons, on the one hand, and the individual pointers on the other hand. But there is competition. There being competition, they prefer to give all

the work to the unions rather than get non-union men to lay bricks and stone to be pointed by the plaintiffs.

"Further, the effect of complying with the labor unions' demand apparently will be the destruction of the plaintiffs' business. But the fact that the business of a plaintiff is destroyed by the acts of the defendants done in pursuance of their right of competition is not decisive of the illegality of them. It was well said by Hammond J., in *Martell v. White*, 185 Mass. 255, 260, 64 L. R. A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085, 1087, in regard to the right of a citizen to pursue his business without interference by a combination to destroy it: 'Speaking generally, however, competition in business is permitted, although frequently disastrous to those engaged in it. It is always selfish, often sharp, and sometimes deadly.'" *Pickett v. Walsh*, 192 Mass. 572, 116 Am. St. Rep. 272, 6 L. R. A. (N.S.) 1067, 78 N. E. 753.

⁶ *Tuttle v. Buck*, 107 Minn. 145, 131 Am. St. Rep. 446, 22 L. R. A. (N.S.) 599, 119 N. W. 946.

¹ *Employing Printers' Club v. Dr. Blosser Co.*, 122 Ga. 509, 106 Am. St. Rep. 137, 69 L. R. A. 90, 50 S. E. 353; *Shinsky v. Tracey*, 228 Mass. 21, L. R. A. 1917C, 1053, 114 N. E. 957; *Brennan v. United Hatters*, 73 N. J. L. 729, 9 L. R. A. (N.S.) 254, 65 Atl. 165.

of the monopoly of the labor market, does not prevent him from obtaining relief.² Whether the combination seeks a lawful purpose or not, its acts may be unlawful because of the means which they may employ. Since he has not based his right of action upon the original contract, the maxim in *pari delicto* does not apply.³ The fact that A induced B to enter into a contract with him by fraud, does not prevent A from having a right of action against X for inducing B to break such contract, if X uses any means in inducing B to break such contract other than disclosing to B the truth as to A's statements.⁴ The fact that an employer has hired employes to take the place of the strikers by false representations to such new employes, does not justify the strikers in using force to compel such employes to quit working.⁵

§ 2419. Knowledge of existence of contract. No liability exists if the party who interferes with the performance of a contract between two others did not know of the existence thereof.¹ If, however, such person, while he does not know of the existence of the contract, knows the facts which put him upon inquiry, and if due inquiry would have disclosed the existence of the contract, such person is liable for interference therewith,² even if he omitted to make such inquiry.³ Actual notice or knowledge of the existence of the contract is unnecessary.⁴

§ 2420. Connection between wrongful act and breach. No action lies against X unless it can be shown that he induced B to break his contract with A. If B's breach of contract was not due to any wrongful act on the part of X, X is not liable to A.¹ If X

² *Brennan v. United Hatters*, 73 N. J. L. 729, 9 L. R. A. (N.S.) 254, 65 Atl. 165.

³ *Employing Printers' Club v. Dr. Blosser Co.*, 122 Ga. 509, 106 Am. St. Rep. 137, 69 L. R. A. 90, 50 S. E. 353.

⁴ *Beekman v. Marsters*, 195 Mass. 205, 122 Am. St. Rep. 232, 11 L. R. A. (N.S.) 201, 80 N. E. 817.

⁵ *Niles-Bement-Pond Co. v. Iron Molders' Union*, 246 Fed. 851.

¹ *McGurk v. Cronenwett*, 199 Mass. 467, 19 L. R. A. (N.S.) 561, 85 N. E. 576.

² *Twitchell v. Nelson*, 131 Minn. 375, 155 N. W. 621.

³ *Twitchell v. Nelson*, 131 Minn. 375, 155 N. W. 621.

⁴ *Twitchell v. Nelson*, 131 Minn. 375, 155 N. W. 621.

¹ *Iowa*. *Kock v. Burgess* (Ia.), 158 N. W. 534 [denying rehearing, *Kock v. Burgess* (Ia.), 156 N. W. 174].

Maryland. *McCarter v. Baltimore Chamber of Commerce*, 126 Md. 131, 94 Atl. 541.

Massachusetts. *Kennedy v. Hub Manufacturing Co.*, 221 Mass. 136, 108 N. E. 932.

seeks to recover damages against A, an attorney, for making false representations to B, to induce B to break his contract with X, X must show that B would have performed but for A's false statements.² If B has no valid contract with A, but only an option which has expired, and the only interference on the part of X is to advise A that such option is not valid, and to buy the property on which such option was given, X has no right of action against A.³ If A, the holder of an option, attempts to sell it to B, and B promises to pay a certain sum to A in case B exercises such option. B can not be compelled to pay such sum of money if he does not exercise such option, but waits until such option has expired and then buys such property from the original owner; and the fact that B tries in vain to prevent the owner from giving an extension of such option, does not increase B's liability.⁴

If the natural consequence of X's wrongful act is a breach of the contract between A and B, X is liable to A for damages thus caused, although X might not have been able to foresee such result.⁵ If A's wrongful act is such as naturally to result in a breach of the contract between A and B, X's liability is not impaired by the fact that B's act in terminating such contract was wrongful,⁶ or that such act was the result of a mistake upon B's part.⁷ If X holds an assignment of wages which is invalid as against A,⁸ as where it is not signed by A, but by another man bearing A's name,⁹ X's act in presenting such assignment to B with knowledge of a mistake in identity and the like, gives to A a right of action against X in case B discharges A.¹⁰ The fact that B discharges A without using ordinary care and prudence in ascer-

North Carolina. *Swain v. Johnson*, 151 N. Car. 93, 28 L. R. A. (N.S.) 615, 65 S. E. 619.

South Carolina. *Poston v. Lyerly*, 105 S. Car. 37, 89 S. E. 392.

Vermont. *Hooker, Corser & Mitchell Co. v. Hooker*, 33 Vt. 383, 95 Atl. 649.

² *Kock v. Burgess* (Ia.), 158 N. W. 534 [denying rehearing, *Kock v. Burgess* (Ia.), 156 N. W. 174].

³ *Swain v. Johnson*, 151 N. Car. 93, 28 L. R. A. (N.S.) 615, 65 S. E. 619.

⁴ *White v. Carnegie Steel Co.*, 255 Pa. St. 100, 99 Atl. 460.

⁵ *Doucette v. Sallinger*, 228 Mass. 444, 117 N. E. 897.

⁶ *Doucette v. Sallinger*, 228 Mass. 444, 117 N. E. 897; *Max v. Kahn*. — N. J. —, 102 Atl. 737.

⁷ *Doucette v. Sallinger*, 228 Mass. 444, 117 N. E. 897.

⁸ *Kennedy v. Hub Manufacturing Co.*, 221 Mass. 136, 108 N. E. 932.

⁹ *Lopes v. Connolly*, 210 Mass. 487, 38 L. R. A. (N.S.) 986, 97 N. E. 80; *Doucette v. Sallinger*, 228 Mass. 444, 117 N. E. 897.

¹⁰ *Lopes v. Connolly*, 210 Mass. 487, 38 L. R. A. (N.S.) 986, 97 N. E. 80; *Kennedy v. Hub Manufacturing Co.*, 221 Mass. 136, 108 N. E. 932.

now whether A is the person who gave such assignment, does not affect X's liability.¹¹

One who is guilty of interfering with the performance of a contract between two other persons is liable only for the damage which flows naturally and proximately from the breach.¹²

§ 2421. Enforceable character of contract. In order to sustain an action for interference with contract, it has been said that it must appear that there is a valid and enforceable contract, which has not been discharged, for interference with which damages are sought.¹ If A holds an option on B's property, which has expired, X's act in informing B that such option is not valid and in buying such property from B does not give to X a right of action against A.² If the contract of employment between A and B is unenforceable because of the Statute of Frauds, and if B has notified A that he intends to repudiate such contract before X has attempted to entice B away, A has no right of action against X for enticing B.³ If A acquiesces in B's breach and treats the contract between A and B as ended, it is said that A has no right of action against X for inducing B to refuse to perform such contract.⁴ In these cases, however, it is not shown that B would have performed but for X's interference, or else it is shown that A acquiesced in B's breach and treated the contract as discharged.

A may, however, be willing to enter into an agreement with B, which does not amount to an enforceable contract, and he may be willing to rely upon B's honor or B's willingness to perform; and in such cases he may be even more seriously injured by X's interference than he would be if the contract were a valid and enforceable obligation, since in the latter case he would have a cause of action against B for breach of contract, whether he had one against A for interference with contract or not. For these reasons it is held in some jurisdictions that if the agreement between A and B would have been performed by B but for X's interference, A has

¹¹ *Doucette v. Sallinger*, 228 Mass. 444, 117 N. E. 897.

¹² *Wissmath Packing Co. v. Mississippi River Power Co.*, 179 Ia. 1309, L. R. A. 1917F, 790, 162 N. W. 846.

¹ *Kock v. Burgess* (Ia.), 156 N. W. 174 [rehearing denied, *Kock v. Burgess* (Ia.), 158 N. W. 534]; *Swain v. Johnson*, 151 N. Car. 93, 28 L. R. A. (N.S.)

615, 65 S. E. 619; *Poston v. Lyerly*, 105 S. Car. 37, 89 S. E. 392.

² *Swain v. Johnson*, 151 N. Car. 93, 28 L. R. A. (N.S.) 615, 65 S. E. 619.

³ *Poston v. Lyerly*, 105 S. Car. 37, 89 S. E. 392.

⁴ *Kock v. Burgess* (Ia.), 156 N. W. 174 [rehearing denied, *Kock v. Burgess* (Ia.), 158 N. W. 534].

a cause of action against B, even though the agreement was not an enforceable contract.⁵ If B would have performed but for X's interference, the fact that A can not enforce such contract against B by reason of the Statute of Frauds, is not a defense to X, if B did not repudiate for that reason.⁶

§ 2422. Contract for indefinite time. Intermediate between ordinary cases of interference with an existing contract, and cases of the prevention of future contracts, are cases of existing contracts which can be terminated at the option of one of the parties thereto. The question is then presented whether interference whereby such person is induced to exercise such option is a tort. The weight of authority is that such conduct amounts to a tort if interference with a contract not voidable at the option of the party would be a tort.¹ It is a tort to make use of wrongful means to induce an employer to discharge an employee,² or to induce an employee to quit

⁵Cumberland Glass Mfg. Co. v. De Witt, 120 Md. 381, 87 Atl. 927; Rice v. Manley, 66 N. Y. 82, 23 Am. Rep. 30; Benton v. Pratt, 2 Wend. (N. Y.) 385, 20 Am. Dec. 623.

⁶Cumberland Glass Mfg. Co. v. De Witt, 120 Md. 381, 87 Atl. 927; Rice v. Manley, 66 N. Y. 82, 23 Am. Rep. 30; Benton v. Pratt, 2 Wend. (N. Y.) 385, 20 Am. Dec. 623.

¹Florida. Chipley v. Atkinson, 23 Fla. 206, 11 Am. St. Rep. 367, 1 So. 934.

Kentucky. Chambers v. Probst, 145 Ky. 381, 36 L. R. A. (N.S.) 1207, 140 S. W. 572.

Maine. Perkins v. Pendleton, 90 Me. 166, 60 Am. St. Rep. 252, 38 Atl. 96.

Maryland. Lucke v. Clothing Cutters' & T. Assembly, 77 Md. 396, 19 L. R. A. 408, 39 Am. St. Rep. 421, 26 Atl. 505; McCarter v. Baltimore Chamber of Commerce, 126 Md. 131, 94 Atl. 541.

Massachusetts. Moran v. Dunphy, 177 Mass. 485, 52 L. R. A. 115, 83 Am. St. Rep. 289, 59 N. E. 125; Berry v. Donovan, 188 Mass. 353, 108 Am. St. Rep. 499, 5 L. R. A. (N.S.) 899, 3 Am. & Eng. Ann. Cas. 738, 74 N. E. 603.

New Jersey. Brennan v. United Hat-

ters, 73 N. J. L. 729, 118 Am. St. Rep. 727, 9 L. R. A. (N.S.) 254, 9 Am. & Eng. Ann. Cas. 698, 65 Atl. 165; Jonas Glass Co. v. Glass Bottle Blowers' Assn., 77 N. J. Eq. 219, 41 L. R. A. (N. S.) 445, 79 Atl. 262.

²England. Read v. Friendly Society of Operative Stonemasons [1902], 2 K. B. 732.

United States. Blumenthal v. Shaw, 77 Fed. 954, 23 C. C. A. 690.

Florida. Chipley v. Atkinson, 23 Fla. 206, 11 Am. St. Rep. 367, 1 So. 934.

Illinois. London Guarantee & Accident Co. v. Horn, 206 Ill. 493, 99 Am. St. Rep. 185, 69 N. E. 526.

Kentucky. Chambers v. Probst, 145 Ky. 381, 36 L. R. A. (N.S.) 1207, 140 S. W. 572.

Maryland. McCarter v. Baltimore Chamber of Commerce, 126 Md. 131, 94 Atl. 541.

Massachusetts. Berry v. Donovan, 188 Mass. 353, 5 L. R. A. (N.S.) 899, 74 N. E. 603; Shinkay v. Tracey, 226 Mass. 21, L. R. A. 1917C, 1058, 114 N. E. 957.

New Jersey. Brennan v. United Hatters, etc., 73 N. J. L. 729, 118 Am. St. Rep. 727, 9 L. R. A. (N.S.) 254, 66 Atl. 165.

work,³ even if there is no employment for any fixed time. So a combination to cause the discharge of one whom his employer could discharge at his pleasure at the end of any week, is a tort.⁴ Where no action lies for causing breach of a contract of employment for an indefinite time, it is either because in that jurisdiction no action lies, even if the contract is for a definite time,⁵ or because the discharge is for other reasons not wrongful.⁶ A combination to induce or coerce customers to quit dealing with one with whom they have no binding contracts, but with whom they are in the habit of dealing, is actionable in tort.⁷

In some states, however, the fact that the party who is induced to terminate the contract has a legal right so to do, prevents the act of a third person in causing him to terminate it from being a tort, though it would have been a tort had such right to terminate it not existed.⁸ Thus A, a vendor of land, had agreed that B might withdraw from the contract for any reason that he saw fit. X, a broker, who negotiated the sale, made false and fraudulent representations to B, and thereby induced him to withdraw from such contract. It was held that A had no right of action against B.⁹ If no definite contract exists,¹⁰ or if an existing contract is about to terminate,¹¹ interference with the continuance or renewal of the contract is said not to be actionable. If a tenant's contract for electricity is about to expire, the act of the landlord in demanding that his tenant discontinue such service and enter into a contract

³ Walker v. Cronin, 107 Mass. 556.

⁴ Lucke v. Trimmers' Assembly, 77 Md. 396, 39 Am. St. Rep. 421, 19 L. R. A. 408, 26 Atl. 505.

⁵ Baker v. Ins. Co. (Ky.), 64 S. W. 913; Trimble v. Ins. Co. (Ky.), 64 S. W. 915.

⁶ Lancaster v. Hamburger, 70 O. S. 156, 71 N. E. 289 (where the party causing the discharge was a patron of the employer's street railway who made a justifiable complaint of employe's conduct, thereby causing his discharge); Raycroft v. Tayntor, 68 Vt. 219, 54 Am. St. Rep. 882, 33 L. R. A. 225, 35 Atl. 53 (where the party causing the discharge was in fact a foreman with full power to discharge).

⁷ Quinn v. Leathem [1901], App. Cas.

495 [affirming, Leathem v. Craig, 2 Ir. Rep. (1899) 667].

⁸ McGuire v. Gerstley, 204 U. S. 489, 51 L. ed. 581; Truax v. Bisbee Local, No. 380, Cooks' and Waiters' Union, 19 Ariz. 379, 171 Pac. 121; Hetzler v. Morrell, 82 Ia. 562, 48 N. W. 938; J. I. Case Threshing Machine Co. v. Fisher, 144 Ia. 45, 122 N. W. 675; People's Land & Manufacturing Co. v. Beyer, 161 Wis. 349, L. R. A. 1916B, 813, 154 N. W. 382.

⁹ Hetzler v. Morrell, 82 Ia. 562, 48 N. W. 938.

¹⁰ Truax v. Bisbee Local, No. 380, Cooks' and Waiters' Union, 19 Ariz. 379, 171 Pac. 121.

¹¹ People's Land & Manufacturing Co. v. Beyer, 161 Wis. 349, L. R. A. 1916B, 813, 154 N. W. 382.

with a competing public utility as a condition to renewing his lease, is not actionable.¹² If no binding contract of employment exists between an employer and members of a labor union, it is said that no right of action exists by reason of the fact that such union requires its members in such employment to quit work.¹³

§ 2423. Interference with existing contract—Subject-matter of contract—Doctrine of *Lumley v. Gye*. In considering the question of the liability of an individual who induces one person to break his contract with another, we are met at the outset by a hopeless difference of authority as to the general principle underlying the subject. Does this principle apply to all contracts or only to certain classes of contracts, such as contracts of employment? On this question there is such divergence as to make a general statement impossible. Considering first, therefore, contracts of employment, we find that the leading case at modern law is *Lumley v. Gye*.¹ A had a contract with B to sing at B's theater. X induced A to break her contract with B. B sued X for damages, and it was held that B could recover. This case was decided by a divided court, the majority of which agreed that there should be a recovery, but differed as to the ground on which recovery should be placed. One judge took the view that such interference with any contract was a tort; one, that the tort existed wherever a contract of employment was thus interfered with, but that the principle should be limited to contracts of employment; while the third held that the principle applied only where the contract was with one who was in the strict sense of the term a servant, and hence could have no application to such a contract as was here presented. The divergence of judicial opinion in this case was only a shadow, cast before, of the divergence of authority to follow. In England, *Lumley v. Gye* was followed in a case the facts of which were similar,² and the reasoning of the court reaffirmed the broad principle that interference with a contract of any subject-matter might be a tort. This principle was thought by some authorities to be discarded by the House of Lords in *Allen v. Flood*,³ but in a case

¹² *People's Land & Manufacturing Co. v. Beyer*, 161 Wis. 349, L. R. A. 1916B, 813, 154 N. W. 382.

¹³ *Truax v. Bisbee Local*, No. 380, *Cooks' and Waiters' Union*, 19 Ariz. 379, 171 Pac. 121.

¹ 12 El. & Bl. 216, 75 E. C. L. 216. See, *Principle of Lumley v. Gye, and Its Application*, by William Schofield, 2 *Harvard Law Review*, 19.

² *Bowen v. Hall*, 6 Q. B. D. 333.

³ [1898] A. C. 1 [reversing, *Flood v. Jackson* (1895), 2 Q. B. 21].

decided three years later,⁴ the House of Lords, while still dealing with contracts of employment, took the view that the principle involved was broad enough to apply to all contracts.

§ 2424. Contract of employment as servant. If the contract is one of employment as a servant, it is generally conceded that one who induces the servant to break the contract is liable in tort.¹ Cases of this sort are rare at modern law. The tort may not be uncommon, but litigation arising out of such tort is infrequent.

§ 2425. Contract of employment other than as servant. If the contract is one of employment, but not as servant in the strict sense of the term, we find a divergence of authority corresponding to that in *Lumley v. Gye*. The weight of modern authority is that one who induces another to break such a contract is liable to the party injured thereby.¹ In some jurisdictions interference with

See, *Allen v. Flood*, by Frederick Pollock, 14 *Law Quarterly Review*, 129; *The Authority of Allen v. Flood*, by H. L. Wilgus, 1 *Michigan Law Review*, 28, and *Allen v. Flood*: In *Roman Law*, by Walter H. Griffith, 1 *Journal of Comparative Legislation* (N.S.), 309.

⁴ *Quinn v. Leathem* [1901], App. Cas. 495 [affirming, *Leathem v. Craig*, 2 Ir. Rep. (1899), 667].

¹ *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475.

¹ **England.** *Bowen v. Hall*, 6 Q. B. D. 333; *Read v. Friendly Society of Operative Stonemasons* [1902], 2 K. B. 732; *Giblan v. National Amalgamated Labourers' Union* [1903], 2 K. B. 600; *South Wales Miners' Federation v. Glamorgan Coal Co.* [1905], A. C. 239.

United States. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 62 L. ed. 260, L. R. A. 1918C, 497.

Arkansas. *Johns v. Patterson*, — Ark. —, 211 S. W. 387.

Massachusetts. *McGurk v. Cronenwett*, 199 Mass. 457, 19 L. R. A. (N.S.) 561, 85 N. E. 576; *Lopes v. Connolly*, 210 Mass. 487, 38 L. R. A. (N.S.) 986, 97 N. E. 80; *Kennedy v. Hub Manufac-*

turing Co., 221 Mass. 136, 108 N. E. 932; *Doucette v. Sallinger*, 228 Mass. 444, 117 N. E. 897.

Minnesota. *Faunce v. Searles*, 122 Minn. 343, 142 N. W. 816.

New Jersey. *Max v. Kahn*, — N. J. —, 102 Atl. 737.

New York. *S. C. Posner Co. v. Jackson*, 223 N. Y. 325, 119 N. E. 573.

South Carolina. *Oxner v. Seaboard Air Line Ry. Co.*, — S. Car. —, 96 S. E. 559.

Vermont. *Hooker, Corser & Mitchell Co. v. Hooker*, 88 Vt. 335, 92 Atl. 443; *Hooker, Corser & Mitchell Co. v. Hooker*, 89 Vt. 383, 95 Atl. 649.

West Virginia. *Thacker Coal & Coke Co. v. Burke*, 59 W. Va. 253, 5 L. R. A. (N.S.) 1091, 53 S. E. 161.

For relief against directors of a corporation for enticing away the employees of the corporation, see *Hooker, Corser & Mitchell Co. v. Hooker*, 88 Vt. 335, 92 Atl. 443; *Hooker, Corser & Mitchell Co. v. Hooker*, 89 Vt. 383, 95 Atl. 649.

For the measure of damages in such cases, see *Hooker, Corser & Mitchell Co. v. Hooker*, 89 Vt. 383, 95 Atl. 649.

certain contracts,² such as contracts of employment,³ has been made a crime. The employer's right of action to recover for wrongful interference with a contract of employment, does not, however, depend upon statute.⁴

This principle has been applied to contracts to sing in a theater;⁵ to serve as laborer, or cropper,⁶ or farm laborer;⁷ to live with and care for a person in consideration of a certain weekly payment and a specified legacy;⁸ to act as exclusive agent for a hotel;⁹ to act as a salesman;¹⁰ to act as selling agent on commission,¹¹ or as general superintendent of a manufacturing company;¹² to work as mechanic in some manufacturing or mechanical business,¹³ or to serve as superintendent of schools.¹⁴ If A has employed B and others under a contract by which they have agreed not to join a labor union, and X attempts to induce them to break such provision of their contract, and to join a labor union, A is

² *Johns v. Patterson*, — Ark. —, 211 S. W. 387; *State v. Hurdle*, 113 Miss. 736, 74 So. 681.

³ *Johns v. Patterson*, — Ark. —, 211 S. W. 387; *State v. Hurdle*, 113 Miss. 736, 74 So. 681.

Such a statute (Arkansas, Acts 1905, p. 725), is not invalid as a violation of the Federal Peonage Act (Act of March 2, 1867, c. 187; 14 Stats. at L. 546, c. 187). *Johns v. Patterson*, — Ark. —, 211 S. W. 387.

Conviction of the crime is not a condition precedent to the right of action in tort. *Johns v. Patterson*, — Ark. —, 211 S. W. 387.

Such a statute, as far as it gives a right of action for damages, is declaratory of the common law, except where it clearly modifies it. *Johns v. Patterson*, — Ark. —, 211 S. W. 387.

⁴ *S. C. Posner Co. v. Jackson*, 223 N. Y. 325, 119 N. E. 673.

⁵ *Lumley v. Gye*, 2 El. & Bl. 216, 75 E. C. L. 216.

⁶ *Haskins v. Royster*, 70 N. Car. 601, 16 Am. Rep. 780.

⁷ *Oxner v. Seaboard Air Line Ry. Co.* — S. Car. —, 96 S. E. 559.

⁸ *May v. Wood*, 172 Mass. 11, 51 N. E. 191. (Breach was induced by state-

ments to the employer that the person performing the services was a dangerous person. The decision really was on a question of pleading, the majority of the court holding that the complaint was defective as not showing the statements substantially, while the minority held that the complaint was sufficient.)

⁹ *Beekman v. Marsters*, 195 Mass. 205, 122 Am. St. Rep. 232, 11 L. R. A. (N.S.) 201, 80 N. E. 817.

¹⁰ *Hooker, Corser & Mitchell Co. v. Hooker*, 88 Vt. 335, 92 Atl. 443; *Hooker, Corser & Mitchell Co. v. Hooker*, 89 Vt. 383, 95 Atl. 649.

¹¹ *Raymond v. Yarrington*, 96 Tex. 443, 62 L. R. A. 962, 73 S. W. 800 [reversing (Tex. Civ. App.), 69 S. W. 436]. (The defendant who induced the employer first to limit plaintiff's territory and finally to dismiss him, had been in the same business, and had sold out his business to plaintiff, with an agreement not to compete.)

¹² *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367, 1 So. 934.

¹³ *Walker v. Cronin*, 107 Mass. 555.

¹⁴ *Faunce v. Searles*, 122 Minn. 343, 142 N. W. 816.

entitled to relief against X.¹⁵ If A is a corporation which is formed for the purpose of capitalizing the name and the reputation of B, who is an expert designer, and if A has made a contract with B, extending over a number of years, X is liable to A for inducing B to break her contract with A in order to injure A.¹⁶ An officer of a corporation who has wrongfully induced such corporation to break its contract with one of its employes, and discharge him, is liable for damages.¹⁷

In other cases, however, it has been held that if the contract is for employment, but not as servant, a third party who induces its

¹⁵ *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 62 L. ed. 260, L. R. A. 1918C, 497.

"Another fundamental error in defendants' position consists in the assumption that all measures that may be resorted to are lawful if they are 'peaceable'—that is, if they stop short of physical violence, or coercion through fear of it. In our opinion, any violation of plaintiff's legal rights contrived by defendants for the purpose of inflicting damage, or having that as its necessary effect, is as plainly inhibited by the law as if it involved a breach of the peace. A combination to procure concerted breaches of contract by plaintiff's employes constitutes such a violation. *Flaccus v. Smith*, 199 Pa. St. 123, 54 L. R. A. 640; *South Wales Miners' Federation v. Glamorgan Coal Co.* [1905], A. C. 239, 244, 250, 253; *Jonas Glass Co. v. Glass Bottle Blow-Co.* [1905] A. C. 239, 244, 250, 253; *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 62 L. ed. 260, L. R. A. 1918C, 497.

"It was one thing for plaintiff to find, from time to time, comparatively small numbers of men to take vacant places in a going mine, another and a much more difficult thing to find a complete gang of new men to start up a mine shut down by a strike, when there might be a reasonable apprehension of violence at the hands of the strikers and their sympathizers. The

disordered condition of a mining town in time of strike is matter of common knowledge. It was this kind of intimidation, as well as that resulting from the large organized membership of the union, that defendants sought to exert upon plaintiff, and it renders pertinent what was said by this court in the *Gompers Case* (221 U. S. 418, 439), immediately following the recognition of the right to form labor unions: 'But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, can not be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights and appealing to the preventive powers of a court of equity. When such appeal is made it is the duty of the government to protect the one against the many as well as the many against the one.'" *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 62 L. ed. 260, L. R. A. 1918C, 497.

¹⁶ *S. C. Posner Co. v. Jackson*, 223 N. Y. 325, 119 N. E. 573.

¹⁷ *McGurk v. Cronenwett*, 199 Mass. 457, 19 L. R. A. (N.S.) 561, 85 N. E. 576.

breach is not liable in tort.¹⁸ This principle has been applied to a contract of employment as an actress.¹⁹

§ 2426. Contract other than employment—Interference held actionable. In contracts other than those of employment we find a divergence even greater than in that class of cases. The weight of modern authority holds that interference with any contract amounts to a tort.¹ While the injured party has an action against the party in default upon the contract, he is not limited thereto,

¹⁸ *Bourlier v. Macauley*, 91 Ky. 135, 34 Am. St. Rep. 171, 11 L. R. A. 550, 15 S. W. 60.

¹⁹ *Bourlier v. Macauley*, 91 Ky. 135, 34 Am. St. Rep. 171, 11 L. R. A. 550, 15 S. W. 60. (Inducing Mary Anderson to break her contract to appear at plaintiff's theatre.)

¹ *England. National Phonograph Co. v. Edison-Bell Consolidated Phonograph Co.* [1908], 1 Ch. 335. (If interference is by tortious means, otherwise not.)

United States. Bitterman v. Louisville & Nashville Ry., 207 U. S. 205, 52 L. ed. 171; *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 55 L. ed. 502 (obiter); *Automobile Insurance Co. v. Guaranty Securities Corporation*, 240 Fed. 222.

Arkansas. Wakin v. Wakin, 119 Ark. 509, 180 S. W. 471.

Iowa. Dunshee v. Standard Oil Co., 152 Ia. 618, 36 L. R. A. (N.S.) 263, 132 N. W. 371.

Kansas. Vaught v. Pettyjohn, — Kan. —, 178 Pac. 623.

Kentucky. Friedberg v. McClary, 173 Ky. 579, L. R. A. 1917C 777, 191 S. W. 300.

Maryland. Knickerbocker Ice Co. v. Gardiner Dairy Co., 107 Md. 556, 16 L. R. A. (N.S.) 746, 69 Atl. 405.

Massachusetts. Beekman v. Masters, 195 Mass. 205, 122 Am. St. Rep. 232, 11 L. R. A. (N.S.) 201, 11 Am. & Eng. Ann. Cas. 332, 80 N. E. 817; *McGurk v. Cronenwett*, 199 Mass. 457,

19 L. R. A. (N.S.) 561, 85 N. E. 576; *Wheeler-Stenzel Co. v. American Window Glass Co.*, 202 Mass. 471, L. R. A. 1915F, 1076, 89 N. E. 28.

Minnesota. Twitchell v. Nelson, 131 Minn. 375, 155 N. W. 621. "The same reasons cover every case where one person maliciously persuades another to break any contract with a third person. It is not confined to contracts for service." *Jones v. Stanly*, 76 N. Car. 355, 356 [quoted in *Angle v. Ry.*, 151 U. S. 1, 15]. "At common law the remedies for breach of contract were confined to the contracting parties, and limited to direct damages and consequential damages proximately resulting from the act of him who is sued. This general rule admitted of one exception, and that was the right of action against a stranger for wrongfully enticing away a servant in violation of his contract of service with his master. The exception is said to have been based on the ancient statute of laborers. The early English cases limited the action to the enticement of menial servants, but the later cases, beginning with *Lumley v. Gye*, 2 El. & Bl. 216, have extended the doctrine beyond menial servants; and by the modern interpretation of this doctrine by the English courts the rule is extended to a malicious interference with any contract." *Employing Printers' Club v. Doctor Blosser Co.*, 122 Ga. 509, 106 Am. St. Rep. 137, 69 L. R. A. 90, 50 S. E. 353.

but he may also maintain an action against the wrongdoer who induced such breach.²

This principle has been applied to contracts for the sale of realty;³ to contracts for the sale of personalty,⁴ whether the vendor,⁵ or the vendee,⁶ is induced to break the contract; to contracts to manufacture an article to order;⁷ to contracts with a carrier of freight,⁸ or passengers;⁹ to contracts of lease,¹⁰ and to bonds given to the state, to the damage of the sureties thereon.¹¹ It has been applied to an executed conspiracy between A and B to prevent B's divorced wife, X, from obtaining the benefits of her antenuptial contract with B, by having B transfer his property to A, in fraud of X's rights.¹²

² *National Phonograph Co. v. Edison-Bell Consolidated Phonograph Co.* [1908], 1 Ch. 335. (If interference is by tortious means; otherwise not); *Raymond v. Yarrington*, 96 Tex. 443, 97 Am. St. Rep. 914, 62 L. R. A. 962, 72 S. W. 580, 73 S. W. 800.

³ *Vaught v. Pettyjohn*, 104 Kan. 174, 178 Pac. 623; *Martens v. Reilly*, 109 Wis. 464, 84 N. W. 840; *McLennan v. Church*, 163 Wis. 411, 158 Wis. 73.

⁴ *Indiana*. *Jackson v. Stanfield*, 137 Ind. 592, 23 L. R. A. 588, 36 N. E. 345, 37 N. E. 14.

Iowa. *Dunshee v. Standard Oil Co.*, 152 Ia. 618, 36 L. R. A. (N.S.) 263, 132 N. W. 371.

Kentucky. *Friedberg v. McClary*, 173 Ky. 579, L. R. A. 1917C, 777, 191 S. W. 300.

Maryland. *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556, 16 L. R. A. (N.S.) 746, 69 Atl. 405.

Massachusetts. *Wheeler-Stenzel Co. v. American Window Glass Co.*, 202 Mass. 471, L. R. A. 1915F, 1076, 89 N. E. 28.

⁵ *England*. *Green v. Button*, 2 Crompt. M. & R. 707.

Kentucky. *Friedberg v. McClary*, 173 Ky. 579, L. R. A. 1917C, 777, 191 S. W. 300.

Maryland. *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556, 16 L.

R. A. (N.S.) 746, 69 Atl. 405; *Sumwalt Ice & Coal Co. v. Knickerbocker Ice Co.*, 114 Md. 403, 80 Atl. 48.

Massachusetts. *Wheeler-Stenzel Co. v. American Window Glass Co.*, 202 Mass. 471, L. R. A. 1915F, 1076, 89 N. E. 28.

New York. *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30.

Oklahoma. *Schonwald v. Ragains*, 32 Okla. 223, 39 L. R. A. (N.S.) 854, 122 Pac. 203.

⁶ *National Phonograph Co. v. Edison-Bell Consolidated Phonograph Co.* [1908], 1 Ch. 335. (Interference by fraud; no recovery if interference wrongful.) *Dunshee v. Standard Oil Co.*, 152 Ia. 618, 36 L. R. A. (N.S.) 263, 132 N. W. 371; *Cumberland Glass Mfg. Co. v. De Witt*, 120 Md. 381, Ann. Cas. 1915A, 702, 87 Atl. 927; *Morgan v. Andrews*, 107 Mich. 33, 64 N. W. 869.

⁷ *Morgan v. Andrews*, 107 Mich. 33, 64 N. W. 869.

⁸ *Jones v. Stanly*, 76 N. Car. 355.

⁹ *Nashville, etc., Ry. v. McConnell*, 82 Fed. 65.

¹⁰ *Twitchell v. Nelson*, 131 Minn. 375, 155 N. W. 621.

¹¹ *Wakin v. Wakin*, 119 Ark. 509, 180 S. W. 471.

¹² *Schwenn v. Schwenn*, 166 Wis. 420, 2 A. L. R. 281, 166 N. W. 171.

The right of the injured party to recover from the party who is guilty of interference is especially clear if such interference is effected by an act which is wrongful in itself.¹³ If A has agreed with a wholesale dealer, B, not to sell B's goods to X, and X, by fraud, induces A to break such covenant and to sell such goods to X, B may recover damages from X for such fraud.¹⁴

§ 2427. Contract other than employment—Interference held not actionable. In other jurisdictions liability in tort for inducing a breach of contract is held not to exist in contracts outside of contracts of employment if no wrongful act exists other than inducing such breach.¹ A leased rooms in a hotel to B. X induced A to break his contract and eject B. It was held that B had no right of action against X.² So A agreed to sell tobacco to B. X induced A to sell this tobacco to X, knowing of A's contract with B. It was held that B could not recover from X.³ So A owed an account to B, an undertaker. All the undertakers in the city had agreed to serve no one who owed a bill to any member of their organization. A needed the services of an undertaker and applied to B, who refused him. He then applied to the other members of the association, each of whom refused him. It was held that A had no right of action against B.⁴ A can not maintain an action against X for inducing B to break his contract to marry A, if X is not guilty of slander.⁵ A and B were engaged to be married. A's father, X, advised A to break the engagement and finally induced A to do so. It was held that B had no right of action against X

¹³ National Phonograph Co. v. Edison-Bell Consolidated Phonograph Co. [1908], 1 Ch. 335.

¹⁴ National Phonograph Co. v. Edison-Bell Consolidated Phonograph Co. [1908], 1 Ch. 335.

¹ Boyson v. Thorn, 98 Cal. 578, 21 L. R. A. 233, 33 Pac. 492; Chambers v. Baldwin, 91 Ky. 121, 34 Am. St. Rep. 165, 11 L. R. A. 545, 15 S. W. 57; Homan v. Hall, 102 Neb. 70, L. R. A. 1918C, 1195, 165 N. W. 881; Swain v. Johnson, 151 N. Car. 93, 28 L. R. A. (N.S.) 615, 65 S. E. 619; Sleeper v. Baker, 22 N. D. 386, 39 L. R. A. (N.S.) 864, Ann. Cas. 1914B, 1189, 134 N. W. 716.

It is said that X is liable to B, outside of employment contracts, only if he is guilty of deception or coercion as against A. Swain v. Johnson, 151 N. Car. 93, 28 L. R. A. (N.S.) 615, 65 S. E. 619.

² Boyson v. Thorn, 98 Cal. 578, 21 L. R. A. 233, 33 Pac. 492.

³ Chambers v. Baldwin, 91 Ky. 121, 34 Am. St. Rep. 165, 11 L. R. A. 545, 15 S. W. 57.

⁴ Brewster v. Miller, 101 Ky. 368, 38 L. R. A. 505, 41 S. W. 301.

⁵ Homan v. Hall, 102 Neb. 70, L. R. A. 1918C, 1195, 165 N. W. 881.

for interference with contract, her only remedy being an action for slander if X had been guilty of that tort.⁶

In some of the cases in which this doctrine has been announced, it may be doubted if the party whose liability in tort is sought to be enforced had committed any wrongful act. A had employed B for an indefinite term. X was A's foreman and had authority to discharge B. X quarreled with B, and instead of discharging B himself, X appealed to A, and notified him that if he did not discharge B, X would not work for A longer. A discharged B. It was held that B had no right of action against X.⁷ A had a contract with a railroad company, B, to haul sand and gravel which A was digging on land claimed by him, and was selling and shipping away. X claimed the same realty and notified B that he would hold him liable if he hauled such sand and gravel away. B broke his contract with A and refused to haul such sand and gravel. It was held that A had no right of action against X.⁸ In this case the court observed that the defendant corporation "had the undoubted legal right to protect its property interests in that manner," but at the same time the court further said that the doctrine of *Lumley v. Gye* was limited to interference between master and servant. A had given an option on certain realty to B. It was doubtful if B had any rights as against A, as he had not accepted the option in time; but A was ready to convey to B if B would pay the purchase price; and A had placed a deed with his attorney, Y, to deliver to B if B elected to take the land in a certain further period. B did not make such payment and X then bought such land from A. It was held that B had no right of action against X.⁹

§ 2428. Wrongfully preventing performance. In jurisdictions in which a party who induces another to break a contract is liable to the adversary party, his liability is still clearer if instead of inducing the breach, he does some wrongful act which makes performance impossible.¹ A had a contract with a railroad corpora-

⁶ *Leonard v. Whetstone*, 34 Ind. App. 383, 68 N. E. 197. For an action of slander in a somewhat similar case under a contract to bequeath property, see *May v. Wood*, 172 Mass. 11, 51 N. E. 191.

⁷ *Raycroft v. Tayntor*, 68 Vt. 219, 54 Am. St. Rep. 882, 33 L. R. A. 225, 35 Atl. 53.

⁸ *Glencoe, etc., Co. v. Commission Co.*, 138 Mo. 439, 60 Am. St. Rep. 560, 36 L. R. A. 804, 40 S. W. 93.

⁹ *Swain v. Johnson*, 151 N. Car. 93, 28 L. R. A. (N.S.) 615, 65 S. E. 619.

¹ *Angle v. Ry.*, 151 U. S. 1, 38 L. ed. 55; *Sandlin v. Coyle*, 143 La. 121, L. R. A. 1918D, 389, 78 So. 261; *Twitchell v. Glenwood-Inglewood Co.*, 131 Minn. 375, 155 N. W. 621.

tion, B, to construct a line of railroad, and was engaged in performing the contract. X, a rival company, bribed the officers of B to transfer to X all the stock of B, or put it under the control of X, and thus caused the general manager of B to withdraw the engineers of B from the work, without whom it could not proceed, and to give notices which caused A's tools and supplies to be seized and his workmen to be dispersed. A sued X, and it was held, on demurrer to A's petition, that he had stated a cause of action.² A, a real estate broker, effected a contract for the sale of realty between B, the vendor, and X, the vendee, under a contract whereby A was to look to B for his commission. X refused to perform and made it impossible for B to perform the contract to sell the realty, and thus deprived A of his commission. It was held that A could maintain an action against X for the damages thus caused.³ If X has interfered with B, who is A's tenant, so as to prevent B from performing the contract of lease into which he has entered with A, A may recover damages from B.⁴ In some jurisdictions it is made a wrongful act to induce tenants to abandon their leases.⁵ No liability exists under such statute, however, unless it can be shown that the party against whom the action was brought caused the breach of contract or took advantage thereof.⁶ If the statute makes such act a crime as well as a wrongful act, it is not necessary that the party against whom such action is brought shall be first convicted of the crime.⁷ If B has entered into a contract to deliver certain property to A, and X prevents B from performing by inducing B's employe to quit his employment, A may recover from X.⁸

In some jurisdictions, however, the right of the injured party to recover from the party outside the contract, who has made

² "If the Omaha company had by its wrongful conduct simply induced the Portage company to break its contract with Angle, it would have been liable to him for the damages sustained thereby. A fortiori when it not only induces a breach of the contract by the Portage company, but also disables it from performance." *Angle v. Ry.*, 151 U. S. 1, 15, 38 L. ed. 55.

³ *Livermore v. Crane*, 26 Wash. 529, 57 L. R. A. 401, 67 Pac. 221.

⁴ *Sandlin v. Coyle*, 143 La. 121, L. R. A. 1918D, 389, 78 So. 261; *Twitchell v. Glenwood-Inglewood Co.*, 131 Minn. 375, 155 N. W. 621.

⁵ *Sunnyside Co. v. Read*, 71 Ark. 59, 70 S. W. 462.

⁶ *Sunnyside Co. v. Read*, 71 Ark. 59, 70 S. W. 462; *Sneed v. Gilman* (Miss.), 44 So. 830.

⁷ *Wheeler v. Pannell*, 96 Miss. 382, 51 So. 598.

⁸ *Mealey v. Bemidji Lumber Co.*, 118 Minn. 427, 136 N. W. 1090.

performance impossible by some wrongful act, is denied.⁹ A had a contract to furnish B with electricity by means of B's wire, under a contract by which A was not to be liable in case of interruption of the current without A's fault. X cut the wire. It was held that B could not maintain an action against X for the damage caused by interruption of the current.¹⁰ It will be observed that this theory results in freeing X from all liability for the real injury done by his wrongful act, and in denying to B the right to recover from any one—a result which tends to show some error in the process whereby it was reached.

Where A had agreed to support B and X by its negligence disabled A, and made it practically impossible for him to perform, it was held that B had no cause of action against X.¹¹ A, the owner of certain realty, leased it to B. X entered and built a fence thereon, as a result of which B left and did not pay any rent. It was held that in the absence of fraud, A had no right of action against X.¹² If A has entered into a contract with B to cut B's timber, A can not recover from a railroad company which negligently sets fire to B's timber and destroys it without knowledge of A's contract with B.¹³ If B has entered into a contract with A, by which B is to lend money to A to enable A to redeem mortgaged realty, and X floods A's land and thus causes B to refuse to advance such money because of his distrust of the mortgage security, A can not recover from X for such damage.¹⁴

§ 2429. Interference with formation of future contract. If there is no contract in existence between A and B, and X interferes to prevent A from making contracts with B, some courts hold that B may recover from X for the damage thus caused.¹ In

⁹ *Wissmath Packing Co. v. Mississippi River Power Co.*, 179 Ia. 1309, L. R. A. 1917F, 790, 162 N. W. 846; *Thompson v. Seaboard Air Line Railway*, 165 N. Car. 377, 52 L. R. A. (N.S.) 97, 81 S. E. 315.

¹⁰ *Byrd v. English*, 117 Ga. 191, 43 S. E. 419.

¹¹ *Brink v. R. R.*, 160 Mo. 87, 53 L. R. A. 811, 60 S. W. 1058.

¹² *Walden v. Conn.*, 84 Ky. 312, 4 Am. St. Rep. 204, 1 S. W. 537.

¹³ *Thompson v. Seaboard Air Line Railway*, 165 N. Car. 377, 52 L. R. A. (N.S.) 97, 81 S. E. 315.

¹⁴ *Wissmath Packing Co. v. Mississippi River Power Co.*, 179 Ia. 1309, L. R. A. 1917F, 790, 162 N. W. 846. (This was decided under a statute which made X liable to persons whose lands were overflowed or damaged.)

¹ *Graham v. St. Charles Street R. Co.*, 47 La. Ann. 214, 49 Am. St. Rep. 366, 27 L. R. A. 416, 16 So. 806; *Moody v. Perley*, 78 N. H. 17, 95 Atl. 1047.

the common class of cases, B has some business or trade and X's wrongful act is looked upon as interfering therewith. Thus if X, an employer, threatens to discharge an employe, A, if A trades with B, it has been held that B can maintain an action against X.² If X, who is the cashier of the B bank, misrepresents to B the amount which A will wish to borrow in order to redeem from a mortgage in which X has an interest, in order to prevent A from redeeming from such mortgage, X is liable to A for the damage caused by such statement.³

In other cases this right of action has been denied if the means used to prevent the formation of the contract was not itself a tort.⁴ Thus where a teacher persuaded pupils not to patronize a certain store, it was held that the owner of the store could not maintain an action against the teacher, even if such conduct was malicious.⁵ A keeper of a restaurant, who is not a student in a college, and who has no children who are students therein, can not maintain an action against such college for an injunction and for damages, although the college has made a rule forbidding the students of such college to patronize such restaurant.⁶ If an employer threatens to discharge employes if they deal at a certain store, it has been held, contrary to the authority already discussed,⁷ that the owner of the store has no right of action against the employer.⁸ If X, who has leased realty to B, notifies B that on the expiration of such lease B will not be permitted to occupy X's premises unless B ceases purchasing electric power from A,

For the validity of criminal statutes on this subject, see *Aikens v. Wisconsin*, 195 U. S. 194, 49 L. ed. 154.

² *Graham v. R. R.*, 47 La. Ann. 214, 49 Am. St. Rep. 366, 27 L. R. A. 416, 16 So. 806; *Moody v. Perley*, 78 N. H. 17, 95 Atl. 1047.

³ *Moody v. Perley*, 78 N. H. 17, 95 Atl. 1047.

⁴ *United States v. Passaic Print Works v. Dry Goods Co.*, 105 Fed. 163, 44 C. C. A. 426, 62 L. R. A. 673.

Indiana. *Guethler v. Altman*, 26 Ind. App. 587, 84 Am. St. Rep. 313, 60 N. E. 355.

Kentucky. *Gott v. Berea College*, 156 Ky. 376, 51 L. R. A. (N.S.) 17, 161 S. W. 204.

Maine. *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373.

Tennessee. *Payne v. Ry.*, 81 Tenn. (13 Lea) 507, 49 Am. Rep. 666.

Wisconsin. *People's Land & Manufacturing Co. v. Beyer*, 161 Wis. 349, L. R. A. 1916B, 813, 154 N. W. 382.

⁵ *Guethler v. Altman*, 26 Ind. App. 587, 84 Am. St. Rep. 313, 60 N. E. 355; *People's Land & Manufacturing Co. v. Beyer*, 161 Wis. 349, L. R. A. 1916B, 813, 154 N. W. 382.

⁶ *Gott v. Berea College*, 156 Ky. 376, 51 L. R. A. (N.S.) 17, 161 S. W. 204.

⁷ See ante, this section.

⁸ *Payne v. Ry.*, 81 Tenn. (13 Lea) 507, 49 Am. St. Rep. 666.

with whom B has no definite contract, X incurs no liability to A by such demand, although as a result thereof B ceases to take electric power from A.⁹ It has been held that if X refuses to employ any one who rents of A, and by reason thereof A is unable to rent his house, A has no right of action against X.¹⁰ No injunction can be given against the action of competitors in cutting rates in order to break up a rival's business.¹¹

III

INTERFERENCE BY COMBINATION OR ASSOCIATION

§ 2430. Combination on different footing from individual. If a combination of persons, acting in conspiracy, attempts to compel one person to break a contract with another, a question is presented which in some respects is different from that in which one person induces or compels a breach of contract, since threats made by a number of persons, or by one person who controls a number of persons, may involve consequences very different from threats made by a single person.¹ If two or more persons unite for the purpose of accomplishing a given result, such combination is unlaw-

⁹ *People's Land & Manufacturing Co. v. Beyer*, 161 Wis. 349, L. R. A. 1916B, 813, 154 N. W. 382.

¹⁰ *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373.

¹¹ *Passaic Print Works v. Dry Goods Co.*, 105 Fed. 163, 62 L. R. A. 673, 44 C. C. A. 426.

¹ *England. Quinn v. Leathem* [1901], App. Cas. 495 [affirming *Leathem v. Craig*, 2 Ir. Rep. (1899), 667]; *Read v. Friendly Society of Operative Stonemasons* [1902], 2 K. B. 732; *Giblan v. National Amalgamated Laborers' Union* [1903], 2 K. B. 600.

United States. Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, L. R. A. 1918C, 497; *Niles-Bement-Pond Co. v. Iron Molders' Union*, 246 Fed. 851.

Massachusetts. Martell v. White, 185 Mass. 255, 102 Am. St. Rep. 341, 64 L. R. A. 260, 69 N. E. 1085; *Pickett v. Walsh*, 192 Mass. 572, 116 Am. St. Rep. 272, 6 L. R. A. 1067, 78 N. E. 753.

Nebraska. Marsh-Burke Co. v. Yost, 98 Neb. 523, 153 N. W. 573.

Wisconsin. Martens v. Reilly, 109 Wis. 464, 84 N. W. 840. "We have now arrived at the point where a labor union, being an organization brought about by the exercise on the part of its members of the right of every citizen to pursue his calling as he thinks best, is limited in what it can do by the existence of the same right in each and every other citizen to pursue his and their calling as he or they think best.

"In addition to the limitation thus put on labor unions, there is a fact which puts a further limitation on what acts a labor union can legally do. That is the increase of power which a combination of citizens has over the individual citizen. Take, for example, the power of a labor union to compel by a strike compliance with its demands. Speaking generally, a strike, to be successful, means not only coer-

ful either if they intend to accomplish an unlawful purpose or if they use unlawful means in accomplishing a lawful purpose.²

cion and compulsion, but coercion and compulsion which, for practical purposes, are irresistible. A successful strike by laborers means, in many, if not most cases, that for practical purposes the strikers have such a control of the labor which the employer must have, that he has to yield to their demands. A single individual may well be left to take his chances in a struggle with another individual. But in a struggle with a number of persons combined together to fight an individual, the individual's chance is small, if it exists at all. It is plain that a strike by a combination of persons has a power of coercion which an individual does not have.

"The result of this greater power of coercion on the part of a combination of individuals is that what is lawful for an individual is not the test of what is lawful for a combination of individuals; or, to state it in another way, there are things which it is not lawful for a combination of individuals to do. Take, for example, the case put in *Allen v. Flood* [1898], A. C. 1, 165, of a butler refusing to renew a contract of services because the cook was personally distasteful to him, whereupon, in order to secure the services of the butler, the master refrains from re-engaging the cook, whose term of service also had expired. We have no doubt that it is within the legal rights of a single person to refuse to work with another for the reason that the other person is distasteful to him, or for any other reason, however arbitrary. But it is established in this commonwealth that it is not legal (even where he wishes to do so) for an employer to agree with a union to discharge a non-union workman for an arbitrary cause at the request of the

union. *Berry v. Donovan*, 188 Mass. 353, 108 Am. St. Rep. 499, 74 N. E. 603. A fortiori a labor union can not, by a strike, refuse to work with another workman for an arbitrary cause. For the general proposition that what is lawful for an individual is not necessarily lawful for a combination of individuals, see *Quinn v. Leathem* [1901], A. C. 495, 511; *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 598, 616, on Appeal [1892], A. C. 25, 45; *Gregory v. Brunswick*, 6 Mann. & G. 205, on Appeal 3 C. B. 481. It is, in effect, concluded by *Plant v. Woods*, 176 Mass. 492, 51 L. R. A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011." *Pickett v. Walsh*, 192 Mass. 572, 116 Am. St. Rep. 272, 6 L. R. A. (N.S.) 1067, 78 N. E. 753. "Of the general proposition that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which, if it proceeded only from a single person, would be otherwise; and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights." *Martell v. White*, 185 Mass. 255, 102 Am. St. Rep. 341, 64 L. R. A. 260, 69 N. E. 1085.

See, *Privileges of Labor Unions in the Struggle for Life*, by W. W. Cook, 27 Yale Law Journal, 779.

²*Quinn v. Leathem* [1901], A. C. 495; *Martell v. White*, 185 Mass. 255, 102 Am. St. Rep. 341, 64 L. R. A. 260, 69 N. E. 1085, and *Bausbach v. Reiff*, 244 Pa. St. 559, L. R. A. 1915D, 785, 91 Atl. 224. "The case presents one phase of a general subject which gravely concerns the interests of the busi-

In the absence of specific statutory exceptions, combinations by employes or by labor unions for the purpose of interfering with the business of an employer are regarded as violations of the Sherman Act.³ Although the Clayton Act⁴ excepts agricultural and horticultural associations from its provisions, it does not authorize such associations to interfere with the contracts of business of others.⁵ Such an association will be enjoined from carrying on a secondary boycott in order to prevent other persons from trading with a specified individual.⁶

Probably, however, if bona fide persuasion alone were resorted to, the effect of persuasion by several acting in concert might not be substantially different as to its legal effect from persuasion by one. A combination of persons, to induce a breach of contract, usually, however, resorts to some form of compulsion when persuasion fails. At any rate, the reported cases on this branch of the subject involve the idea of compulsion in general.

ness world, and, indeed, those of all organized society, and which in recent years has demanded and received great consideration in the courts and elsewhere. Much remains to be done to clear the atmosphere, but some things, at least, appear to have been settled; and certainly at this stage of the judicial inquiry it can not be necessary to enter upon a course of reasoning or to cite authorities in support of the proposition that, while a person must submit to competition, he has the right to be protected from malicious interference with his business. The rule is well stated in *Walker v. Cronin*, 107 Mass. 555, 564, in the following language: 'Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition, but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise

is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing.' In a case like this, where the injury is intentionally inflicted, the crucial question is whether there is justifiable cause for the act. If the injury be inflicted without just cause or excuse, then it is actionable. *Bowen, L. J.*, in *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 598, 613; *Plant v. Woods*, 176 Mass. 492, 51 L. R. A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011. The justification must be as broad as the act, and must cover, not only the motive and the purpose, or, in other words, the object sought, but also the means used." *Martell v. White*, 185 Mass. 255, 102 Am. St. Rep. 341, 64 L. R. A. 260, 69 N. E. 1085.

³ *Loewe v. Lawler*, 208 U. S. 274, 52 L. ed. 488.

⁴ Act of October 15, 1914; 38 Stat. at L., 73 O. C. 323, § 6.

⁵ *United States v. King*, 250 Fed. 908.

⁶ *United States v. King*, 250 Fed. 908.

§ 2431. Whether combination necessarily illegal. It seems to have been held originally that a combination between workmen, for the purpose of raising their wages, was necessarily illegal, no matter what means might be employed.¹ It was also held that a combination between employers for the purpose of keeping down wages was illegal.² The rate of wages was probably selected by the court stating this view of the law, because, at the outset, the rate of wages was the chief thing in which the combination of employers and employes was concerned. The view that combinations of employes for the purpose of raising their wages, securing a better condition in hours of labor, circumstances of labor, and the like, is necessarily illegal, has long since been abandoned.³ At modern law the fact that employes or others act in combination is not necessarily illegal; and as long as it does not attempt to accomplish an illegal purpose, or to use illegal means, its acts are not regarded as illegal.

A labor union can not lawfully exercise coercion to compel its members to vote for certain designated public officers,⁴ whether they have pledged themselves in advance to support the candidates of the labor union or not.⁵

§ 2432. Discharge of employe caused by combination. The nature and extent of the liability of striking workmen, or others who have entered into a combination to compel a given course of action on the part of another, depends in part upon the relation of the party seeking relief to the transaction. An action against the parties to such a combination is often brought by an employe whose discharge is demanded. An employe whose discharge has been caused by the wrongful interference of an organization or association may recover damages against such organization or association.¹ By the weight of authority, an employe under

¹ *Rex v. Mawbey*, 6 T. R. 619; *Hilton v. Eckersley*, 6 El. & Bl. 47.

² *Hilton v. Eckersley*, 6 El. & Bl. 47.

³ *Farrer v. Close*, L. R. 4 Q. B. 602; *Hornby v. Close*, L. R. 2 Q. B. 153; *Arthur v. Oakes*, 63 Fed. 310, 25 L. R. A. 414, 11 C. C. A. 209; *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 38 Am. Dec. 346; *Snow v. Wheeler*, 113 Mass. 179; *Longshore Printing Co. v. Howell*, 23 Or. 527, 46 Am. St. Rep. 640, 38 L. R. A. 464, 38 Pac. 547.

⁴ *Schneider v. Local Union No. 60*, 116 La. 270, 114 Am. St. Rep. 549, 5 L. R. A. (N.S.) 891, 40 So. 700.

⁵ *Schneider v. Local Union No. 60*, 116 La. 270, 114 Am. St. Rep. 549, 5 L. R. A. (N.S.) 891, 40 So. 700.

¹ *Wyeman v. Deady*, 79 Conn. 414, 118 Am. St. Rep. 152, 65 Atl. 129; *Connors v. Connolly*, 86 Conn. 641, 45 L. R. A. (N.S.) 564, 86 Atl. 600; *Berry v. Donovan*, 188 Mass. 353, 5 L. R. A. (N.S.) 899, 74 N. E. 603; *Shinkley v.*

a contract, who is discharged by his employer, not for any fault of such employe, but because his other workmen refuse to work for him unless such employe is discharged, may have an action for damages against the persons thus causing his discharge.² The case of *Allen v. Flood*³ has been thought to modify this rule at

Tracey, 226 Mass. 21, L. R. A. 1917C, 1053, 114 N. E. 957; *Brennan v. United Hatters*, 73 N. J. L. 729, 118 Am. St. Rep. 727, 9 L. R. A. (N.S.) 254, 65 Atl. 165.

²*England*. *Read v. Friendly Society of Operative Stonemasons* [1902], 2 K. B. 732; *Giblan v. National Amalgamated Laborers' Union* [1903], 2 K. B. 600.

Connecticut. *Wyeman v. Deady*, 79 Conn. 414, 118 Am. St. Rep. 152, 65 Atl. 129; *Connors v. Connolly*, 86 Conn. 641, 45 L. R. A. (N.S.) 564, 86 Atl. 600.

Louisiana. *Schneider v. Local Union No. 60*, 116 La. 270, 114 Am. St. Rep. 549, 5 L. R. A. (N.S.) 891, 40 So. 700.

Maine. *Perkins v. Pendleton*, 90 Me. 166, 60 Am. St. Rep. 252, 38 Atl. 96.

Maryland. *Lucke v. Clothing Cutters*, etc., Assembly, 77 Md. 396, 39 Am. St. Rep. 421, 19 L. R. A. 408, 26 Atl. 505.

Massachusetts. *Berry v. Donovan*, 188 Mass. 353, 5 L. R. A. (N.S.) 899, 74 N. E. 603; *Shinkay v. Tracey*, 226 Mass. 21, L. R. A. 1917C, 1053, 114 N. E. 957.

New Jersey. *Brennan v. United Hatters*, 73 N. J. L. 729, 118 Am. St. Rep. 727, 9 L. R. A. (N.S.) 254, 65 Atl. 165. "The defendants did knowingly and for their own ends induce the commission of an actionable wrong, and they employed illegal means to bring it about. Such conduct would be actionable in an individual and incapable of justification, a fortiori where the defendants acted in concert." *Read v. Friendly Society of Operative Stonemasons* [1902], 2 K. B. 732, 738.

³[1898] A. C. 1 [reversing *Flood v. Jackson* (1895), 2 Q. B. 21].

"As to the vital distinction between *Allen v. Flood* ([1898] A. C. 1) and the present case, it may be stated in a single sentence. In *Allen v. Flood* ([1898] A. C. 1) the purpose of the defendant was by the acts complained of to promote his own trade interest, which it was held he was entitled to do, although injurious to his competitors, whereas in the present case, while it is clear there was combination, the purpose of the defendants was 'to injure the plaintiff in his trade as distinguished from the intention of legitimately advancing their own interests.' It is unnecessary to quote from the judgments of the majority of the learned judges in *Allen v. Flood* ([1898] A. C. 1) to show their opinions on the importance of this essential point. Lord Herschell, for example, said ([1898] A. C. at p. 132): 'The object which the defendant and those whom he represented had in view throughout was what they believed to be the interest of the class to which they belonged; the step taken was a means to that end.' And the other noble and learned lords in the majority expressed themselves to a similar effect. For myself, what I said was this ([1898] A. C. at p. 163): 'If anything is clear on the evidence, it seems to me to be this, that the defendant was bent, and bent exclusively, on the object of furthering the interests of those he represented in all he did; that this was his motive of action, and not a desire, to use the words of the learned judge, "to do mischief to the plaintiffs in their lawful calling." The case was one of competition in labour, which, in my

English law. In a recent case, however,⁴ *Allen v. Flood* has been explained and shown to be not necessarily opposed to this rule. In *Allen v. Flood* certain shipwrights were hired by the job, their employer being free to discharge them at any time. Some of the iron-workers in the shipyard refused to work with these shipwrights, because the shipwrights had in the past, while working for another employer, done certain iron work. Allen, a delegate of the iron-workers, notified the employers that the iron-workers would be called out, or would knock off work, the evidence being conflicting on this point, unless the shipwrights were discharged. Accordingly they were discharged. They then brought suit against Allen. It was held by a divided court that they could not recover. The subsequent case referred to⁵ points out that it did not appear in *Allen v. Flood* that Allen had any authority to cause a strike, and that as far as the record showed he did nothing more than to communicate to the employer the conceded fact that some of the men at least were not willing to continue work while these shipwrights were employed.

The fact that the organization or association which induces or compels others to break their contracts is acting primarily for the purpose of advancing the interests of its own members, and that it is interfering with the contracts of others, not with the primary object of injuring them, but with the incidental object of injuring

opinion, is in all essentials analogous to competition in trade, and to which the same principles must apply.'

"The ground of judgment of the majority of the House, however varied in expression by their Lordships, was, as it appears to me, that Allen in what he said and did was only exercising the right of himself and his fellow workmen as competitors in the labour market, and the effect of injury thus caused to others from such competition, which was legitimate, was not a legal wrong.

"It is only necessary to add that the defendants here have no such defense as legitimate trade competition. Their acts were wrongful and malicious in the sense found by the jury—that is to say, they acted by conspiracy, not for any purpose of advancing their

own interests as workmen, but for the sole purpose of injuring the plaintiff in his trade. I am of opinion that the law prohibits such acts as unjustifiable and illegal; that by so acting the defendants were guilty of a clear violation of the rights of the plaintiff, with the result of causing serious injury to him, and that the case of *Allen v. Flood* ([1898] A. C. 1), as a case of legitimate competition in the labour market, is essentially different, and gives no ground for the defendant's argument." *Quinn v. Leatham* [1901], A. C. 495.

⁴ *Quinn v. Leatham* [1901], App. Cas. 495 [affirming *Leatham v. Craig*, 2 Ir. Rep. (1899), 667].

⁵ *Quinn v. Leatham* [1901], App. Cas. 495 [affirming *Leatham v. Craig*, 2 Ir. Rep. (1899), 667].

them in order to advance its primary purpose of advancing the interests of its members, does not necessarily prevent such interference from being wrongful.⁶

⁶ "Serjeant Sullivan, on behalf of the appellants, insisted that the fact that the members of the Transport Union thought it for their own interest to pass a rule that they should not work for a stevedore who was not a member of the Stevedores' Union was quite legitimate, that they were not bound to work for him or for any other person for whom they did not choose to work, and were, in the legitimate promotion of their own interest, entitled, within the decision of *Mogul Steamship Co. v. McGregor, Gow & Co.* ([1892] A. C. 25), to observe that rule, though it might incidentally cause injury to those who desired to employ these workmen, but for whom they themselves did not desire to work. It is undoubtedly true that the members of a trade union need not work for those for whom they do not desire to work. That is the right to personal freedom of action referred to in the following well-known passages from the judgment of Lord Bramwell in *Reg. v. Druitt* ([1867] 10 Cox, C. C. 592, at p. 600) and from the essay of Sir W. Erle on Trade Unions (p. 12). They have been many times approved in your Lordships' House. They respectively run thus: 'The liberty of a man's mind and will, to say how he should bestow himself and his means, his talents, and his industry was as much a subject of the law's protection as was that of his body.' And, 'Every person has a right, under the law, as between himself and his fellow subjects, to full freedom in disposing of his own labour or his own capital, according to his own will. It follows that every person is subject to the correlative duty arising therefrom, and is prohibited from any ob-

struction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others.'

"But it is equally true that the members of trade unions are bound to respect the right of other workmen to work for whom they please, on what terms and at what times they please, so long as they do nothing illegal, and are also bound to respect the right of an employer to undertake any work he pleases to undertake, and to employ what workmen he chooses, on whatever terms they both agree to, unless there is something unlawful in his action. If, therefore, any two or more members of a trade union, whatever its rules may be, wilfully and knowingly combine to injure an employer by inducing his workmen to break their contracts with him, or not to enter into contracts with him resulting in damage to him, that is an entirely different matter. That is an invasion of the liberty of action of others, and has no analogy to the action of the defendant in the *Mogul Case* ([1892] A. C. 25); for there, as Lord Halsbury pointed out in *Quinn v. Leatham* ([1901] A. C. 495), no legal right had been interfered with, no coercion of mind or will had been effected, all were left free to trade on what terms they willed, and nothing was done except in rival trading which could be supposed to interfere with the appellant's interest.

"The fact that members of a trade union are merely acting in obedience to a rule of their union believed by them to be for their benefit is no defense to an action for the breach of any contracts they have entered into—*Read v. Friendly Society of Operative*

The fact that the employe whose discharge is caused by a combination, had voluntarily become a member of such corporation for the purpose of securing the monopolistic advantages thereof, does not prevent him from maintaining such action.⁷

§ 2433. Interference by voluntary association of dealers, manufacturers, etc. So-called voluntary associations are often found, the members of which agree not to deal with those who are not members of their association, or, in some cases, of an allied association. Such associations generally enforce discipline by means of fines or threats of expulsion. Whether a non-member, whose business is wrecked by his being excluded from or voluntarily remaining out of such association can have any relief against such association, is a question upon which there is a conflict of authority. In some states, especial stress is laid on the right of any man or any number of men, acting singly or in combination, to deal only with such persons as they may please. "It is perfectly lawful for any man (unless under contract obligation, or unless his employment charges him with some public duty) to refuse to work for or deal with any man or class of men as he sees fit. This doctrine is founded upon the fundamental right of every man to conduct his own business in his own way, subject only to the condition that he does not interfere with the legal rights of others. And, as has already been said, the right which one man may exercise singly, many, after consultation, may agree to exercise jointly and make simultaneous declaration of their choice."¹ If X gives to B the choice between remaining in the association X, and ceasing to do business with A, on the one hand, and leaving such association and doing business with A, on the other, X's act in giving such choice to B is said in some jurisdictions not to be a wrongful act; and A has no right of action against X if B elects to remain

Stonemasons ([1902] 2 K. B. 88, 732)—and still less is it a defense to the wilful and malicious infringement in combination of that legal right of personal freedom of action which they claim for themselves, but which others are entitled to quite as fully and as absolutely as they are." *Larkin v. Long* [1915] A. C. 814.

⁷ *Brennan v. United Hatters*, 73 N. J. L. 729, 9 L. R. A. (N.S.) 254, 65 Atl. 165.

¹ *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 234, 40 Am. St. Rep. 319, 21 L. R. A. 337, 55 N. W. 1119. See to the same effect, *Klingel's Pharmacy v. Sharpe*, 104 Md. 218, 64 Atl. 1029; *McCarter v. Baltimore Chamber of Commerce*, 126 Md. 131, 94 Atl. 541.

in such association and to cease doing business with A.² It is held that one who is not a member of a voluntary association of dealers in live stock, who had a rule not to recognize any yard trader unless a member, and to expel members who dealt with those who are not members, can not have an injunction against such association, although his business is wrecked because practically all the persons with whom he can do business are in such association and will not deal with him.³ A retail lumber association agreed not to buy of any wholesale dealer who should sell to any customers or dealers not members of such association at any point where a member of such association did business. A, a wholesale dealer, sold at such a point to one outside the association. B, the secretary of the association, demanded that A pay into the treasury of the association ten per cent. of the amount received from such sales; and on A's refusal so to do, B declared his intention of notifying the members of the association of A's conduct. A sued for an injunction. It was held that injunction should not be given.⁴ A was a master plumber not a member of the local association nor of the national association, of which the local association was a branch. The national association had passed a resolution that none of its members would buy material from any firm selling to any persons other than master plumbers, which by construction was held to mean master plumbers in the association. A sued to enjoin the local association from using this resolution to prevent firms from selling material to A. The injunction was refused.⁵

In other states, however, it has been held that the conduct of such voluntary associations is unlawful if it is intended to wreck the business of others by inducing third persons to cease dealing with such others.⁶ A combination of persons for the purpose of causing a malicious injury to another by running his business, is held to be actionable at common law as well as by statute.⁷ A

² *Klingel's Pharmacy v. Sharpe*, 104 Md. 218, 64 Atl. 1029; *McCarter v. Baltimore Chamber of Commerce*, 126 Md. 131, 94 Atl. 541.

³ *Doune v. Bennett*, 63 Kan. 653, 88 Am. St. Rep. 256, 55 L. R. A. 560, 66 Pac. 623.

⁴ *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 40 Am. St. Rep. 319, 21 L. R. A. 337, 55 N. W. 1119.

⁵ *Macauley v. Tierney*, 19 R. I. 255,

61 Am. St. Rep. 770, 37 L. R. A. 455, 33 Atl. 1. (The doctrine of competition was invoked as the ground for refusing such injunction. *Bohn Mfg. Co. v. Hollis*, *supra*, was cited and followed.)

⁶ *Martell v. White*, 185 Mass. 255, 64 L. R. A. 260, 69 N. E. 1085.

⁷ *State, ex rel. Durner, v. Huegin*, 110 Wis. 189, 62 L. R. A. 700, 85 N. W. 1046.

combination of a number of dealers to maintain prices and to prevent supplies from being furnished to dealers, who will not join their organization, is illegal.⁸ An action for damages lies by a dealer who has been prevented from obtaining articles necessary in his business by a combination of other dealers formed for the purpose of maintaining prices, if such combination so acts in order to compel him to become a member thereof.⁹ If an association of dealers imposes fines upon its members, for dealing with those who are not members, and such fines are so large as to amount to coercion, such association is liable to persons whose trade or business is injured by their conduct.¹⁰ Thus it has been held that a druggist who was not a member of the druggists' association of a certain city, could have an injunction to prevent the association restraining or from sending circulars out to wholesale dealers, notifying them that if they continued to deal with plaintiff the druggists' association would not buy from them.¹¹ It has been suggested in argument that a distinction should be made between cases where the association attempts to influence the action of its own members only, and those where the association attempts to influence the conduct of those outside of the association.¹² This distinction has, however, been repudiated on the ground that the system of fines and expulsions amounts to coercion, and that no logical distinction can be drawn between coercion of those outside of an association, and coercion of a minority of the members of an association by the majority.¹³ An association of granite manufacturers, including practically all those in that business with whom A could have dealings, made a rule that they would not sell to or deal with persons not members of their association. The association notified A, who owned the plant for polishing granite, that he could not do any polishing until he joined the association. They did not try to affect the conduct of any not members of the association, but a system of fines compelled the members of the associa-

⁸ *Klingel's Pharmacy v. Sharpe*, 104 Md. 218, 118 Am. St. Rep. 399, 7 L. R. A. (N.S.) 976, 64 Atl. 1029.

⁹ *Klingel's Pharmacy v. Sharpe*, 104 Md. 218, 118 Am. St. Rep. 399, 7 L. R. A. (N.S.) 976, 64 Atl. 1029.

¹⁰ *Martell v. White*, 185 Mass. 255, 102 Am. St. Rep. 341, 64 L. R. A. 260, 69 N. E. 1085.

¹¹ *Brown v. Pharmacy Co.*, 115 Ga. 429, 90 Am. St. Rep. 126, 57 L. R. A. 547, 41 S. E. 553.

¹² See argument in *Boutwell v. Marr*, 71 Vt. 1, 76 Am. St. Rep. 746, 43 L. R. A. 803, 42 Atl. 607, as discussed in opinion of the court.

¹³ *Boutwell v. Marr*, 71 Vt. 1, 76 Am. St. Rep. 746, 43 L. R. A. 803, 42 Atl. 607.

tion to comply with the resolutions passed by the majority. It was held that A could recover actual damages from those persons who had, by passing and enforcing such resolution, wrecked his business.¹⁴ It has also been held that an action for damages would lie at common law against a combination of wholesalers who agreed to sell to or deal with certain retailers only.¹⁵ It has been suggested that in order to make such combinations unlawful, so that a third person may have a right of action against the combination or the members thereof, the action of the combination must be malicious. Thus a combination of cattle dealers who refused to sell to A, a butcher, and induced a third person to refuse to deal with A, was held actionable if malicious, otherwise not.¹⁶ This distinction is open to the criticism that if "malice" means personal ill will, or a desire to injure, this rule makes motive the controlling factor, instead of the doing of a wrongful act, followed by damage caused thereby; while if "malice" means the doing of a wrongful act without just excuse, the rule begs the entire question, as the point to be determined is whether any wrongful act has been done, and whether any just excuse exists. If the article whose sale is contracted for is one in which a legal monopoly exists, such as a proprietary or a patent medicine, it has been held that a contract entered into with a retail druggists' association, requiring the proprietor not to sell to "cut-rate" druggists, is not an unlawful interference with the business of a "cut-rate" druggist.¹⁷ Members of an illegal organization to maintain prices will be enjoined from instigating a strike among the union workmen of one who has been a member of such organization but who has withdrawn therefrom.¹⁸

§ 2434. Blacklisting by association of employers. Questions which are the converse of those presented in strikes exist where employers combine to prevent certain workmen from obtaining employment. This often takes the form known as the "blacklist." It has been held that an employe who by reason of having taken part in a strike has been blacklisted, can not have an injunction

¹⁴ *Boutwell v. Marr*, 71 Vt. 1, 76 Am. St. Rep. 746, 43 L. R. A. 803, 42 Atl. 607.

¹⁵ *Hawarden v. Coal Co.*, 111 Wis. 545, 87 N. W. 472.

¹⁶ *Delz v. Winfree*, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111.

¹⁷ *Park & Sons Co. v. Druggists' Association*, 175 N. Y. 1, 96 Am. St. Rep. 578, 67 N. E. 136.

¹⁸ *Employing Printers' Club v. Dr. Blosser Co.*, 122 Ga. 509, 106 Am. St. Rep. 137, 69 L. R. A. 90, 50 S. E. 353.

against the employers to prevent them from continuing to act in conspiracy not to employ such employe.¹ The existence of any civil remedy has been denied.² Some cases are presented in which employers will not accept an employe unless he has a certificate or clearance card from his last employer. Such last employer is, even under such circumstances, under no obligation at common law to furnish such certificate.³ Hence, if such employe is refused employment for want of such certificate, he can not maintain an action against his former employer for refusal to give such certificate.⁴ Where the former employer assigns a reason for the discharge of the employe, and such reason is entered upon the employer's records or transferred to the certificate given to such employe at his request, the action of the employe is often based on the theory that such former employer is liable for slander or libel if such assigned reason is false. It has been held that if the entry on the employer's books is false and prevents the employe from obtaining employment, such employe may maintain an action against such employer.⁵ In other cases there seems to be a tendency to hold that entries, made for the benefit and sole use of the employer, and transferred to the certificate at the request of the employe, are not actionable unless malicious. Thus entering the ground of discharge as "carelessness," on the discharge list of a railway for its own use, is not actionable unless malicious.⁶ Publication is often lacking, and hence neither libel nor slander can exist. Thus the entry on employe's record, "Dismissed—insolent and abusive to company's patrons," was read by one clerk to another, who copied it on a card. It was signed by the employer's

¹ *Worthington v. Waring*, 157 Mass. 421, 34 Am. St. Rep. 294, 20 L. R. A. 342, 32 N. E. 744. (The court declined to express any opinion as to whether he had a remedy at common law; but said that if he had any, it was by indictment.)

² *Boyer v. Telegraph Co.*, 124 Fed. 246.

³ *Cleveland, etc., Ry. v. Jenkins*, 174 Ill. 398, 66 Am. St. Rep. 296, 62 L. R. A. 922, 51 N. E. 811.

⁴ *New York, etc., R. R. v. Schaffer*, 65 O. S. 414, 87 Am. St. Rep. 628, 62 L. R. A. 931, 62 N. E. 1036. (In this case it was pointed out by one of the

court that the record failed to show any agreement between the former employer and the employer refusing employe not to hire former employes without such certificate.)

⁵ *Hundley v. R. R.*, 105 Ky. 162, 88 Am. St. Rep. 298, 48 S. W. 429. (This is part obiter, since the declaration was held to be demurrable, as it did not show that by reason of such false entry plaintiff had been unable to obtain employment.)

⁶ *Missouri Pacific Ry. v. Richmond*, 73 Tex. 568, 15 Am. St. Rep. 794, 4 L. R. A. 280, 11 S. W. 555.

superintendent and given to the employe. All this was done because of his request for his record. No other publication was shown, and from the evidence it was at least very probable that the alleged ground of discharge was true. It was held not libel.⁷ Even if it has been shown that the agreement between employers not to accept former employes of each other is the cause of the employe's being refused employment, or being discharged, it has been held that no action will lie against any of such employers. Two insurance companies, B and X, entered into an agreement not to employ any one who had worked for the other within two years from the termination of his former employment. A had worked for X, had been discharged and had been employed by B under a contract for an indefinite term. When B and X made their contract, B discharged A. A had, of course, no remedy against B for breach of contract, and it was held that in tort A could recover neither against B,⁸ nor against X.⁹ The reason advanced for this rule is that such contract between the insurance companies is illegal, hence not binding; hence, the failure to secure employment is in law due to the voluntary and rightful act of the employer.¹⁰ While such reasoning is rather artificial, Kentucky is a state in which procuring breach of a contract of employment is not actionable.¹¹

§ 2435. Peaceful interference with business. Whether an injunction can be given against a systematic attempt to induce other persons to refrain from future business relations with the party seeking relief, as long as no violence is used, is a question upon which there is some conflict of authority. In some states it is held that an injunction will be granted.¹ In some states such conduct

⁷ *Hebner v. Ry.*, 78 Minn. 289, 79 Am. St. Rep. 387, 80 N. W. 1128.

⁸ *Baker v. Ins. Co. (Ky.)*, 64 S. W. 913.

⁹ *Trimble v. Ins. Co. (Ky.)*, 64 S. W. 915.

¹⁰ *Trimble v. Ins. Co. (Ky.)*, 64 S. W. 915.

¹¹ See § 2425.

¹ *California*. *Goldberg v. Stablemen's Union*, 149 Cal. 429, 117 Am. St. Rep. 445, 8 L. R. A. (N.S.) 460, 86 Pac. 806.

Michigan. *Beck v. Protective Union*,

118 Mich. 497, 74 Am. St. Rep. 421, 42 L. R. A. 407, 77 N. W. 13.

Minnesota. *Roraback v. Motion Picture Machine Operators' Union*, 140 Minn. 481, 3 A. L. R. 1290, 168 N. W. 766, 169 N. W. 529.

New Jersey. *Barr v. Trades' Council*, 53 N. J. Eq. 101, 111, 30 Atl. 881, 884; *Martin v. McFall*, 65 N. J. Eq. 91, 55 Atl. 465.

Oregon. *Longshore Printing Co. v. Howell*, 26 Or. 527, 46 Am. St. Rep. 640, 28 L. R. A. 464, 38 Pac. 547.

is criminal.² In other states such conduct is held to be a mere exercise of the employes' right of free speech in telling of their grievances; and such conduct will not be enjoined.³

§ 2436. Strikes. It is very generally held that workmen may combine for the purpose of stopping work, at least as long as they do not break any existing contracts, and that they may refuse to resume work until their demands are complied with.¹ Such conduct constitutes a strike, and is not necessarily illegal. A labor union may call a strike to compel employers to allot certain kinds of work to such union to the exclusion of a competitor.² Bricklayers and masons may strike in order to compel their employers to allot the work of pointing to them,³ even though the employers may believe that such work can be done by persons who are regularly engaged in the business of pointing in a more satisfactory manner and at a less cost.⁴ A contract between members of labor unions engaged in the building trade, that in case of a bona fide dispute between a member of such union and a contractor, the members of the union will withhold their services from him or their

Pennsylvania. *Erdman v. Mitchell*, 207 Pa. St. 79, 63 L. R. A. 534, 56 Atl. 327.

The act of a union in placing banners near a place of business denouncing the employer as unfair to organized labor, in order to compel him to desist from working at his own business in person, is wrongful. *Roraback v. Motion Picture Machine Operators' Union*, 140 Minn. 481, 3 A. L. R. 1290, 168 N. W. 766, 169 N. W. 529.

² *State v. Gliden*, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890.

³ *Truax v. Bisbee Local, No. 380, Cooks' and Waiters' Union*, 19 Ariz. 379, 171 Pac. 121; *Gray v. Building Trades Council*, 91 Minn. 171, 103 Am. St. Rep. 477, 63 L. R. A. 753, 97 N. W. 663, 1118; *Marx, etc., Co. v. Watson*, 168 Mo. 133, 90 Am. St. Rep. 440, 56 L. R. A. 951, 67 S. W. 391; *Atkins v. Fletcher Co.*, 65 N. J. Eq. 658, 55 Atl. 1074.

¹ *Arthur v. Oakes*, 63 Fed. 310, 25 L. R. A. 414, 11 C. C. A. 209; *Wabash*

Ry. v. Hannahan, 121 Fed. 563; *State v. Stockford*, 77 Conn. 227, 107 Am. St. Rep. 28, 58 Atl. 769; *Pickett v. Walsh*, 192 Mass. 572, 116 Am. St. Rep. 272, 6 L. R. A. (N.S.) 1067, 78 N. E. 753; *Minnesota Stove Co. v. Cavanaugh*, 131 Minn. 458, 155 N. W. 638. "Strikes are not necessarily illegal. A strike is properly defined as 'a simultaneous cessation of work on the part of the workmen,' and its legality or illegality must depend on the means by which it is enforced and its objects." *Farrer v. Close*, L. R. 4 Q. B. 602, 612, quoted in *Longshore Printing Co. v. Howell*, 26 Or. 527, 542, 46 Am. St. Rep. 640, 28 L. R. A. 464, 38 Pac. 547.

² *Pickett v. Walsh*, 192 Mass. 572, 116 Am. St. Rep. 272, 6 L. R. A. (N.S.) 1067, 78 N. E. 753.

³ *Pickett v. Walsh*, 192 Mass. 572, 116 Am. St. Rep. 272, 6 L. R. A. (N.S.) 1067, 78 N. E. 753.

⁴ *Pickett v. Walsh*, 192 Mass. 572, 116 Am. St. Rep. 272, 6 L. R. A. (N.S.) 1067, 78 N. E. 753.

subcontractors, until such dispute is settled, is not rendered invalid by a statute which forbids combinations in restraint of trade.⁵

A strike may be wrongful under the special circumstances of the case. Where a number of tailors stopped work and sent back in an unfinished condition the work on which they were engaged, knowing that under the circumstances it would be impossible for their employer to get men to finish it, such conduct was held to amount to a tort.⁶

It may also be wrongful because of the purpose for which it is called, or because of the means which are employed.⁷

§ 2437. Sympathetic strikes. An actual or threatened strike against one with whom the employees or labor unions have no dispute because he does business with another with whom they have a dispute, in order to induce the employer against whom they strike to put some kind of pressure upon such other person to compel him to yield to the demands of the labor union, is sometimes known as a sympathetic strike. The sympathetic strike is, in its nature, closely allied to the boycott, and it is frequently employed as an effective means of enforcing a boycott. In many jurisdictions it is said to be illegal and unjustifiable.¹ If A, who

⁵ *George J. Grant Const. Co. v. St. Paul Bldg. Trades Council*, 136 Minn. 167, 161 N. W. 1055 [denying reargument, 136 Minn. 167, 161 N. W. 520].

⁶ *Mapstrich v. Range*, 9 Neb. 390, 31 Am. Rep. 415, 2 N. W. 739.

⁷ See §§ 2437 et seq.

¹ *Pickett v. Walsh*, 192 Mass. 572, 116 Am. St. Rep. 272, 61 L. R. A. (N.S.) 1067, 78 N. E. 753; *New England Cement Gun Co. v. McGivern*, 218 Mass. 198, L. R. A. 1916C, 986, 105 N. E. 885; *Harvey v. Chapman*, 226 Mass. 191, L. R. A. 1917E, 389, 115 N. E. 304; *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 421, 128 Am. St. Rep. 492, 22 L. R. A. (N.S.) 607, 114 S. W. 997. "This brings us to the legality of the strike by the union bricklayers and masons employed by the L. P. Soule & Son Company on other buildings, because that corporation was doing work on a building on which work was being done by pointers

employed, not by the L. P. Soule & Son Company, but by the owners of the building.

"That strike has an element in it like that in a sympathetic strike, in a boycott, and in a blacklisting, namely: It is a refusal to work for A, with whom the strikers have no dispute, because A works for B, with whom the strikers have a dispute, for the purpose of forcing A to force B to yield to the strikers' demands. In the case at bar the strike on the L. P. Soule & Son Company was a strike on that contractor to force it to force the owner of the Ford building to give the work of pointing to the defendant unions. That passes beyond a case of competition where the owner of the Ford building is left to choose between the two competitors. Such a strike is, in effect, compelling the L. P. Soule & Son Company to join in a boycott on the owner

conducts a retail business, employs B, a boycott of A's business, by a labor union, X, in order to compel A to coerce B into paying his back dues to X or else to discharge B, is unjustifiable.² If the officers of a labor union, X, combine to compel B to discharge A as a means of compelling A to pay a debt which he owes to X,

of the Ford building. It is a combination by the union to obtain a decision in their favor by forcing third persons, who have no interest in the dispute, to force the employer to decide the dispute in their (the defendant unions') favor. Such a strike is not a justifiable interference with the right of the plaintiffs to pursue their calling as they think best. In our opinion organized labor's right of coercion and compulsion is limited to strikes on persons with whom the organization has a trade dispute; or, to put it in another way, we are of opinion that a strike on A, with whom the striker has no trade dispute, to compel A to force B to yield to the striker's demands, is an unjustifiable interference with the right of A to pursue his calling as he thinks best. Only two cases to the contrary have come to our attention, namely: *Bohn Mfg. Co. v. Hollis* (*Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.*), 54 Minn. 233, 21 L. R. A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119, and *Marx & H. Jeans Clothing Co. v. Watson*, 168 Mo. 133, 56 L. R. A. 951, 90 Am. St. Rep. 440, 67 S. W. 391. The first of these two cases was overruled on this point in *Gray v. Building Trades Council*, 91 Minn. 171, 63 L. R. A. 753, 103 Am. St. Rep. 477, 97 N. W. 663, 1118. The conclusion to which we have come is supported by *My Maryland Lodge No. 186 of Machinists v. Adt*, 100 Md. 238, 68 L. R. A. 752, 59 Atl. 721; *Gray v. Building Trades Council*, *supra*; *Purington v. Hinchliff*, 219 Ill. 159, 2 L. R. A. (N.S.) 824, 109 Am. St. Rep. 322, 76 N. E. 47; *Beck v. Railway Team-*

sters' Protective Union, 118 Mich. 497, 42 L. R. A. 407, 74 Am. St. Rep. 421, 77 N. W. 13; *Crump v. Com.*, 84 Va. 927, 10 Am. St. Rep. 895, 6 S. E. 620; *State v. Glidden*, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890; *Purvis v. Local No. 500, U. B. of C. & J.*, 214 Pa. 348, 63 Atl. 585; *Gatzow v. Buening*, 106 Wis. 1, 49 L. R. A. 475, 80 Am. St. Rep. 17, 81 N. W. 1003; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Temperton v. Russell* [1893], 1 Q. B. 715; *Taft, J., in Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.*, 19 L. R. A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730; *Loewe v. California State Federation of Labor*, 139 Fed. 71; *Hopkins v. Oxley Stave Co.*, 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912; *Casey v. Cincinnati Typographical Union No. 3*, 12 L. R. A. 193, 45 Fed. 135. It is settled in this commonwealth by a long line of cases that a defendant is liable for an intentional and unjustifiable interference with the pursuit on the part of the plaintiff of his calling, whether it be of labor or business. *Walker v. Greenin*, 107 Mass. 555; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Vegelahn v. Guntner*, 167 Mass. 92, 35 L. R. A. 722, 57 Am. St. Rep. 113, 44 N. E. 1077; *Plant v. Woods*, 176 Mass. 492, 51 L. R. A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; *Martell v. White*, 185 Mass. 255, 64 L. R. A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085." *Pickett v. Walsh*, 192 Mass. 572, 116 Am. St. Rep. 272, 6 L. R. A. (N.S.) 1067, 78 N. E. 753.

² *Harvey v. Chapman*, 226 Mass. 191, L. R. A. 1917E, 389, 115 N. E. 304.

such officers are liable in damages to A;³ and if the labor union approves of such acts and takes advantage thereof, such labor union is also liable.⁴ In other jurisdictions, strikes for the purpose of compelling an employer to quit dealing with persons from whom he purchases articles, has been held to be legal.⁵

§ 2438. Closed shop. Analogous to the sympathetic strike, is the strike for the so-called "closed shop"; that is, as the term is frequently used, for the employment of all employes from certain organizations or associations exclusively. An actual or threatened strike for the purpose of compelling an employer to exclude non-union men from his employment, and to run a "closed shop," is held, in many jurisdictions, to be an unlawful violation of the rights of the employer and of his prospective employes.¹ In some jurisdictions, however, such purpose is held to be a lawful purpose.² In other cases it has been held, by reason of the special facts of the case, that conduct of union men in refusing to work with non-union men, and thus prevent the latter from obtaining employment, was not a wrongful act, and accordingly an injunction against such conduct has been refused where no further element of wrong was shown to exist.³ In these cases emphasis is

³ *Giblan v. National Amalgamated Laborers' Union* [1903], 2 K. B. 600.

⁴ *National Amalgamated Laborers' Union* [1903], 2 K. B. 600.

⁵ *Meier v. Speir*, 96 Ark. 618, 32 L. R. A. (N.S.) 792, 132 S. W. 988; *J. F. Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 21 L. R. A. (N.S.) 550, 98 Pac. 1027.

See also, *J. F. Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 21 L. R. A. (N.S.) 550, 98 Pac. 1027.

¹ *England. Valentine v. Hyde* [1919], 2 Ch. 128. (It is not a trade dispute within the meaning of a statutory provision for such disputes.)

United States. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 62 L. ed. 260, L. R. A. 1918C, 497; *Niles-Bement-Pond Co. v. Iron Molders' Union*, 246 Fed. 851.

California. *J. F. Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 21 L. R. A. (N.S.) 550, 98 Pac. 1027.

Illinois. *Barnes v. Chicago Typographical Union*, 232 Ill. 424, 14 L. R. A. (N.S.) 1018, 83 N. E. 940.

Massachusetts. *Reynolds v. Davis*, 198 Mass. 294, 17 L. R. A. (N.S.) 162, 84 N. E. 457; *Folsom v. Lewis*, 208 Mass. 336, 35 L. R. A. (N.S.) 787, 94 N. E. 316.

This is especially true if the employer and his employes have agreed to run a non-union plant. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 62 L. ed. 260, L. R. A. 1918C, 497.

² *Cohn & Roth Electric Co. v. Bricklayers', Masons' & Plasterers' Local Union*, 92 Conn. 161, 101 Atl. 659.

³ *National Protective Union v. Cumming*, 170 N. Y. 315, 88 Am. St. Rep. 648, 58 L. R. A. 135, 63 N. E. 369. (Three judges dissenting.) (*Distiguishing, Curran v. Galen*, 152 N. Y. 33, 57 Am. St. Rep. 496, 37 L. R. A. 802, 46 N. E. 297, as a case in which the

laid upon the right of every man to choose such associates in work as he pleases, especially in view of the fact that every employe assumes the risk of injury from the negligence of his fellow-employes. Two points distinguish *National Protective Association v. Cummings*⁴ from the cases in which the employes are held to be guilty of a tort in striking to cause the discharge of another employe: (1) The real trouble was between rival labor unions. The strike may be, therefore, held to be merely a protective measure, and to come under the doctrine of competition.⁵ (2) The union whose members refused to work, required an examination as to qualifications for work as a condition precedent to admission. Considerable importance is attached to this fact in the opinion of the court, as showing that the union men were unwilling to assume the risk of working with men outside of their union, whose efficiency had not been thus tested.

§ 2439. Boycotts. "A boycott may be defined to be a combination of several persons to cause a loss to a third person by causing others against their will to withdraw from him their beneficial business intercourse through threats that, unless a compliance with their demands be made, the persons forming the combination will cause loss or injury to him; or an organization formed to exclude a person from business relations with others by persuasion, intimidation, and other acts, which tend to violence, and thereby cause him through fear of resulting injury to submit to dictation in the management of his affairs."¹ A boycott is a crim-

discharge was caused by threats and use of false reports.) The same view was expressed in *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230, where the employer sought an injunction; while the right to strike because of discharge of non-union men was recognized, injunction was granted, as violence was employed.

⁴ 170 N. Y. 315, 88 Am. St. Rep. 648, 58 L. R. A. 135, 63 N. E. 369.

⁵ See §§ 1325, 1331.

¹ *Gray v. Building Trades Council*, 91 Minn. 171, 103 Am. St. Rep. 477, 63 L. R. A. 753, 97 N. W. 663, 1118. For similar definitions see —.

District of Columbia. *American Federation of Labor v. Buck's Stove*

Co., 33 D. C. App. 83, 32 L. R. A. (N.S.) 748.

Iowa. *Funck v. Farmers' Elevator Co.*, 142 Ia. 621, 24 L. R. A. (N.S.) 109, 121 N. W. 53.

Massachusetts. *Hoban v. Dempsey*, 217 Mass. 166, L. R. A. 1915A, 1217, Ann. Cas. 1915C, 810, 104 N. E. 717.

Michigan. *Baldwin v. Escanaba Liquor Dealers' Association*, 165 Mich. 98, 130 N. W. 214.

Missouri. *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 421, 128 Am. St. Rep. 492, 22 L. R. A. (N.S.) 607, 114 S. W. 997.

See, *Solidarity of Interest as Basis of Legality of Boycotting*, by F. H. Cook, 11 Yale Law Journal, 153.

inal conspiracy,² and, as ordinarily conducted, it gives a right of action to the party against whom such boycott is aimed.³ A boycott is unlawful, whether it is intended to prevent prospective customers from dealing with the person against whom the boycott is aimed,⁴ or whether it is intended to prevent him from obtaining the assistance of employes.⁵ A boycott is an unlawful means in itself, even though it is employed for a lawful purpose,⁶ such as securing improved labor conditions.⁷ Even if the competition between the parties is legitimate competition, the boycott can not be employed.⁸ A, a butcher, had employed non-union men. X, a retail seller of meat, had been taking fine meat from A, though without any binding contract in advance to take it. The union demanded that A employ only union men. On A's refusal the union demanded that X refuse to deal with A, and ordered X's men to strike if X continued to buy meat from A. X accordingly discontinued his dealings with A. It was held that A could recover damages against the persons who by such threats induced X to discontinue his dealings with A.⁹ X, a trades-union committee, tried to compel the builders of a certain town to obey certain rules. A declined. X then tried to induce those who supplied A with material to refuse to continue to do so. B, one of such materialmen, declined to do this. X then induced Y, who had a contract with B to furnish material, to break such contract and refuse performance. B brought an action against X for damages. It was held that he could recover.¹⁰

² *State v. Stockford*, 77 Conn. 227, 107 Am. St. Rep. 28, 58 Atl. 769; *State v. Stewart*, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559; *Crump v. Commonwealth*, 84 Va. 927, 10 Am. St. Rep. 896, 6 S. E. 620.

³ *Purington v. Hinchliff*, 219 Ill. 159, 109 Am. St. Rep. 322, 2 L. R. A. (N.S.) 824, 76 N. E. 47; *Funk v. Farmers Elevator Co.*, 142 Ia. 621, 24 L. R. A. (N.S.) 108, 121 N. W. 53.

⁴ *Booth v. Burgess*, 72 N. J. Eq. 181, 65 Atl. 226.

⁵ *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45, 20 L. R. A. (N.S.) 315; *Willcutt v. Driscoll* 200 Mass. 110, 23 L. R. A. (N.S.) 1236, 85

N. E. 897; *Purvis v. United Brotherhood*, 214 Pa. St. 348, 112 Am. St. Rep. 757, 12 L. R. A. (N.S.) 642, 63 Atl. 585.

⁶ *State v. Glidden*, 55 Conn. 46, 3 Am. St. Rep. 23, 8 Atl. 890.

⁷ *George Jonas Glass Co. v. Glass Bottle Blowers' Association*, 77 N. J. Eq. 219, 41 L. R. A. (N.S.) 445, 79 Atl. 262.

⁸ *My Maryland Lodge v. Adt*, 100 Md. 238, 68 L. R. A. 752, 59 Atl. 721.

⁹ *Quinn v. Leathem* [1901], App. Cas. 495 [affirming, *Leathem v. Craig*, 2 Ir. Rep. (1899), 667].

¹⁰ *Temperton v. Russell* [1893], 1 Q. B. 715.

§ 2440. Unfair lists. Whether placing an individual upon an "unfair list" is actionable or not, depends in part upon the meaning which usually attaches to the term "unfair." If, as a matter of fact, the term generally imports nothing further than the fact that the persons who make such announcement do not regard such person as having complied with reasonable requirements, such announcement is no more unlawful than any announcement of disapproval of another's methods of production or of carrying on business. As the term is generally used, however, it imports more than this. It is ordinarily understood to be a declaration of a boycott, together with a threat of boycotting those who pay no attention to the notification, that the party in question is on the unfair list and who continue to do business with him. Where this meaning attaches to the term, and where the court regards a combination to crush a business as illegal,¹ placing a person upon the unfair list itself is illegal.² Some courts take the view that a threat of strike, and a boycott without any threat of violence, but merely stating that the employer will be left off the fair list, will be enjoined, since such threat ultimately involves the coercion which the court looks upon as the necessary concomitant of a strike, and the interruption of business which is necessarily involved in a boycott.³ Injunction will issue to prevent a labor union from publishing a notice that a certain employer or business is on the unfair list if the effect of such notice will be to induce third persons to break off business relations with the business or

¹ See §§ 2430 et seq.

² *Seattle Brewing & Malting Co. v. Hansen*, 144 Fed. 1011; *Wilson v. Hey*, 232 Ill. 389, 122 Am. St. Rep. 119, 16 L. R. A. (N.S.) 85, 13 Am. & Eng. Ann. Cas. 82, 83 N. E. 928; *Plant v. Woods*, 176 Mass. 492, 79 Am. St. Rep. 330, 51 L. R. A. 339, 57 N. E. 1011; *Gray v. Trades Council*, 91 Minn. 171, 103 Am. St. Rep. 477, 63 L. R. A. 753, 97 N. W. 663.

³ *Plant v. Woods*, 176 Mass. 492, 79 Am. St. Rep. 330, 51 L. R. A. 339, 57 N. E. 1011. (See the dissenting opinion in this case for a statement of the opposite doctrine.) *Gray v. Trades Council*, 91 Minn. 171, 103 Am. St. Rep. 477, 63 L. R. A. 753, 97 N. W. 663. "It

is not wrong for members of a union to cease patronizing any one when they regard it for their interest to do so, but they have no right to compel others to break off business relations with the one from whom they have withdrawn their patronage, and to do this by unlawful means, with the motive of injuring such person. Such means as giving notices which excite the fear or reasonable apprehension of other persons that their business will be injured unless they do break off such relations or cease patronizing another, are wrong and unlawful. If the notices given or things done have the natural effect of exciting such reasonable fear and apprehension and ac-

contractor named, for fear that they will themselves be boycotted.⁴ Injunction will issue to prevent a buildings trades council from putting a building contractor on the unfair list so as to prevent members of the building trades union from dealing with him, and to prevent him from obtaining contracts.⁵

In jurisdictions in which a combination to crush a business is not regarded as illegal unless it is formed for purposes or performs acts which would be illegal on the part of an individual, the act of placing a party on the unfair list is not of itself regarded as an illegal act.⁶ A publication that a certain employer or business is "unfair" to organized labor, is not regarded as actionable in such jurisdictions, although such declaration is in effect a declaration of a boycott.⁷

to accomplish the result intended, it is immaterial that they are not accompanied by direct threats." *Wilson v. Hey*, 232 Ill. 389, 122 Am. St. Rep. 119, 83 N. E. 928.

⁴ *Wilson v. Hey*, 232 Ill. 389, 122 Am. St. Rep. 119, 83 N. E. 928.

See also, *Roraback v. Motion Picture Machine Operators' Union*, 140 Minn. 481, 3 A. L. R. 1290, 168 N. W. 766, 169 N. W. 529.

⁵ *Gray v. Building Trades Council*, 91 Minn. 171, 103 Am. St. Rep. 477, 63 L. R. A. 753, 97 N. W. 663, 1118.

⁶ *Lindsay v. Montana Federation of Labor*, 37 Mont. 264, 127 Am. St. Rep. 722, 18 L. R. A. (N.S.) 707, 96 Pac. 127; *Empire Theater Co. v. Cloke*, 53 Mont. 183, L. R. A. 1917E. 383, 163 Pac. 107. "But what is there unlawful in the act of the union workmen of Billings in withdrawing their patronage from the plaintiff? Certainly it can not be said that Lindsay & Company had a property right in the trade of any particular person. In this country patronage depends upon good will, and we do not think that it will be contended by any one that it was wrongful or unlawful, or violated any right of the plaintiff company, for any particular individual in Billings to withdraw his patronage from Lindsay & Company, or from any other concern which might be doing

business with that company, and that, too, without regard to his reason for doing so. But there can be found running through our legal literature many remarkable statements that an act perfectly lawful when done by one person becomes by some sort of legerdemain criminal when done by two or more persons acting in concert, and this upon the theory that the concerted action amounts to a conspiracy. But with this doctrine we do not agree. If an individual is clothed with a right when acting alone, he does not lose such right merely by acting with others, each of whom is clothed with the same right. If the act done is lawful, the combination of several persons to commit it does not render it unlawful. In other words, the mere combination of action is not an element which gives character to the act. It is the illegality of the purpose to be accomplished, or the illegal means used in furtherance of the purpose, which makes the act illegal." *Lindsay v. Montana Federation of Labor*, 37 Mont. 264, 127 Am. St. Rep. 722, 18 L. R. A. (N.S.) 707, 96 Pac. 127.

⁷ *Truax v. Bisbee Local, No. 380, Cooks' and Waiters' Union*, 19 Ariz. 379, 171 Pac. 121; *Lindsay v. Montana Federation of Labor*, 37 Mont. 264, 18 L. R. A. (N.S.) 707, 96 Pac. 127.

§ 2441. Picketing. A method often employed by strikers is what is known as "picketing," which consists in stationing persons to meet at points where they can intercept the new workmen of the employers, and observe who continue work, or where they can observe the customers of the person whose place of business is "picketed." If violence exists as a result of such picketing,¹ whether violence of the strikers,² or violence of those in sympathy with them,³ which the officers of the strikers do not restrain,⁴ an injunction will be given. It has been held that no actual force need be used if there is an apparent display of force,⁵ since threats may be implied as well as expressed,⁶ and that if the new workmen are unwilling to stop to discuss questions of their continuing in employment with the pickets or strikers, the act of the strikers in insisting on continuing such discussion is such annoyance as will be enjoined. So strikers will be enjoined from taking up the time of the new workmen during the hours of their employment, to discuss with them the question of their quitting work.⁷

In some jurisdictions it is held that the very nature of picketing implies unlawful coercion, and that peaceful picketing does not exist.⁸ Injunction will lie to prevent the picketing of a grocery

¹ *Southern Ry. v. Machinists' Local Union*, 111 Fed. 49; *Allis-Chalmers Co. v. Reliable Lodge*, 111 Fed. 264; *Vege-lahn v. Gunter*, 167 Mass. 92, 57 Am. St. Rep. 443, 35 L. R. A. 772, 44 N. E. 1077; *Hamilton Brown Shoe Co. v. Saxey*, 131 Mo. 212, 52 Am. St. Rep. 622, 32 S. W. 1106; *Murdock v. Walker*, 152 Pa. St. 595, 34 Am. St. Rep. 678, 25 Atl. 492.

² See cases cited in the preceding note.

³ *Southern Ry. v. Machinists' Local Union*, 111 Fed. 49.

⁴ *Union Pacific Ry. v. Ruef*, 120 Fed. 102.

⁵ *Otis Steel Co. v. Iron Molders' Union*, 110 Fed. 698; *Beck v. Protective Union*, 118 Mich. 497, 74 Am. St. Rep. 421, 42 L. R. A. 407, 77 N. W. 13; *O'Neil v. Behanna*, 182 Pa. St. 236, 61 Am. St. Rep. 702, 38 L. R. A. 382, 37 Atl. 843.

⁶ "Threats in language are not the

only threats recognized by the law. Covert and unspoken threats may be just as effective as spoken threats." *Beck v. Protective Union*, 118 Mich. 497, 519, 74 Am. St. Rep. 421, 42 L. R. A. 407, 77 N. W. 13.

⁷ *O'Neil v. Behanna*, 182 Pa. St. 236, 61 Am. St. Rep. 702, 38 L. R. A. 382, 37 Atl. 843.

⁸ *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 324; *Moore v. Cooks', Waiters' and Waitresses' Union*, — Cal. App. —, 179 Pac. 417; *Barnes & Co. v. Chicago Typographical Union*, 232 Ill. 424, 14 L. R. A. (N.S.) 1018, 13 Am. & Eng. Ann. Cas. 54, 83 N. E. 940; *Hall v. Johnson*, 87 Or. 21, 169 Pac. 515; *St. Germain v. Bakery, etc., Union*, 97 Wash. 282, L. R. A. 1917F, 824, 166 Pac. 665. "Peaceful picketing! There is no such thing, if the term is intended to apply to the facts as they are shown to be by the record in the case at bar. We are in full accord

store and stationing banners near it, denouncing it as an unfair

with the doctrine enunciated in the case of *Atchinson v. Gee* (C.C.) 139 Fed. 582, where it is held that 'there is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching.' After an exhaustive examination of the decisions of this and other jurisdictions, we are of the opinion that the doctrine laid down by the appellate tribunals of this state is supported by the weight of authority throughout the union; but, regardless of that fact, the point involved in this case has been so often decided, and that adversely to the contentions of appellants here—as is evidenced by the following decisions: *Goldberg v. Stablemen's Union*, 149 Cal. 429, 86 Pac. 806, 8 L. R. A. (N.S.) 460, 117 Am. St. Rep. 145, 9 Ann. Cas. 1219; *Parkinson v. Building Trades' Council*, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. (N.S.) 550; *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 324; *Berger v. Superior Court*, 175 Cal. 719, 167 Pac. 143—that it would be useless to cite further authorities. In the *Berger* case the supreme court supported the same doctrine, but refused to support the conclusion of the trial court adjudging the petitioner, therein guilty of contempt, when the record did not disclose anywhere 'that the person charged is one of the persons or classes enjoined, or acting as the agent or servant of or in * * * combination with them, but only that he had actual knowledge of the terms of the injunction by reason of the service of a copy thereof upon him.' That this is a correct statement of the law we think is not debatable.

"The court further found 'that during the time of said picketing the said pickets patrolled the sidewalk in front of the plaintiff's place of business the

entire width of the restaurant, and near the outer edge of the said sidewalk,' and as a conclusion of law, held that 'the picketing of the plaintiff's place of business, with instructions to walk up and down the pavement in front thereof, and the patrol of said picket in accordance with said instructions upon the sidewalk in front of plaintiff's place of business, was and is unlawful, illegal, and a trespass and illegal injury to the property rights of the plaintiffs, and an illegal restraint of trade.'" *Moore v. Cooks', Waiters' and Waitresses' Union*, — Cal. App. —, 179 Pac. 417. "The vital question at issue, however, it seems to us, is a simple one and easy of solution. Clearly the acts of the appellants and defendants, as set forth in the complaint, are illegal and may be restrained by an injunction. It is true that a man, not under contract obligations to the contrary, has the right to quit the service of another at any time he sees fit, and may lawfully state, either publicly or privately, the grievances felt by him which gave rise to his conduct. And that right, which one man may exercise singly, many may lawfully agree, by voluntary association, to exercise jointly. But one man singly, or any number of men jointly, having no legitimate interests to protect, may not ruin the business of another by maliciously inducing his patrons and other persons not to deal with him. Men can not lawfully jointly congregate about the entrance of one's place of business, and there, either by persuasion, coercion, or force, prevent his patrons and the public at large from entering his place of business or dealing with him. To destroy his business in this manner is just as reprehensible as it is to physically destroy his property. Either is a violation of a

business and asking persons not to patronize it.⁹ If no strike exists and an attempt is made to picket a store to coerce the employer to compel his employees to join the union or else to discharge them, injunction will lie.¹⁰

natural right, the right to own, and peaceably enjoy, property." *St. Germain v. Bakery and Confectionery Workers' International Union*, 97 Wash. 282, L. R. A. 1917F, 824, 166 Pac. 665.

"A picket, in its very nature, tends to accomplish, and is designed to accomplish, these very things: It tends to, and is designed by physical intimidation to, deter other men from seeking employment in the places vacated by the strikers. It tends, and is designed, to drive business away from the boycotted place, not by the legitimate methods of persuasion, but by the illegitimate means of physical intimidation and fear. Crowds naturally collect; disturbances of the peace are always imminent and of frequent occurrence. Many peaceful citizens, men and women, are always deterred by physical trepidation from entering places of business so under a boycott patrol. It is idle to split hairs upon so plain a proposition, and to say that the picket may consist of nothing more than a single individual, peacefully endeavoring by persuasion to prevent customers from entering the boycotted place. The plain facts are always at variance with such refinements of reason." *St. Germain v. Bakery and Confectionery Workers' International Union*, 97 Wash. 282, L. R. A. 1917F, 824, 166 Pac. 665. "There have been a few cases where it was held that picketing by a labor union of a place of business is not necessarily unlawful if the pickets are peaceful and well-behaved: but if the watching and besetting of the workmen is carried to such a length as to constitute an annoyance to them or their employer, it becomes

unlawful. But manifestly that is not a safe rule, and furnishes no fixed or certain standard of what is lawful or unlawful. Any picket line must result in annoyance, both to the employer and the workmen, no matter what is said or done; and to say that the court is to determine by the degree of annoyance whether it shall be stopped or not would furnish no guide, but leave the question to the individual notions or bias of the particular judge. To picket the complainants' premises was in itself an act of intimidation, and an unwarrantable interference with their rights." *St. Germain v. Bakery and Confectionery Workers' International Union*, 97 Wash. 282, L. R. A. 1917F, 824, 166 Pac. 665. "To picket complainants' premises in order to intercept their teamsters or persons going there to trade is unlawful. It itself is an act of intimidation, and an unwarrantable interference with the right of free trade. The highways and public streets must be free to all for the purposes of trade, commerce and labor. The law protects the buyer, the seller, the merchant, the manufacturer, and the laborer, in the right to walk the streets unmolested. It is no respecter of persons, and it makes no difference, in effect, whether the picketing is done ten or one thousand feet away." *St. Germain v. Bakery and Confectionery Workers' International Union*, 97 Wash. 282, L. R. A. 1917F, 824, 166 Pac. 665.

⁹ *Goldberg v. Stablemen's Union*, 149 Cal. 429, 117 Am. St. Rep. 145, 8 L. R. A. (N.S.) 460, 86 Pac. 806.

¹⁰ *Harvey v. Chapman*, 226 Mass. 191 L. R. A. 1917E, 389, 115 N. E. 304.

In some jurisdictions it is held that every person has a right to have labor and business flow freely to him, and that an organized effort to prevent this is a wrong against which he may have an injunction. Where this view is taken, even peaceable picketing for the purpose of preventing an employer from obtaining a supply of labor in the normal course of business, will be enjoined.¹¹ In other jurisdictions it has been held that a peaceful picketing is the only available method by which the strikers can state their grievances, use arguments to induce others to co-operate with them, and that this is accordingly a mere exercise of the right of free speech. Where such view is taken, peaceful picketing is not enjoined.¹² Injunction will not issue to restrain a union from hav-

¹¹ *Harvey v. Chapman*, 226 Mass. 191, L. R. A. 1917E, 389, 115 N. E. 304.

¹² *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45, 20 L. R. A. (N.S.) 315; *Niles-Bement-Pond Co. v. Iron Molders' Union*, 246 Fed. 851; *Truax v. Bisbee Local, No. 380, Cooks' and Waiters' Union*, 19 Ariz. 379, 171 Pac. 121; *Empire Theater Co. v. Cloke*, 53 Mont. 183, L. R. A. 1917E, 383, 163 Pac. 107.

"Cases that have held picketing to be per se illegal, and that there can be no such things as peaceable picketing (*Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 324; *Barnes & Co. v. Chicago Typographical Union*, 232 Ill. 424, 83 N. E. 940, 14 L. R. A. (N.S.) 1018, 13 Ann. Cas. 54; *St. Germain v. Bakery, etc., Union*, 97 Wash. 282, 166 Pac. 665, L. R. A. 1917F, 824; *Hall v. Johnson [Or.]*, 169 Pac. 515), deal with a state of facts wherein the purpose of the picketing was to watch and influence the employes working or persons seeking employment, and by causing men who were working to quit work, or preventing those seeking work from working. No case has been brought to my attention wherein the 'picketing' was intended solely to affect prospective patrons and customers by causing such patrons and customers to change their minds and trade elsewhere. No

court, so far as I have observed, has held such acts of union men 'picketing.' Yet the union agent who displays a banner advertising the existence of a strike against the place of business in front of which the banner is displayed and paraded, is commonly referred to as a 'picket.' Under the evidence in this case, as given by Wm. Truax, one of plaintiffs, the person carrying the display banners immediately in front of plaintiffs' business place, 'walks back and forth and does not say anything. He never speaks to any one. One of them that carries the banner makes signs and in other ways attracts the attention of people, singing and whistling.' On cross-examination the witness says: 'I never saw them have any fights in front of our place, or grab hold of anybody and pull them out. So far as I know, everything that was done there was done quietly, with the exception' of what witness was told by others.

"Conceding that the persons who carried the banners were 'pickets,' then the purpose of such picketing was to advertise and make known to the public in general that a strike was on against the English Kitchen for the reason that the English Kitchen is 'unfair' to organized labor. Whatever interference with plaintiffs' business the

ing a banner exhibited in front of the theater when the audience is entering for each performance, declaring that such theater was "unfair to organized labor," and from announcing that all who deal with such theater will be considered themselves as unfair to organized labor.¹³

§ 2442. Slander, fraud, etc. The use of slander and the like would seem to be no more justifiable in trade disputes than in other cases. Accordingly, it is generally held that an action to recover damages will lie for slander in such cases.¹ Sending out a statement that a contractor has been employing non-union men, and that union workmen will no longer work for him with the intention of preventing him from obtaining building contracts, is actionable if such statement is substantially false.²

Different considerations obtain when injunction is the remedy which is sought. In some jurisdictions it is said that injunction will not issue to prevent the publication of statements, whether

presence of the banner carriers caused, that interference did not arise from any boisterous conduct of the carriers. Their conduct was at least peaceable. Their presence near the English Kitchen is the only ground for complaint.

"By the express terms of Civ. Code 1913, par. 1464, the courts are prohibited from restraining orders or injunctions, the issuance of which prohibits any person or persons 'from attending at or near a house or place where any person resides, or works, or carries on business, as happens to be for the purpose of peaceably obtaining or communicating information, or of peaceably persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute; or from recommending, advising or persuading others by peaceful means so to do.'
* * *

"In the absence of this statute, a serious question would likely exist in this jurisdiction, whether, as a matter of law, in the nature of things, 'peace-

ful' picketing may exist; but with par. 1464, supra, on our statute books, that question is eliminated as a question of law, and expressly made a question of fact during the existence of a labor strike; and, before the courts are permitted to interfere by injunction, the necessity must appear to prevent irreparable injury to property or property rights, and picketing in a peaceful manner creates no such necessity for injunction interference by the courts." *Truax v. Bisbee Local, No. 380, Cooks' and Waiters' Union, 19 Ariz. 379, 171 Pac. 121.*

See obiter, in *Union Pacific Ry. v. Ruef, 120 Fed. 102.*

¹³ *Empire Theater Co. v. Cloke, 53 Mont. 183, L. R. A. 1917E, 383, 163 Pac. 107.*

¹ *Standard Oil Co. v. Doyle, 118 Ky. 662, 111 Am. St. Rep. 331, 82 S. W. 271; Martineau v. Foley, 231 Mass. 220, 1 A. L. R. 1145, 120 N. E. 445.*

Contra, by statute, *Vacher v. London Society [1913], A. C. 107.*

² *Martineau v. Foley, 231 Mass. 220, 1 A. L. R. 1145, 120 N. E. 445.*

written or oral, which will tend to interfere with the business of another, under a constitutional provision which guarantees the right of every citizen freely to speak, right and publish on all subjects, being responsible for the abuse of that right.³ Under this theory

³ *Truax v. Bisbee Local, No. 380, Cooks' and Waiters' Union*, 19 Ariz. 379, 171 Pac. 121; *Dailey v. Superior Court*, 112 Cal. 94, 53 Am. St. Rep. 160, 32 L. R. A. 273, 44 Pac. 458; *Goldberg v. Stablemen's Union*, 149 Cal. 429, 117 Am. St. Rep. 145, 8 L. R. A. (N.S.) 460, 86 Pac. 806; *Marx & Hass Jeans Clothing Co. v. Watson*, 168 Mo. 133, 90 Am. St. Rep. 440, 56 L. R. A. 951, 67 S. W. 391; *Lindsay v. Montana Federation of Labor*, 37 Mont. 264, 127 Am. St. Rep. 722, 18 L. R. A. (N.S.) 707, 96 Pac. 127; *Empire Theater Co. v. Cloke*, 53 Mont. 183, L. R. A. 1917E, 383, 163 Pac. 107. "Conceding the statements on the banners, circulars and language used in loud street talks, to the effect that plaintiffs are 'unfair to organized labor,' that one of the plaintiffs, armed with a butcher knife, has a habit of chasing employes on the street, that plaintiffs habitually violate contracts with their employes, and other statements, attributing to plaintiffs acts and characteristics which in their nature tend to bring plaintiffs into disrepute, contempt, or ridicule; yet the statements made are statements spoken or written and published on the subject of the strike pending by persons interested therein, and

"Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." Section 6, Article 2, State Constitution.

"If a court of equity may restrain and prohibit members of a labor union from speaking, writing and publishing on the subject of a dispute between the union and employers of its members, then the members of a labor union are not such persons as are within the contemplation of the said constitutional

provision. Certainly, if the court issues its extraordinary writ of injunction prohibiting the defendants from displaying banners, circulars, and talking on the streets with respect to the strike, then, while the restraining order exists, the defendants restrained by the terms of such order are deprived of a constitutional right enjoyed by all other citizens of the state. Can a court of equity thus suspend the constitutional rights of a citizen because such citizen happens to be insolvent and unable financially to respond in damages for the abuse of that right? What degree of wealth is required to authorize a citizen to enjoy all of his constitutional rights without interference by the courts? The answer is that the matter of financial worth does not limit the constitutional right to speak, write and publish on all subjects. If this right is abused to the harm of another, the remedy given is an action for damages, and that remedy is deemed adequate. If the public suffers injury because the things written, printed and published are maliciously false, and in their nature tend to bring any person into disrepute, contempt, or ridicule, the remedy is by a criminal action of libel. Section 221, Pen. Code 1913.

"In *Lindsay & Co. v. Montana Federation of Labor*, 37 Mont. 264, 96 Pac. 127, 18 L. R. A. (N.S.) 707, 127 Am. St. Rep. 722, the court, having before it the interpretation of a similar constitutional provision, used the following language:

"The guaranty of this section extends as fully to the poorest as to the wealthiest citizen of the state; and, though an abuse of the liberty so guaranteed may result in loss for which

the court has refused to enjoin the publication of a circular which denounced the autocratic method of an employer in chasing his employes down the street with a butcher knife.⁴ Under this theory, injunction will not issue to restrain the publication of notices that all who patronize a certain theater will be regarded as unfair to organized labor.⁵ The fact that the persons by whom such false statements are made are financially insolvent and are very numerous, does not justify the court, under such theory, in issuing an injunction to restrain such false and malicious publications, since in theory at least, the right of action for damages against each individual is an adequate remedy at law.⁶

In other jurisdictions equity has not felt that the constitutional guaranty of free speech was intended to permit the use of slander or fraud to wreck a business; and such wrongs have been restrained by injunction.⁷

If X has, by means of fraud, induced A to break his contract with B, B may recover from X.⁸

there can not be any adequate compensation, the framers of our constitution in preparing it, and the people in adopting it, doubtless concluded that it was better that such results be reached in isolated cases than that the liberty of speech be subject to the supervision of a censor. To declare that a court may say that an individual shall not publish a particular item is to say that the court may determine in advance just what the citizen may or may not speak * * * upon a given subject, is, in fact, to say such court is a censor of speech as well as of the press. Under similar constitutional provisions the supreme courts of California and Missouri have reached the same conclusion. *Dailey v. Superior Court*, 112 Cal. 94, 44 Pac. 458, 32 L. R. A. 273, 53 Am. St. Rep. 160; *Marx & Haas Jeans Clothing Co. v. Watson*, 168 Mo. 133, 67 S. W. 391, 56 L. R. A. 951, 90 Am. St. Rep. 440.

"I think this is the sound interpretation to be given the constitutional provision supra. The fact that the person attacked by the wrongful speech, writing, or printing, if injured, may recover damages by a civil action, he is

the remedy furnished is adequate for the purposes, and equity may not be invoked because the offending person or persons are financially unable to respond in damages, or because a great number of lawsuits must be commenced." *Truax v. Bisbee Local, No. 380, Cooks' and Waiters' Union*, 19 Ariz. 379, 171 Pac. 121.

⁴ *Truax v. Bisbee Local, No. 380, Cooks' and Waiters' Union*, 19 Ariz. 379, 171 Pac. 121.

⁵ *Empire Theater Co. v. Cloke*, 53 Mont. 183, L. R. A. 1917E, 383, 163 Pac. 107.

⁶ *Marx & Haas Jeans Clothing Co. v. Watson*, 168 Mo. 133, 90 Am. St. Rep. 440, 56 L. R. A. 951, 67 S. W. 391; *Lindsay v. Montana Federation of Labor*, 37 Mont. 264, 127 Am. St. Rep. 722, 18 L. R. A. (N.S.) 707, 96 Pac. 127.

⁷ *Collard v. Marshall* [1892], 1 Ch. 571; *M. Steinert & Sons Co. v. Tegen*, 207 Mass. 394, 32 L. R. A. (N.S.) 1013, 93 N. E. 584; *Harvey v. Chapman*, 226 Mass. 191, L. R. A. 1917E, 389, 115 N. E. 304.

⁸ *National Phonograph Co. v. Edison-Bell Consolidated Phonograph Co.* [1908], 1 Ch. 335.

§ 2443. Violence and coercion. If violence or coercion exist or are threatened, different principles apply from those which apply in cases of peaceful persuasion. The use of coercion is very generally held to be illegal, and relief will be given to the party who is injured thereby.¹ An injunction will be given against strikers who use violence to prevent other workmen from taking their places with their former employer.²

The test for the existence of coercion is said to be the intention of the persons or the association who are claimed to have exerted the coercion,³ and not the effect on the mind upon whom such coercion is alleged to have been exerted.⁴

IV

REMEDIES

§ 2444. Injunction to prevent injury to business. The action or suit may be brought by the employer whose business is threatened. The threatened strike, or boycott, may be intended to compel him to acquiesce in certain arrangements for remuneration, hours of labor, and the like, or to compel him to employ only members of the union, and in this last case the employer is occasionally in

¹ **England.** *Taff Vale Ry. v. Amalgamated Society of Railway Servants* [1901], A. C. 426.

United States. *Niles-Bement-Pond Co. v. Iron Molders' Union*, 246 Fed. 851.

California. *Goldberg v. Stablemen's Union*, 149 Cal. 429, 117 Am. St. Rep. 145, 8 L. R. A. (N.S.) 460, 86 Pac. 806.

Kentucky. *Underhill v. Murphy*, 117 Ky. 640, 78 S. W. 482.

Massachusetts. *Vegelahn v. Gunter*, 167 Mass. 92, 57 Am. St. Rep. 443, 35 L. R. A. 772, 44 N. E. 1077.

Michigan. *Beck v. Protective Union*, 118 Mich. 497, 74 Am. St. Rep. 421, 42 L. R. A. 407, 77 N. W. 13.

Minnesota. *Minnesota Stove Co. v. Cavanaugh*, 131 Minn. 458, 155 N. W. 638.

Missouri. *Hamilton Brown Shoe Co. v. Saxey*, 131 Mo. 212, 52 Am. St. Rep. 622, 32 S. W. 1106.

Nevada. *Branson v. Industrial Workers of the World*, 30 Nev. 270, 95 Pac. 354.

New Jersey. *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230.

See, *The Taff Vale Case*, by Jno. G. Steffee, 37 American Law Review, 385.

² **England.** *Taff Vale Ry. v. Amalgamated Society of Railway Servants* [1901], A. C. 426.

Kentucky. *Underhill v. Murphy*, 117 Ky. 640, 78 S. W. 482.

Massachusetts. *Vegelahn v. Gunter*, 167 Mass. 92, 57 Am. St. Rep. 443, 35 L. R. A. 772, 44 N. E. 1077.

Michigan. *Beck v. Protective Union*, 118 Mich. 497, 74 Am. St. Rep. 421, 42 L. R. A. 407, 77 N. W. 13.

Missouri. *Hamilton Brown Shoe Co. v. Saxey*, 131 Mo. 212, 52 Am. St. Rep. 622, 32 S. W. 1106.

New Jersey. *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230.

³ *Max Ams Machine Co. v. International Association of Machinists*, 92 Conn. 297, 102 Atl. 706.

⁴ *Max Ams Machine Co. v. International Association of Machinists*, 92 Conn. 297, 102 Atl. 706.

no way really involved, since the real conflict is between rival unions, although the employer is likely to be one of the real victims. The remedy of injunction is often sought in such cases, as, if it can be obtained, it is the most efficient remedy for preventing a wreck of business. No injunction can be given against a mere strike, if peaceable and not connected with a boycott.¹ Injunction has, however, been granted restraining employees from interfering with the performance of a contract on the part of their employer, though such interference was peaceable, where the employees did not quit work in good faith.² An employer whose employees or apprentices are under a contract not to join labor unions, may have an injunction against representatives of a union who, knowing of such a contract, seek to induce the apprentices to break their contract and join a union.³

Associations of employees may also be enjoined from ordering,⁴ or soliciting,⁵ employees under contract to break their contracts.

An injunction binds members of an association or union who have knowledge of such injunction, although they are not parties to the action.⁶ They may be guilty of contempt of court, accordingly, if they violate such injunction.⁷

An injunction has been granted on the application of a vendee, to enjoin striking employees of the vendor from preventing the vendor from performing his contract of sale. Thus a mining corporation, A, sold all its product of coal to a coal company, B, which made contracts of sale to others in reliance on obtaining coal from A. By the terms of the contract, A was not liable for failure to deliver, if caused by strikes. A strike in which strikers prevented other persons from working for A, prevented A from delivering coal. It was held that B could enjoin the strikers from interfering with A's business and preventing A from delivering coal to B.⁸

¹ *Wabash Ry. v. Hannahan*, 121 Fed. 563; *Gray v. Building Trades Council*, 91 Minn. 171, 103 Am. St. Rep. 477, 63 L. R. A. 753, 97 N. W. 663, 1118.

² *In re Lennon*, 166 U. S. 548, 41 L. ed. 1110.

³ *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 62 L. ed. 260, L. R. A. 1918C, 497; *Flaccus v. Smith*, 199 Pa. St. 128, 85 Am. St. Rep. 779, 54 L. R. A. 640, 48 Atl. 894.

⁴ *Taff Vale Ry. v. Amalgamated Society of Railway Servants* [1901], App. Cas. 426.

⁵ *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 62 L. ed. 260, L. R. A. 1918C, 497; *Southern Ry. v. Machinists' Local Union*, 11 Fed. 49; *Vegelahn v. Gunter*, 167 Mass. 92, 57 Am. St. Rep. 443, 35 L. R. A. 772, 44 N. E. 1077.

⁶ *People v. Marr*, 181 N. Y. 463, 106 Am. St. Rep. 562, 74 N. E. 431.

⁷ *People v. Marr*, 181 N. Y. 463, 106 Am. St. Rep. 562, 74 N. E. 431.

⁸ *Chesapeake, etc., Co. v. Coke Co.*, 119 Fed. 942; *Carroll v. Coal Agency Co.*, 124 Fed. 305.

The question of the right to equitable relief has been discussed in connection with the various types of wrongful means which may be employed, or wrongful purposes for which proper means are employed.⁹

Injunction will issue to restrain interference with other types of contracts.¹⁰

Injunction will issue to prevent the use of banners in front of a place of business, declaring that the owner is "unfair," because he persists in doing certain of the work himself.¹¹ It will issue to prevent X from buying from A property which, to X's knowledge, A has agreed to sell to B.¹²

§ 2445. Damages. An employer whose employees are induced to leave his employment by the wrongful interference of an organization or association, may recover damages against the person who thus induces them to leave their employment.¹ Punitive damages may be allowed.² If the employer brings an action for an injunction and for damages, and he shows his right to an injunction, he is entitled to at least nominal damages.³ The fact that the employer has agreed with the labor union to employ only persons acceptable to such union, does not relieve the union from liability for damages to one whose discharge it causes by its wrongful interference.⁴

Damages can be recovered for wrongful interference with other types of contracts in jurisdictions in which such act is recognized as a wrong.⁵

⁹ See, *Injunction as a Remedy for the Boycott*, by H. S. Bullard, 3 *Yale Law Journal*, 211; and *Legal Restraint of Labor Strikes*, by Wm. P. Aiken, 4 *Yale Law Journal*, 13.

See §§ 2412 et seq.

¹⁰ *National Phonograph Co. v. Edison-Bell Consolidated Phonograph Co.* [1908], 1 *Ch.* 335; *Friedberg v. McClary*, 173 *Ky.* 579, *L. R. A.* 1917C, 777, 191 *S. W.* 300.

¹¹ *Roraback v. Motion Picture Machine Operators' Union*, 140 *Minn.* 481, 3 *A. L. R.* 1290, 168 *N. W.* 766, 169 *N. W.* 529.

¹² *Friedberg v. McClary*, 173 *Ky.* 579, *L. R. A.* 1917C, 777, 191 *S. W.* 300.

¹ *Max Ams Machine Co. v. International Association of Machinists*, 92 *Conn.* 297, 102 *Atl.* 706; *Employing*

Printers' Club v. Dr. Blosser Co., 122 *Ga.* 509, 106 *Am. St. Rep.* 137, 69 *L. R. A.* 90, 50 *S. E.* 353; *Martineau v. Foley*, 225 *Mass.* 107, 1 *A. L. R.* 1145, 113 *N. E.* 1038.

See, *The Danbury Hatters Case: Its Possible Effect on Labor Unions*, by Theodor Megaarden, 49 *American Law Review*, 417.

² *Wyeman v. Deady*, 79 *Conn.* 414, 118 *Am. St. Rep.* 152, 65 *Atl.* 129.

³ *Max Ams Machine Co. v. International Association of Machinists*, 92 *Conn.* 297, 102 *Atl.* 706.

⁴ *Berry v. Donovan*, 188 *Mass.* 353, 5 *L. R. A. (N.S.)* 899, 74 *N. E.* 603.

⁵ *National Phonograph Co. v. Edison-Bell Consolidated Phonograph Co.* [1908], 1 *Ch.* 335.

See §§ 2426, 2428 and 2429.

CHAPTER LXXV

DISCHARGE BY VOLUNTARY AGREEMENT

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I

GENERAL NATURE OF DISCHARGE

§ 2446. General nature of discharge. In its wider meaning the term "discharge," with reference to contract law, implies that as a result of certain acts which have taken place after the contract was made, a contract which was once a valid and enforceable agree-

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ment has ceased to be enforceable. Discharge is thus to be distinguished from the defenses which were in existence when the contract was made, and which inhered in it from the outset, such as fraud, misrepresentation, mistake, undue influence, duress, want of contractual capacity, and the like.

The Roman law made consistent use of the simile of the knot whereby the parties were bound. The legal power of one party to enforce the contract against the other was the knot, the obligatio. The termination of the obligation was referred to as the untying of the knot, the solutio obligationis. The English law has never been as consistent in its nomenclature and terminology as the Roman law. It has ordinarily used the term "contract" to indicate a promise to which the law attaches an obligation, and it has ordinarily used the term "discharge" to indicate the means by which valid contractual obligations were terminated. While included in the general subject of discharge, there are certain defenses, such as the Statute of Limitations,¹ and bankruptcy,² which permit the defendant to interpose such defenses as bars to an action upon the contract, but which do not in themselves discharge the contractual obligation. In a narrower sense, the term "discharge" is sometimes used of discharge by voluntary agreement,³ or of discharge by a release under seal.⁴ In its wider sense, discharge as a noun includes performance or payment.⁵ Discharge as a verb seems to negative performance.⁶

II

RELEASES AND COVENANTS NOT TO SUE

§ 2447. Definition and nature of release. The term "release," at common law, was used to denote a sealed instrument by which one who had a right or claim of some sort against another discharged such other from liability thereon. It was frequently used without any reference to the law of contracts, of an instrument by which one who had some interest in realty which he might assert, either then or in the future, against one who is in possession of such realty, discharged such other from such liability and thereby

¹ See ch. XCI.

² See ch. LXXXVI.

³ Used as a verb in the plea that the plaintiff "discharged" the defendant. *King v. Gillett*, 7 M. & W. 55.

⁴ *Foster v. Dawber*, 6 Ex. 839.

⁵ On the general subject of discharge, see *Discharge of Contracts*, by Arthur L. Corbin, 22 *Yale Law Journal*, 513.

⁶ *Kemp v. Watt*, 15 M. & W. 672.

in effect transferred his interest or right.¹ It was used in this sense to denote a form of conveyance of realty.

The term "release," however, was also used, from an early period, to denote a sealed instrument by which one who had a personal claim against another, either in contract or in tort, might discharge such other person from such claim.² There does not seem to have been any practical distinction between these two meanings of the term in the minds of the courts or lawyers of the early period of the common law. In the abridgments, the cases discussed under "release" involve release of actions and releases of interests in land; and the two classes of cases are mixed together without the slightest apparent attempt to separate them or to distinguish between them. Probably the fundamental idea was that of a sealed instrument which operated as a discharge of a right, and whether the right was a right in realty or a right to a personal action, was immaterial.

From an early period the term "release" imported a seal.³ The idea of a discharge by a voluntary agreement of the parties through some operative instrument, has been taken by many courts as the fundamental idea of the release, and the term has been applied to a discharge by a subsequent simple contract which, of course, had to be supported by sufficient consideration.⁴ The term "release" is thus treated as equivalent to discharge by any voluntary agreement, and it is used rather to denote the effect of the voluntary agreement which terminates the original right, than to denote the

¹ II Blackstone's Comm. 324.

² **Illinois.** *Illinois Central Ry. v. Read*, 37 Ill. 484, 87 Am. Dec. 260; *Woodbury v. United States Casualty Co.*, 284 Ill. 227, 120 N. E. 8.

Maryland. *Ingersoll v. Martin*, 58 Md. 67.

Massachusetts. *Sigourney v. Sibley*, 38 Mass. (21 Pick.) 101, 32 Am. Dec. 248.

Oregon. *Olaton v. Oregon Water Power Co.*, 52 Or. 343, 96 Pac. 1095, 97 Pac. 538.

Pennsylvania. *Tyson v. Dorr*, 6 Whart. (Penn.) 256.

³ See discussion in *Burgess v. Westmoreland*, 38 S. Car. 425, 17 S. E. 56.

⁴ **Illinois.** *Benjamin v. McConnel*, 9 Ill. 536, 46 Am. Dec. 474.

Iowa. *Bensen v. Reger*, — Ia. —, 168 N. W. 881.

Massachusetts. *Dunham v. Branch*, 59 Mass. (5 Cush.) 558.

Montana. *Collier v. Field*, 1 Mont. 612.

New York. *Dambmann v. Schulting*, 75 N. Y. 55.

Accord and satisfaction is spoken of as a release. *Norvell v. Kanawha & Michigan Ry.*, 67 W. Va. 467, 29 L. R. A. (N.S.) 325, 68 S. E. 288.

See also *Fire Association v. Wells*, — N. J. —, L. R. A. 1916A, 1280, 94 Atl. 619.

nature of the instrument itself.⁵ Indeed, the term "release" is sometimes used as equivalent to discharge and to take in all forms of discharge, whether by the voluntary agreement of the parties, or whether by facts to which the law attaches the consequence of discharge, ignoring or defying the intention of one or both of the parties to the contract.⁶

§ 2448. Definition and nature of covenant not to sue. The covenant not to sue, which is an agreement by one party not to bring an action against the other party, either for a limited period of time, or not to bring it at all,¹ has legal effects which in some respects are substantially the same as the effect of the sealed release, and in other respects are greatly different from those of the release.² It is because of these resemblances that the covenant not to sue must be considered in connection with the release; and it is because of these differences that the two must frequently be distinguished.

§ 2449. History of release. In most systems of law, a contract, even of the most formal type, may be terminated by a contract of equally formal type: This was probably true of the early English law, although much of the original material is so inaccessible that no final answer can be given to this problem. Before the introduction of the seal, it is likely that the written contract was regarded as enforceable because of its form; and a release in the form of the original contract seems to have been assumed as sufficient. Subject to some qualifications, to be discussed later,¹ the sealed release seems to have been operative from an early period of time, to discharge rights in realty, rights of action in tort, and rights arising out of contract. In the early abridgments,² the operative effect of the release is assumed, and the questions which are discussed are detailed questions of its scope and effect, such as ordinarily would not arise until long after the sufficiency of the release had become

⁵ Diehl v. McKinnon, 173 Ia. 32, L. R. A. 1916C. 384, 155 N. W. 259; Bensen v. Reger, — Ia. —, 168 N. W. 881.

⁶ Diehl v. McKinnon, 173 Ia. 32, L. R. A. 1916C. 384, 155 N. W. 259; Herman v. Schlesinger, 114 Wis. 382, 91 Am. St. Rep. 922, 90 N. W. 460.

¹ Ayliff v. Scrimshire, 1 Shaw. 46;

Hastings v. Dickinson, 7 Mass. 153, 5 Am. Dec. 34; Harrison v. Close, 2 Johns. (N. Y.) 448, 3 Am. Dec. 444.

² See §§ 2454 to 2456.

¹ See § 2454.

² Statham's Abridgment, Title, Release; Fitzherbert's Grand Abridgment, Title, Release; Rolle's Abridgment, Title, Release.

thoroughly settled. The gradual abolition of the private seal has caused a marked change in the law of release. In jurisdictions in which the private seal no longer has any legal effect, it is necessary to demand consideration of some sort for the new contract, which is now necessary, on the one hand, in place of the common-law release; or, on the other hand, to give the same effect to the written unsealed release, either by legislation or by change of judicial decision, that the sealed release had at common law.

§ 2450. Elements of release. At common law the elements of the release were the same as those of any other sealed instrument.¹ It was necessary that it should be under seal,² and that it should be delivered.³ It was probably not necessary that it should be signed,⁴ and the presence or absence of consideration was immaterial.⁵ In the broader sense of the term, a release is the consequence of a new contract,⁶ or of a novation,⁷ or of an accord and satisfaction,⁸ as well as of arbitration.⁹ In this sense of the term, it must possess the elements of an ordinary simple contract. A valid and sufficient offer and acceptance must be shown;¹⁰ a sufficient consideration is necessary in most jurisdictions;¹¹ neither the original contract nor the release must contain provisions which were regarded as illegal;¹² and the parties must be competent to enter into the new contract.¹³ In the widest sense of the term, release is regarded as equivalent to discharge, and it is the consequence of a new voluntary agreement of the parties which is intended to act as a discharge of the original liability, or it is the consequence of certain facts to which the law attaches the consequence of a discharge of a prior contract, whether the parties intended them to have that consequence or not. These questions are discussed in this chapter and in the following chapters.

§ 2451. Construction—General principles. In construing the release, the courts frequently repeat the general formula that the intention of the parties as determined by the ordinary rules of construction, is to be ascertained, and when ascertained, it is to

¹ See §§ 1156 et seq.

² See §§ 1157 et seq.

³ See § 1163.

⁴ See § 1160.

⁵ See § 1166.

⁶ See §§ 2457 et seq.

⁷ See §§ 2497 et seq.

⁸ See §§ 2501 et seq.

⁹ See §§ 2525 et seq.

¹⁰ See ch. V.

¹¹ *Bensen v. Reger*, — Ia. —, 168 N. W. 881. See §§ 2461 et seq.

¹² See ch. XX et seq.

¹³ See ch. XLV et seq.

control.¹ Provisions of a release "are not to be shorn of their efficiency by any narrow, technical and close construction."² As will be seen later,³ the repetition of this formula does not prevent the courts from ignoring the intention of the parties when they attempt to grant a release to one of two joint debtors, reserving intact the rights of the creditor against the other joint debtor.

The release is to be construed as a whole.⁴ The words of the release are not to be extended as against the releasor.⁵ If a dispute has arisen with reference to the amount of commission for selling certain property, a release in consideration of a certain sum, which provides that the broker has "no claim whatsoever," is to be construed as applying only to his claim for commissions for the sale of such property, and it does not operate as a release of a claim of commissions for the sale of other property.⁶ A release of claims for work done under a contract, is not to be extended to a claim for damages for the breach of the contract.⁷ The words of a release are to be limited by the express consideration mentioned for such release.⁸

§ 2452. Construction—Scope of subject-matter. As in the case of contracts generally,¹ the general words of a release are frequently limited by specific words in the same instrument; and the

¹ *England.* Ramsden v. Hylton, 2 Ves. Sr. 304; In re Perkins [1898], 2 Ch. 182.

United States. United States v. William Cramp Ship & Engine Building Co., 206 U. S. 118, 51 L. ed. 983.

Connecticut. Dwy v. Connecticut Co. 89 Conn. 74 L. R. A. 1915E, 800, 92 Atl. 883.

Illinois. Colton v. Field, 131 Ill. 398, 22 N. E. 545.

New Hampshire. Cobb v. Morrison, — N. H. —, 104 Atl. 829.

New Jersey. Van Slyke v. Van Slyke, 80 N. J. L. 382, 31 L. R. A. (N.S.) 778, 78 Atl. 179; Haber v. Goldberg, 92 N. J. 367, 105 Atl. 874.

New York. Faber v. New York, 222 N. Y. 255, 118 N. E. 609.

Oregon. Coopey v. Keady, 73 Or. 66, 144 Pac. 99.

Pennsylvania. Flaccus v. Wood, 260 Pa. St. 161, 103 Atl. 549; Heiser v. Reynolds. — Pa. St. —, 106 Atl. 888.

² *United States v. William Cramp Ship & Engine Building Co.*, 206 U. S. 118, 51 L. ed. 983.

³ See § —.

⁴ In re Perkins [1898], 2 Ch. 182; Van Slyke v. Van Slyke, 80 N. J. L. 382, 31 L. R. A. (N.S.) 778, 78 Atl. 179.

⁵ Haber v. Goldberg, 92 N. J. 367, 105 Atl. 874; Faber v. New York, 222 N. Y. 255, 118 N. E. 609; Flaccus v. Wood, 260 Pa. St. 161, 103 Atl. 549.

⁶ Haber v. Goldberg, 92 N. J. 367, 105 Atl. 874.

⁷ Faber v. New York, 222 N. Y. 255, 118 N. E. 609.

⁸ Flaccus v. Wood, 260 Pa. St. 161, 103 Atl. 549.

¹ See § 2026.

release is to be construed as applying only to the claims or demands which are thus referred to specifically.² A release of damages, past, present or future, arising from the construction or operation of tracks in a street, does not include damages caused by the subsequent change of grade of such street.³

The rule that the specific recitals limit general words, is merely an application of the general principle that the release is to be construed as a whole, and that separate parts thereof are to be read in the light of the entire instrument. Accordingly, the instrument taken as a whole may show that it was not the intention of the parties to limit the general words by the particular recitals.⁴ A release of all claims from the beginning of the world and especially those arising out of a certain specified occurrence, is not limited to claims arising out of such specified occurrence, but includes all prior claims.⁵ A release which provides that the releasor does "remit, release and forever discharge the United States of and from all and all manner of debts, dues, sums and sums of money, accounts, reckonings, claims and demands whatsoever, in law or in equity, for or by reason of or on account of the construction of said vessel under the contract aforesaid," is to be regarded as the release which was provided for in the original contract as "a final release * * * of all claims of any kind or description under or by virtue of said contract," and it includes not merely the contract price, but all claims arising out of such contract by reason of the breach thereby by the adversary party.⁶ A release of claims arising out of an act which is done when such release is

² England. *In re Perkins* [1898], 2 Ch. 182.

United States. *Texas & Pacific Ry. v. Dashiell*, 198 U. S. 521, 49 L. ed. 1150.

Massachusetts. *Rich v. Lord*, 35 Mass. (18 Pick.) 322.

Mississippi. *Yazoo & M. Valley R. Co. v. Smith*, 90 Miss. 44, 10 L. R. A. (N.S.) 1202, 43 So. 611.

New Jersey. *Van Slyke v. Van Slyke*, 80 N. J. L. 382, 31 L. R. A. (N.S.) 778, 78 Atl. 179.

New York. *Jackson v. Stackhouse*, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514.

Pennsylvania. *Heiser v. Reynolds*, — Pa. St. —, 106 Atl. 888.

³ *Yazoo & M. Valley R. Co. v. Smith*, 90 Miss. 44, 10 L. R. A. (N.S.) 1202, 43 So. 611.

⁴ *Chicago Union Traction Co. v. O'Connell*, 224 Ill. 428, 8 L. R. A. (N.S.) 1034, 79 N. E. 622; *Van Slyke v. Van Slyke*, 80 N. J. L. 382, 31 L. R. A. (N.S.) 778, 78 Atl. 179.

See also, in a case of tort, *Hooyman v. Reeve*, — Wis. —, 170 N. W. 282.

⁵ *Chicago Union Traction Co. v. O'Connell*, 224 Ill. 428, 8 L. R. A. (N.S.) 1034, 79 N. E. 622.

⁶ *United States v. William Cramp Ship & Engine Building Co.*, 206 U. S. 118, 51 L. ed. 983.

given, includes consequences of such act which are not discovered until after such release is given.¹

Whether a release includes an existing contract or covenant which has not yet been broken, is a question which depends upon the intention of the parties, and this in turn depends upon the language which is used. A release of actions, or claims, and the like, ordinarily applies only to contracts or covenants which have been broken when the release is given; while a release from all covenants, or from all contracts, and the like, includes contracts in existence, whether broken or not.²

§ 2453. Construction as between release and covenant not to sue. An instrument frequently contains language which shows that the parties intend it to operate as a release, but that at the same time they intend it to have consequences which the law would not attach to a release. By a special application of the rule, that the general paramount intent controls the specific intent,¹ and that every part of the contract is to be given effect if practicable,² the courts will construe such an instrument as a covenant not to sue, rather than as a release, if it appears that the consequences provided for in such instrument were primarily intended by the parties and that the release was a mere incident thereto.³ Since the law did not tolerate a release of one joint debtor or of one joint and several debtor, with the reservation of the creditor of his rights against the remaining joint debtors or joint and several debtors, an instrument of this sort was frequently construed by the courts to be a covenant not to sue, although the language which was used was language which was specially appropriate to a release.⁴ A covenant not to sue, which is unlimited in point of time, is treated as equivalent in legal effect at least to a release, if it is

¹ *Cobb v. Morrison*. — N. H. —, 104 Atl. 829.

² *Hoe's Case*, 5 Coke, 70b, 71a.

See also on this general question. *Altham's Case*, 8 Coke 148a, 150b; *Hancock v. Field*, Cro. Jac. 170; *Tynan v. Bridges*, Cro. Jac. 300; *Whitton v. Byc*, Cro. Jac. 486; *Tetley v. Wanless*, L. R. 2 Ex. 275.

³ See § 2039.

⁴ See § 2040.

³ *Solly v. Forbes*, 2 B. & B. 38; *Ward v. New Zealand National Bank*, 8 App. Cas. 755; *Rice v. Reed* [1900], 1 Q. B. 54; *Bradford v. Prescott*, 85 Me. 482, 27 Atl. 461.

A covenant not to sell is not a release. *Carey v. Bilby*, 129 Fed. 203.

⁴ *Price v. Barker*, 4 Ell. & B. 760; *Ward v. New Zealand National Bank*, 8 App. Cas. 755.

See also, *Line v. Nelson*, 38 N. J. L. 358.

given by a sole creditor to a sole debtor, or by all of the joint creditors to all of the joint debtors, or to all of the joint and several debtors.⁵ This view is rather a matter of practical convenience than an attempt to enforce the intention of the parties. If the covenant is really a covenant not to sue, it does not purport to discharge the existing right, but it merely binds the creditor not to enforce it as against the debtor. On the one hand, to treat such a covenant as equivalent to release, is either to ignore the intention of the parties or to grant specific performance at law; but, on the other hand, to treat such a covenant as a mere covenant not to sue, leaving the original creditor free to sue on the original cause of action, would result in giving a cause of action to the original debtor, upon the covenant not to sue. Two actions would thus be brought, in the first of which the creditor would recover against the debtor, and in the second of which the debtor would recover from the creditor the amount which the creditor had just recovered from the debtor. The construction thus adopted prevents this circuitry of action.

On the other hand, a covenant not to sue for a limited time has a legal effect which is substantially different from that of a release. A release must operate permanently or not at all. A right of action can not be suspended by a release.⁶ A covenant not to sue may, on the other hand, subject the creditor to an action on the part of the debtor if he brings an action in violation of such covenant. For these reasons a covenant not to sue for a limited time is not construed as equivalent to a release.⁷

§ 2454. Effect of release as discharge. Apparently a sealed release was at one time inoperative as a discharge of a judgment or other so-called contract of record.¹ This arose out of the fact that a contract of record was regarded as of a higher nature than a contract under seal, and that an obligation could be dissolved only by an obligation of at least as high a rank as that by which it was incurred. At modern law this rule is obsolete, either by statute or

⁵ Ford v. Beech, 11 Q. B. 852; Jones v. Quinnipiack Bank, 29 Conn. 25; Peddecord v. Hill, 20 Ky. (4 T. B. Mon.) 370.

⁶ See § 2455

⁷ Thimbleby v. Barron, 3 M. & W. 210; Ford v. Beech, 11 Q. B. 852; Webb

v. Spicer, 13 Q. B. 886; Mendenhall v. Lenwell, 5 Blackf. (Ind.) 125. 33 Am. Dec. 458; Dow v. Tuttle, 4 Mass. 414, 3 Am. Dec. 226; Chandler v. Herrick, 19 Johns. (N. Y.) 129.

¹ Mitchell v. Hawley, 4 Denio. (N. Y.) 414, 47 Am. Dec. 260.

by the adoption by the common-law courts of the theory of equity, which prevented one whose obligation of record had been satisfied, from making an unconscientious use of his legal power to assert it again.²

It was generally assumed that a sealed release could operate as a discharge of a prior obligation under seal.³ These cases are cases in which a sealed defeasance was given after the original sealed obligation, and in which it was sought to show performance of the sealed defeasance as a defense in an action upon the original sealed obligation. This result was explained on the theory that the defeasance may be pleaded in bar in order not to put the debtor "to his writ of covenant by circuits of action."⁴ Some doubt was cast upon this rule in a subsequent case,⁵ but the reporter tells us that this case was decided by one judge, two being silent, and the third being absent, and that such judgment, originally pronounced with a nisi, was subsequently made absolute by the same judge in a rage.⁶ Whether this decision ever represented the law or not, it has long ceased to be the law, and it is regularly held that a sealed release may operate as a discharge of any claims arising on contract, whether under seal or simple;⁷ subject to the qualifications arising out of the nature of negotiability, that a release of a negotiable instrument, by the holder thereof, before maturity, can not operate as against a subsequent bona fide purchaser for value, who does not know of such release.⁸

² See § 2472 and ch. LXXXI.

³ *Hodges v. Smith*, Cro. Eliz. 623; *Cotton v. Clinton*, Cro. Eliz. 755.

For a similar view, although in a case in which it was doubtful whether the original debt was incurred by a sealed obligation, see *Y. B. 12 Hen. VI (Mich.)* p. 1, pl. 3; *Statham's Abridgment*, Title, Release (18); *Fitzherbert's Grand Abridgment*, Title, Release (7).

⁴ *Hodges v. Smith*, Cro. Eliz. 623.

⁵ *Fowell v. Forrest*, 2 Wms. Saund. 47ff.

⁶ *Fowell v. Forrest*, 2 Wms. Saund. 47ff.

⁷ *United States v. Perkins v. Fourniquet*, 55 U. S. (14 How.) 313, 14 L. ed. 435.

Alabama. *Tennessee Coal, Iron & Ry. v. Moody*, 192 Ala. 364, L. R. A. 1915E, 369, 68 So. 274.

Illinois. *Woodbury v. United States Casualty Co.*, 284 Ill. 227, 120 N. E. 8; *Kusturin v. Chicago & A. R. Co.*, 287 Ill. 306, 122 N. E. 512. (Unsealed release on consideration.)

Iowa. *Taylor v. Chicago, R. I. & P. Ry. Co.* — Ia. —, 170 N. W. 388.

Massachusetts. *La Croix v. Boston Elevated Ry.*, 223 Mass. 242, 111 N. E. 785.

Michigan. *Butterfield v. Reynolds*, 189 Mich. 152, 155 N. W. 442.

New York. *Pratt v. Crocker*, 16 Johns. (N. Y.) 270.

Oregon. *Coopey v. Keady*, 73 Or. 66, 144 Pac. 99.

⁸ See ch. LXXII.

§ 2455. Release upon condition. A release, like any other contract,¹ may be granted to take effect upon the happening of some condition precedent.² Until the happening of such condition, the release is inoperative; and upon the happening of such condition, it becomes absolute.

Whether a release can be granted to take effect at once, subject to being defeated by the happening of a condition subsequent, so that the original cause of action would then revive, is a question upon which there has been considerable discussion and comparatively little direct authority. It was repeatedly declared that at common law, if the cause of action was once barred by the voluntary act of the parties, it was always barred;³ and this principle was invoked as the ground for holding that a covenant not to sue for a limited time could not be pleaded as a bar to an action upon the original cause of action, before the expiration of such period of time.⁴ At the same time the rule itself seems arbitrary and possibly is stated too broadly. Since conditions subsequent were permitted in other contracts or in conveyances of realty, no reason appears for denying their existence in releases. Even if the releasee might plead such conditional release and obtain a judgment in his favor, such judgment ought not to be a bar to a subsequent action on the original cause of action, after new facts had arisen, which prevented the release from operating as a bar; although it might be that the form of judgment and rigidity of common-law theories as to the nature and effect of a judgment as an estoppel of record, would make it operate in defiance of the intention of the parties. In any event, language has been used which tends to indicate that the courts regarded a release upon a condition subsequent as possible.⁵

§ 2456. Releases and covenants not to sue as between joint or joint and several parties. At common law, the release of one of two or more joint promisors or joint and several promisors oper-

¹ See § 2178 and ch. LXXVII.

² *Corner v. Sweet*, L. R. 1 C. P. 456; *Gibbons v. Vouillon*, 8 C. B. 483; *Stowe v. United States Express Co.*, 179 Mich. 349, 146 N. W. 158; *Crane v. Alling*, 15 N. J. L. 423.

³ *Gibbons v. Vouillon*, 8 C. B. 483.

See also *Lord North v. Butts*, 2 Dyer 139b, 140a; *Woodward v. Lord Darcy*, Plowd. 184; *Cheetham v. Ward*, 1 Bos. & P. 630.

⁴ *Ford v. Beech*, 11 Q. B. 852.

⁵ *Aston v. Pye*, 5 Ves. Jr. 350, n. 31; *Newington v. Levy*, L. R. 6 C. P. 180; *Slater v. Jones*, L. R. 8 Ex. 186.

ated as a release of all.¹ For this reason, in jurisdictions in which a contract of partnership was regarded as joint or joint and several, the release of one partner, by a sealed release, operated as a discharge of all.²

In many cases there might be good reasons for the application of this rule, especially in cases in which the creditor had released the principal debtor, and had then sought to enforce the contract against the sureties. If the creditors were permitted to do this, the sureties would then be prevented from enforcing the contract against the principal debtor on any theory of subrogation, since the discharge given by the creditor would operate as a bar against them. The rule, however, was not put upon logical grounds, but rather upon the theory that if the original contract were joint or joint and several, and it were altered either on the face of the instrument itself,³ or by some extrinsic and valid instrument, such alteration as to the nature and effect of the instrument would operate as a discharge of the parties who were originally liable upon such instrument, without regard to the intention of the party who granted such release or discharge, and without regard to the question of the prejudice to the remaining parties to such contract, in case the creditor were permitted to enforce the contract against them alone.

The result of the application of this rule was that if the creditor granted a release to one, with an express reservation of his right to bring an action against the other joint debtors, or joint and several debtors, the courts felt unable to enforce both provisions, and accordingly, under the general principle that the paramount

¹ *Arkansas*. *Tancred v. Bank*, 124 Ark. 154, 187 S. W. 160.

Kentucky. *Williamson v. McGinnis*, 50 Ky. (11 B. Mon.) 74, 52 Am. Dec. 561.

Massachusetts. *Wiggins v. Tudor*, 40 Mass. (23 Pick.) 434; *Hale v. Spaulding*, 145 Mass. 482, 1 Am. St. Rep. 475, 14 N. E. 534; *Brooks v. Neal*, 223 Mass. 467, 112 N. E. 78.

Nebraska. *Banking House v. Rose*, 78 Neb. 693, 111 N. W. 590.

West Virginia. *Rutherford v. Rutherford*, 55 W. Va. 56, 47 S. E. 240.

See § 2074.

On this subject, see *Releases and Covenants not to Sue Joint or Joint and Several Debtors*, by Samuel Williston, 25 *Harvard Law Review*, 203.

For the release or discharge of a joint wrongdoer, see *Berry v. Pullman Co.*, 249 Fed. 816, L. R. A. 1918F, 358; *Maryland v. Maryland Electric Rys. Co.*, 126 Md. 300, L. R. A. 1917A, 270, 95 Atl. 43.

² *Elliott v. Holbrook*, 33 Ala. 659; *Williamson v. McGinnis*, 50 Ky. (11 B. Mon.) 74, 52 Am. Dec. 561.

Contra, *Webb v. Butler*, 192 Ala. 287, 68 So. 369.

³ See ch. LXXXV.

intent would control,⁴ the courts regarded the release as the paramount intent, and the reservation of the right of action against the remaining debtors as the subsidiary intent, and accordingly they treated the entire contract as released.⁵ This rule, however, was limited to a technical release,⁶ and it did not apply to a gratuitous promise to discharge one party.⁷

The rule that a release of one joint debtor operated as a discharge of all, operated unfairly in so many cases, that in a number of jurisdictions it was changed by statute so that the release of one joint debtor or one joint and several debtor, did not of itself operate as a discharge of the entire liability as against all of the remaining debtors.⁸ This result has been reached under a statute which provides that a release "must have effect according to the intention of the parties thereto."⁹

The practical result of this rule has been obviated in many jurisdictions by the rule of construction that in such cases the reservation of the right of action against the remaining debtors will be regarded as the paramount intent, and the release will be regarded as the subsidiary intent; and, accordingly, such intent will be construed as a covenant not to sue, rather than as the release which it purports on its face to be.¹⁰

If all the debtors acquiesced in the release of one of the joint debtors, or one of the joint and several debtors, and in the reservation or rights of action against the remaining debtors, effect has been given both to the release and to the reservation.¹¹

A covenant not to bring an action against one of two parties, who are jointly liable, or jointly and severally liable, does not operate as a discharge of the remaining parties;¹² although if a

⁴See § 2039.

⁵*Cheatham v. Ward*, 1 Bos. & P. 630.

⁶*Harvey v. Sweasy*, 23 Tenn. (4 Humph.) 449.

⁷*Smith v. Bartholomew*, 42 Mass. (1 Met.) 276, 35 Am. Dec. 365; *Dewey v. Derby*, 20 Johns. (N. Y.) 462.

⁸*Alabama*. *Long v. Gwin*, — Ala. —, 80 So. 440.

Missouri. *Baker v. Hunt*, 88 Mo. 405.

New York. *Harbeck v. Pupin*, 123 N. Y. 115, 25 N. E. 311.

Ohio. *Sprague v. Childs*, 16 O. S. 107.

South Dakota. *Central Banking & Trust Co. v. Pussey*, 22 S. D. 223, 116 N. W. 1126.

South Carolina. *Meyer v. Bouchier*, 107 S. Car. 254, 92 S. E. 471.

⁹*Long v. Gwin*, — Ala. —, 80 So. 440. (Decided under § 3973 of the Alabama Code of 1907.)

¹⁰See § 2453.

¹¹*Rogers v. Hosack*, 18 Wend. (N. Y.) 319.

¹²*England*. *Lacy v. Kinnaston*, Holt (K. B.) 173; *Valmesley v. Cooper*, 11 Ad. & El. 216.

United States. *Berry v. Pullman Co.*, 249 Fed. 816.

thing of value has been given in partial satisfaction of the original claim, the remaining parties are entitled to have the amount thus paid credited upon the entire liability.¹³

A release by one of two joint promisees operates as a total discharge of liability.¹⁴

III

NEW CONTRACT

§ 2457. New contract as discharge—General nature. An executory contract may be discharged by a new contract which is entered into for that purpose between the parties thereto.¹ A provision in a written contract that no one can change its provisions,

Arkansas. *Bozeman v. State Bank*, 7 Ark. 328, 46 Am. Dec. 291.

Illinois. *Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271.

Massachusetts. *Goodnow v. Smith*, 35 Mass. (18 Pick.) 414, 29 Am. Dec. 600; *O'Neil v. National Oil Co.*, 20 Mass. 231, 120 N. E. 107.

Mississippi. *Bogdahn v. Pascagoula St. Ry. & Power Co.*, 118 Miss. 668, 79 So. 844.

New Jersey. *Bowne v. Mt. Holly National Bank*, 45 N. J. L. 360.

Oklahoma. *Lisle v. Anderson*, — Okla. —, 159 Pac. 278.

Vermont. *Spencer v. Williams*, 2 Vt. 209, 19 Am. Dec. 711.

A "covenant not to sue" a joint wrongdoer, reserving a right of action against the other joint wrongdoer, has been treated as a release of both. *Clark v. Union Electric Light & Power Co.*, — Mo. —, 213 S. W. 851.

The release or discharge of a joint wrongdoer is held not to discharge the other. *Adams Express Co. v. Beckwith*, — O. S. —, 17 O. L. R. 379 [overruling, *Ellis v. Bitzer*, 2 Ohio, 89].

¹³ *O'Neil v. National Oil Co.*, 231 Mass. 20, 120 N. E. 107; *Bogdahn v. Pascagoula St. Ry. & Power Co.*, 118 Miss. 668, 79 So. 844.

¹⁴ *Fitch v. Forman*, 14 Johns. (N. Y.)

172; *Weakly v. Hall*, 13 Ohio 167, 42 Am. Dec. 194.

See § 2081 for a discussion of this rule.

¹ **United States.** *Smith v. Salt Lake City*, 83 Fed. 784; *Westinghouse Electric & Mfg. Co. v. Binghamton Ry. Co.*, 255 Fed. 376.

Alabama. *Mylin v. King*, 139 Ala. 319, 35 So. 998; *Mobile Electric Co. v. Mobile*, — Ala. —, 79 So. 39.

Arkansas. *Grider v. Three States Lumber Co.*, 72 Ark. 190, 79 S. W. 763; *Nothwang v. Harrison*, 126 Ark. 548, 191 S. W. 2.

California. *Stewart, etc., Co. v. Krambs*, 139 Cal. 318, 73 Pac. 854; *Youngberg v. South End Warehouse Co.*, 177 Cal. 504, 171 Pac. 97.

Illinois. *Chicago, etc., Ry. v. Moran*, 187 Ill. 316, 58 N. E. 335; *Hutchinson v. Coonley*, 209 Ill. 437, 70 N. E. 686; *Hills v. McMunn*, 232 Ill. 488, 83 N. E. 963.

Iowa. *Smith v. Trust Co.*, 97 Ia. 117, 66 N. W. 84; *Iowa-Minnesota Land Co. v. Conner*, 136 Ia. 674, 112 N. W. 820.

Kentucky. *John King Co. v. Louisville & N. R. Co.*, 131 Ky. 46, 114 S. W. 308 [rehearing denied, 116 S. W. 1201].

Louisiana. *Brunswick v. Chemical Co.*, 110 La. 214, 34 So. 417.

is inoperative as against a subsequent modification to which the parties assent.² This form of discharge is sometimes spoken of as "discharge,"³ as though it were the technical form of discharge. It is sometimes spoken of as rescission,⁴ although the term "rescission" is also used in a number of other meanings, such as avoidance of a contract by one who has been induced to enter into it under fraud and the like,⁵ or by one who has entered into it under some disability, such as infancy or insanity;⁶ and it is also used of the act of equity in rendering a formal decree terminating the effect of the contract either for fraud and the like or for incapacity or in some cases some certain types of breach.

Maryland. *Linz v. Schuck*, 106 Md. 220, 124 Am. St. Rep. 481, 11 L. R. A. (N.S.) 789, 67 Atl. 286.

Massachusetts. *Sherman v. Buffinton*, 228 Mass. 139, 117 N. E. 33.

Michigan. *Grand Traverse Fruit & Produce Exchange v. Thomas Canning Co.*, 200 Mich. 95, 166 N. W. 878.

Minnesota. *Youngberg v. Lambertson*, 91 Minn. 100, 97 N. W. 571.

Nebraska. *Herpolsheimer v. Christopher*, 76 Neb. 352, 107 N. W. 382.

New Jersey. *Morecraft v. Allen*, 78 N. J. L. 729, L. R. A. 1913B, 1, 75 Atl. 920.

New York. *McCreery v. Day*, 119 N. Y. 1, 16 Am. St. Rep. 793, 6 L. R. A. 503, 23 N. E. 198.

North Carolina. *Burns v. McFarland*, 146 N. Car. 382, 59 S. E. 1011.

Oklahoma. *Hart v. Frost*, — Okla. —, 175 Pac. 257.

Oregon. *Good v. Smith*, 44 Or. 578, 76 Pac. 354; *Carnahan Mfg. Co. v. Beebe-Bowles Co.*, 91 Or. 302, 178 Pac. 233.

Pennsylvania. *Flegel v. Hoover*, 156 Pa. St. 276, 27 Atl. 162; *Murphy v. Bank*, 184 Pa. St. 208, 39 Atl. 143; *Robert Grace Contracting Co. v. Norfolk & W. Ry. Co.*, 259 Pa. St. 241, 102 Atl. 956.

Vermont. *Davenport v. Crowell*, 79 Vt. 419, 65 Atl. 557.

Washington. *Farley v. Letterman*, 87 Wash. 641, 152 Pac. 515 (obiter).

West Virginia. *Marsh v. Despard*, 56 W. Va. 132, 49 S. E. 24.

Wisconsin. *Fitzgerald v. Walsh*, 107 Wis. 92, 81 Am. St. Rep. 824, 82 N. W. 717.

On this subject, see *Rescission by Parol Agreement*, by Samuel Williston, 4 *Columbia Law Review*, 455; *Waiver in Insurance Cases*, by John S. Ewart, 18 *Harvard Law Review*, 364; *Waiver or Election*, by John S. Ewart, 29 *Harvard Law Review*, 724; *Parol Waiver Under the New York Fire Policy*, by George Richards, 12 *Columbia Law Review*, 134; *Election in Insurance Cases*, by John S. Ewart, 12 *Columbia Law Review*, 619; *Election in Insurance Cases*, by George Richards, 13 *Columbia Law Review*, 51; *The Extension of the Right of Waiver*, by F. Granville Munson, 14 *Columbia Law Review*, 571 and *The Doctrine of Waiver*, by Colin P. Campbell, 3 *Michigan Law Review*, 9.

² *Peterson v. Reaping Machine Co.*, 97 Ia. 148, 59 Am. St. Rep. 399, 66 N. W. 96.

³ *King v. Gillett*, 7 M. & W. 55.

⁴ *Davenport v. Crowell*, 79 Vt. 419, 65 Atl. 557.

⁵ See §§ 341 et seq., 372 et seq., 477 and 504.

⁶ See ch. XIV et seq.

The problems of the formation, validity, effect and operation of the new contract which modifies or discharges the original contract, are, in general, the same as those which arise in the case of any contract. At the same time there are a number of special applications of the general principles of contract law with reference to the assent of the parties to the new contract. The fact that there is in existence some form of contractual liability between the parties, and that one of the parties to the contract either gives up part of his rights, or forbears to act, in reliance upon the promise of the adversary party, causes special applications of the general rules of consideration. The form of the original contract operates in some cases as a restriction upon the power of the parties to modify or discharge the original contract by a contract of a rank, as to form, lower than that of the original contract. The fact that one contractual obligation is superimposed upon another, results in a special application of the ordinary rules of construction for the purpose of determining the intention of the parties as ascertained from the two instruments taken together. For these reasons a discussion of these special applications of the general principles of contract law is necessary in the case of new contracts.

Other questions, such as capacity of the parties, assignment, and the like, present no special questions with reference to new contracts different from those which are presented with reference to contracts generally, and need no further discussion in this connection.

§ 2458. New contract must be enforceable—Mutual assent of parties. The proposition that a prior contract may be modified or rescinded by a subsequent contract, implies that such subsequent contract must have the elements necessary to the formation of a valid original contract. The new contract requires the assent of all the parties to the original contract or of their successors, in interest to operate as a discharge thereof.¹ One of the parties to a

¹ *United States*, *Utley v. Donaldson*, 94 U. S. 29, 24 L. ed. 54; *Smoot v. United States*, 237 U. S. 38, 59 L. ed. 829 [affirming judgment, *Smoot v. United States*, 48 Ct. Cl. 427]; *Frankfurt-Barnett Co. v. Prym Co.*, 237 Fed. 21, L. R. A. 1918A, 602; *In re Mullings Clothing Co.*, 238 Fed. 58, L. R. A. 1918A, 539.

Alabama. *Pittsburgh Reliance Life Ins. Co. v. Garth*, 192 Ala. 91, 68 S. W. 871.

Colorado. *Adams v. Guiraud*, 62 Colo. 114, 169 Pac. 580.

Connecticut. *Smith v. Miller*, 79 Conn. 624, 66 Atl. 172; *Trowbridge v. Jefferson Auto Co.*, 92 Conn. 569, 103 Atl. 843.

contract can not modify such contract or terminate it lawfully unless the other party assents thereto.² A contract between A and B can not be modified by A's declaration of his wish to avoid the contract and the promise of B's agent to try to induce B to consent thereto.³ So a contract between A and B can not be abrogated or modified by a subsequent contract between B and C, to which A does not assent.⁴ An agreement between A and B, to divide the profits to be received from the sale of certain lands, can not be modified by an agreement between B and C, whereby C agrees that B shall have any bonus which may be paid upon a particular transaction with respect to certain lands included in the contract between A and B.⁵ If a contract is made by which B is to act as

District of Columbia. *Fontano v. Robbins*, 22 D. C. App. 253.

Georgia. *Central of Georgia, Ry. Co. v. Gortatowsky*, 123 Ga. 366, 51 S. E. 469; *Bearden Mercantile Co. v. Madison Oil Co.*, 128 Ga. 695, 58 S. E. 200; *Bailey State Bank v. Heinse*, 178 Ia. 1203, 160 N. W. 903.

Maryland. *B. F. Sturtevant Co. v. Cumberland*, 106 Md. 587, 68 Atl. 351.

Massachusetts. *Picard v. Beers*, 195 Mass. 419, 81 N. E. 246; *Boyden v. Hill*, 198 Mass. 477, 85 N. E. 413.

Minnesota. *Northwestern Fire & Marine Ins. Co. v. Connecticut Fire Ins. Co.*, 105 Minn. 483, 117 N. W. 825.

Nebraska. *Herpolsheimer v. Christopher*, 76 Neb. 352, 107 N. W. 382.

New Jersey. *Sperry & Hutchinson Co. v. Hertzberg*, 69 N. J. Eq. 264, 60 Atl. 368; *Ferber v. Cona*, 91 N. J. L. 688, 103 Atl. 471.

North Carolina. *Brown v. Lumber Co.*, 117 N. Car. 287, 23 S. E. 253; *Billings v. Wilby*, 175 N. Car. 571, 96 S. E. 50.

North Dakota. *Libby v. Barry*, 15 N. D. 286, 107 N. W. 972; *Bellaire Stove Co. v. Midland Steel Co.*, 66 O. S. 1, 63 N. E. 587.

Wisconsin. *Dickinson v. Plow Co.*, 101 Wis. 157, 76 N. W. 1108.

² **United States.** *Central Coal & Coke Co. v. Good*, 120 Fed. 793.

Colorado. *Adams v. Guiraud*, 62 Colo. 114, 169 Pac. 580.

Connecticut. *Trowbridge v. Jefferson Auto Co.*, 92 Conn. 569, 103 Atl. 843.

District of Columbia. *Fontano v. Robbins*, 22 D. C. App. 253.

Georgia. *Oklahoma Vinegar Co. v. Carter*, 116 Ga. 140, 94 Am. St. Rep. 112, 59 L. R. A. 122, 42 S. E. 378; *Central of Georgia, Ry. Co. v. Gortatowsky*, 123 Ga. 366, 51 S. E. 469.

Maryland. *B. F. Sturtevant Co. v. Cumberland*, 106 Md. 587, 68 Atl. 351.

Massachusetts. *Picard v. Beers*, 195 Mass. 419, 81 N. E. 246.

New Jersey. *Sperry & Hutchinson Co. v. Hertzberg*, 69 N. J. Eq. 264, 60 Atl. 368.

Ohio. *Bellaire Stove Co. v. Midland Steel Co.*, 66 O. S. 1, 63 N. E. 587.

Wisconsin. *Dickinson v. Plow Co.*, 101 Wis. 157, 76 N. W. 1108.

³ *McCormick Harvesting Machine Co. v. Markert*, 107 Ia. 340, 78 N. W. 33.

⁴ *Currier v. Kretzinger*, 162 Ill. 511, 44 N. E. 882; *McKay v. Myers*, 168 Mass. 312, 47 N. E. 96; *Ludlow v. Strong*, 53 N. J. Eq. 326, 31 Atl. 409; *Bowen v. Ry.*, 34 S. Car. 217, 13 S. E. 421.

⁵ *Currier v. Kretzinger*, 162 Ill. 511, 44 N. E. 882.

factor for A, and such contract makes no provision with reference to insurance, the principal can not add to such contract a provision requiring the factor to keep the goods insured,⁶ as by inserting in the invoices a provision that goods were to be kept covered by insurance for the benefit of the consignor.⁷ If A and B have entered into a building contract, such contract is not terminated by A's offer to pay a certain sum for a building to be constructed according to a new plan which A submitted to B, but to which B never agreed.⁸ A notice by an engineer of the United States to a contractor, to the effect that a greater quantity of material would probably be required than was provided for by the contract, is not such a contract for such additional amount of material that the contractor can recover probable profits for furnishing such material in case such material is not in fact needed for the performance of the contract.⁹ So a promise by a construction company to pay the salary of the president of a railway company, will not discharge the railway company from liability to its president unless the latter assents to such new contract.¹⁰

To abrogate¹¹ or modify¹² a prior contract, it is necessary that the minds of the parties to the original contract should meet by offer and acceptance upon the terms of the new contract. Mere negotiations, consisting of unaccepted offers, can not affect a prior contract.¹³ Subsequently, conversations as to the meaning of a prior contract, not amounting to a new contract and not giving rise to an estoppel, are not intended to change the legal effect of such contract, and hence do not operate as such change.¹⁴ In order to establish a subsequent oral modification of an oral written contract, it must be shown that the minds of the parties meet upon such subsequent modification.¹⁵ An ambiguous statement which is

⁶ *B. F. Sturtevant Co. v. Cumberland*, 106 Md. 587, 68 Atl. 351.

⁷ *B. F. Sturtevant Co. v. Cumberland*, 106 Md. 587, 68 Atl. 351.

⁸ *Ferber v. Cona*, 91 N. J. L. 688, 103 Atl. 471.

⁹ *Smoot v. United States*, 237 U. S. 38, 59 L. ed. 829 [affirming judgment, *Smoot v. United States*, 48 Ct. Cl. 427].

¹⁰ *Bowen v. Ry.*, 34 S. Car. 217, 13 S. E. 421.

¹¹ *Hamilton v. State (Miss.)*, 8 So. 761; *Gottstein v. Lumber Co.*, 7 Wash. 424, 35 Pac. 133.

¹² *Stix v. Roulston*, 88 Ga. 743, 15 S. E. 826; *Furness-Withy v. Fahey*, 127 Md. 333, 96 Atl. 619.

¹³ *Bellamy v. Debenham, L. R.* 45 Ch. D. 481; *Mt. Holly, etc., Co. v. Caraleigh, etc., Works*, 72 Fed. 244, 16 C. C. A. 535; *Globe Refining Co. v. Guano Co.*, 112 Ga. 366, 37 S. E. 379; *Hamilton v. State (Miss.)*, 8 So. 761.

¹⁴ *Dixon v. Williamson*, 173 Mass. 50, 52 N. E. 1067.

¹⁵ *Northwestern Fire & Marine Ins. Co. v. Connecticut Fire Ins. Co.*, 105 Minn. 483, 117 N. W. 825.

not accepted as an offer by the adversary party, can not operate to modify a prior contract.¹⁶ Mere statements by one party to a contract, made after the contract is entered into, can not modify or abrogate it if not assented to by the adversary party.¹⁷ A subsequent conversation between the parties to a written contract had immediately after signing it, whereby they discuss and construe it, does not of itself affect the contract, since the parties had no intention of modifying it by such conversation.¹⁸ Notice by one party to a contract of a change desired or insisted on by him, does not amount to a modification unless the adversary party assents thereto either expressly or impliedly. Thus a notice by an employer to an employe, with whom he has an unexpired contract, of a reduction in the contract rate, is without effect if the employe does not assent thereto.¹⁹ A bill of lading sent to a consignee after an oral agreement for shipping goods has been entered into between himself and the carrier, can not limit the carrier's liability.²⁰ An oral contract can not be modified by a written memorandum signed by one person and setting forth terms different from those of the original contract.²¹ A contract for the sale of goods can not be changed to a consignment or agency for sale by a provision in an invoice subsequently forwarded to the purchaser, even though he does not actively dissent therefrom.²² A sold an elevator to B, who bought for C. Subsequently B wrote to A that he did not expect to be called to pay for the elevator until C paid B. A did not dissent and thereafter put the elevator in place. It was held that A's silence did not amount to an acceptance of B's request, even if the elevator was put in after the time fixed by the original contract.²³ General authority by some promoters of a corporation to others, to do whatever the latter think best, abrogates a prior contract that they would retain a controlling interest in the stock of such cor-

¹⁶ *Billings v. Wilby*, 175 N. Car. 571, 96 S. E. 50.

¹⁷ *Aurora Water Co. v. Aurora*, 129 Mo. 540, 31 S. W. 946; *Wolff Dryer Co. v. Bigler*, 192 Pa. St. 466, 43 Atl. 1092; *Stacy v. Rose* (Tenn. Ch. App.), 58 S. W. 1087.

¹⁸ *Dean v. Mfg. Co.*, 177 Mass. 137, 56 N. E. 162; *Picard v. Beers*, 195 Mass. 419, 81 N. E. 246; *Richards v. Manitowoc & N. Trac. Co.*, 140 Wis. 85, 121 N. W. 937.

¹⁹ *Kendrick v. Visage*, 88 Ga. 275, 14 S. E. 612.

²⁰ *St. Louis, etc., Ry. v. Milk Co.*, 175 Ill. 557, 67 Am. St. Rep. 238, 51 N. E. 911.

²¹ *Picard v. Beers*, 195 Mass. 419, 81 N. E. 246.

²² *John S. Brittain Dry-Goods Co. v. Birkenfeld*, 20 Mont. 347, 51 Pac. 263.

²³ *C. & C. Electric Motor Co. v. Frisbie Co.*, 66 Conn. 67, 33 Atl. 604.

poration and not sell their shares without first offering them to their associates where, in order to secure the co-operation of others, without which such corporation could not be organized, it is necessary to let them have a controlling interest in such corporation.²⁴

While the parties to a contract may modify it by a subsequent contract which is shown by their acts,²⁵ the acts which are relied upon to modify a prior contract must be unequivocal in their character.²⁶ Acts which are ambiguous in their character, and which are consistent either with the continued existence of the original contract, or with a modification thereof, are not sufficient to establish a modification.²⁷

Conduct which is not necessarily inconsistent with the continuation of a contract, will not be regarded as showing an implied agreement to discharge it, although such conduct might have been consistent with an agreement to discharge such prior contract.²⁸ A contract by which the widow of a decedent is given the right to use certain realty of the decedent while she remains his widow, does not require her to occupy such property in person; and the fact that she leases such property to one of the heirs of the decedent does not indicate an implied understanding that the original contract shall terminate.²⁹ The fact that the parties to a contract to intermarry enter into improper relations does not indicate that the original contract is terminated,³⁰ although the fact of such improper relationship may be the motive for delaying performance of the original contract.³¹

A definite refusal to perform unless the adversary party consents to a modification, suggested by the party who thus refuses performance, amounts to breach.³²

²⁴ *Smith v. Bierce*, 104 La. 96, 28 So. 905.

²⁵ See §§ 2471 and 2491.

²⁶ *Bearden Mercantile Co. v. Madison Oil Co.*, 128 Ga. 695, 58 S. E. 200; *Boyden v. Hill*, 198 Mass. 477, 85 N. E. 413; *Northwestern Fire & Marine Ins. Co. v. Connecticut Fire Ins. Co.*, 105 Minn. 483, 117 N. W. 825; *Herpolsheimer v. Christopher*, 76 Neb. 352, 107 N. W. 382.

²⁷ *Northwestern Fire & Marine Ins. Co. v. Connecticut Fire Ins. Co.*, 105 Minn. 483, 117 N. W. 825.

²⁸ *Henderson v. Henderson*, 136 Ia. 564, 114 N. W. 178; *Crossett v. Brackett*, — N. H. —, 105 Atl. 5.

²⁹ *Henderson v. Henderson*, 136 Ia. 564, 114 N. W. 178.

³⁰ *Crossett v. Brackett*, — N. H. —, 105 Atl. 5.

³¹ *Crossett v. Brackett*, — N. H. —, 105 Atl. 5.

³² *Richards v. Manitowoc & N. Traction Co.*, 140 Wis. 85, 121 N. W. 937. See ch. LXXXIV.

In order to establish a new contract which modifies or terminates the original contract, it must be shown that the parties agreed upon some definite modification.³³

§ 2459. Recognition of breach not new contract. The recognition of the fact of a breach by the adversary party, followed by conduct consistent with the fact of such breach, which looks to the mitigation of damages arising therefrom, does not amount to an abrogation of the contract.¹ An employee's conduct in accepting other employment from one member of a partnership on breach of a contract of employment between such employee and such partnership, does not abrogate such contract.² If a buyer does not perform the contract of sale, the fact that the vendor resells on the vendee's account,³ and that he acts under the vendee's instructions in making such resale,⁴ does not abrogate the contract of sale. If A breaks a contract into which he has entered with B, B's unaccepted offer to release A from liability on certain terms does not operate as a discharge of such contract.⁵

Receiving notice of intended breach by the adversary party,⁶ even if without protest,⁷ does not amount to a new contract discharging such prior contract. If the receiver of an insolvent corporation disavows a lease made to it, the act of the lessor in receiving the keys and leasing the premises to another tenant, does not amount to a discharge of the original contract of lease,⁸ especially under a clause giving to the lessor a right to re-enter for breach of condition in case of non-payment of rent.⁹

§ 2460. Assent of beneficiary. An agreement between A, B and C can not be modified to C's prejudice by a subsequent agree-

³³ *Northwestern Fire & Marine Ins. Co. v. Connecticut Fire Ins. Co.*, 105 Minn. 483, 117 N. W. 825.

¹ *Nickerson v. Russell*, 172 Mass. 584, 53 N. E. 141; *Doty v. Nixon*, 109 Mich. 266, 67 N. W. 116.

² *Nickerson v. Russell*, 172 Mass. 584, 53 N. E. 141.

³ *Doty v. Nixon*, 109 Mich. 266, 67 N. W. 116.

⁴ *Grist v. Williams*, 111 N. Car. 53, 32 Am. St. Rep. 782, 15 S. E. 839.

⁵ *Sheffield Furnace Co. v. Coke Co.*, 101 Ala. 446, 14 So. 672; *Spinning v. Drake*, 4 Wash. 285, 30 Pac. 82, 31 Pac. 319.

⁶ *In re Mullings Clothing Co.*, 238 Fed. 58, L. R. A. 1918A, 539; *Central of Georgia, Ry. Co. v. Gortatowsky*, 123 Ga. 366, 51 S. E. 469.

⁷ *In re Mullings Clothing Co.*, 238 Fed. 58, L. R. A. 1918A, 539.

⁸ *In re Mullings Clothing Co.*, 238 Fed. 58, L. R. A. 1918A, 539.

See, however, as to the effect of the lessor's taking possession. *Bernard v. Renard*, 175 Cal. 230, 3 A. L. R. 1076, 165 Pac. 694; *Chase v. Evans*, 178 Ia. 885, 3 A. L. R. 1071, 160 N. W. 346.

⁹ *In re Mullings Clothing Co.*, 238 Fed. 58, L. R. A. 1918A, 539.

ment between A and B.¹ It has been held that a modification by A and B, which does not increase C's liability, can not be invoked by C as a discharge of his original liability.² A contract between a father and his son, for the support of the father, can not be modified after the father becomes insane by an agreement between the son and the other children,³ though it can, of course, be modified by a contract made between father and son while the father has still capacity to contract.⁴ If A and B have entered into a contract for C's benefit, they may modify or abrogate such contract at any time before C has assented thereto,⁵ but they can not modify it thereafter.⁶

§ 2461. Consideration for new contract. While the principles which apply in cases of new contracts are the same that apply in questions of consideration generally, there are some special peculiarities in the application of these principles, growing out of the fact that the parties have already entered into a contractual obligation. As in the case of other contracts,¹ a subsequent contract which is to operate as a complete discharge or a modification of a prior contract, must itself be supported by sufficient valuable consideration.² If the new contract is in writing it may import consideration.³

¹ California. *Ehrman v. Rosenthal*, 117 Cal. 491, 49 Pac. 460.

Indiana. *American Central Life Ins. Co. v. Rosenstein* (Ind.), 88 N. E. 97.

Louisiana. *People's Bank v. Shreveport Ice & Brewing Co.*, 142 La. 802, 77 So. 636.

New York. *Gifford v. Corrigan*, 117 N. Y. 257, 15 Am. St. Rep. 508, 6 L. R. A. 610, 22 N. E. 756.

Wisconsin. *Bassett v. Hughes*, 43 Wis. 319.

² *Weed v. Spears*, 193 N. Y. 289, 86 N. E. 10; *Gibbons v. Grinsel*, 79 Wis. 365, 48 N. W. 255.

³ *Hudson v. Hudson*, 90 Ga. 581, 16 S. E. 349; *Hudson v. Hudson*, 87 Ga. 678, 27 Am. St. Rep. 270, 13 S. E. 583.

⁴ *Hudson v. Hudson*, 90 Ga. 581, 16 S. E. 349.

⁵ *Jordan v. Laverty*, 53 N. J. L. 15, 20 Atl. 332.

⁶ See § 2304.

¹ See §§ 537 et seq.

For qualifications of this general rule, see §§ 541, 601, 602, 603, 604 et seq.

² California. *In re McDougald's Estate*, 146 Cal. 196, 79 Pac. 875.

Iowa. *Lamb's Estate v. Morrow*, 140 Ia. 89, 18 L. R. A. (N.S.) 226, 117 N. W. 1118.

Kentucky. *People's Savings Bank v. Wright*, 183 Ky. 362, 209 S. W. 342 (obiter).

Maryland. *Linz v. Schuck*, 106 Md. 220, 124 Am. St. Rep. 481, 11 L. R. A. (N.S.) 789, 67 Atl. 286.

Virginia. *Producers' Coal Co. v. Miffin Coal Mining Co.*, — Va. —, 95 S. E. 948.

³ *Commercial National Bank v. May*, — Ia. —, 174 N. W. 646.

§ 2462. No new or additional consideration—Contract executory on both sides—Mutual discharge. If the original contract is still executory on both sides, either in whole or in part, and the parties in forming the new contract waive or release any liability created by the original contract, such waiver or release is a consideration for the promise of the party whose liability is thus released.¹ If the original contract is subject to be terminated by the happening of a condition subsequent, and it is in whole or in part executory on both sides, the mutual discharge of liabilities under such contract is a sufficient consideration.²

§ 2463. Discharge or increase in liability of one party. If an executory contract between A and B is modified by imposing a new liability upon A without releasing him from any liability, and without imposing any additional liability upon B, such promise does not contain in itself any consideration sufficient to support A's promise to assume such new liability. Unless some consideration exists outside of the mutual promises of A and B, the new contract has no consideration and is unenforceable.¹ If an executory con-

¹ **Alabama.** *Badders v. Davis*, 88 Ala. 367, 6 So. 834; *Pioneer Savings & Loan Co. v. Nonnemacher* (Ala.), 30 So. 79; *Warren v. Cash*, 143 Ala. 158, 39 So. 124; *Wellden v. Witt*, 145 Ala. 605, 40 So. 126; *Elliott v. Howison*, 146 Ala. 568, 40 So. 1018.

Arkansas. *Kilgore Lumber Co. v. Thomas*, 98 Ark. 219, 135 S. W. 858.

California. *Carter v. Rhodes*, 135 Cal. 46, 66 Pac. 985.

District of Columbia. *Hughes v. Brennan Construction Co.*, 24 D. C. App. 90.

Iowa. *Jones v. Haines*, 117 Ia. 80, 90 N. W. 518; *Lamb's Estate v. Morrow*, 140 Ia. 89, 18 L. R. A. (N.S.) 226, 117 N. W. 1118; *Richards v. Heilen*, 153 Ia. 66, 133 N. W. 393.

Kentucky. *Johnson v. Broughton*, 183 Ky. 628, 210 S. W. 455.

Maryland. *Linz v. Schuck*, 106 Md. 220, 124 Am. St. Rep. 481, 11 L. R. A. (N.S.) 789, 67 Atl. 286.

Massachusetts. *Thomas v. Barnes*, 156 Mass. 581, 31 N. E. 683; *Pease v.*

McQuillin, 180 Mass. 135, 61 N. E. 819; *Hanson v. Wittenberg*, 205 Mass. 319, 91 N. E. 383.

Nebraska. *Bryant v. Thesing*, 46 Neb. 244, 64 N. W. 967; *Bowman v. Wright*, 65 Neb. 661, 91 N. W. 589 [affirmed on rehearing, 65 Neb. 666, 92 N. W. 580]; *Strahl v. Western Grocer Co. (Neb.)*, 98 N. W. 1043.

New York. *Clark v. West*, 193 N. Y. 349, 86 N. E. 1.

Utah. *Prye v. Kalbaugh*, 34 Utah 306, 97 Pac. 331.

Washington. *Long v. Pierce County*, 22 Wash. 330, 61 Pac. 142; *Dyer v. Irrigation District*, 25 Wash. 80, 64 Pac. 1009.

Wisconsin. *Brown v. Everhard*, 52 Wis. 205, 8 N. W. 725; *Wisconsin Sulphite Fibre Co. v. D. K. Jeffris Lumber Co.*, 132 Wis. 1, 111 N. W. 237.

² *Prye v. Kalbaugh*, 34 Utah 306, 97 Pac. 331.

¹ *Main Street, etc., Ry. Co. v. Traction Co.*, 129 Cal. 301, 61 Pac. 937; *Pence v. Adams*, 116 Ia. 462, 89 N. W.

tract between A and B is modified by discharging a part of the liability which was imposed upon A by the original contract, without releasing B from any liability and without imposing any new liability upon B, such new contract is without consideration and is unenforceable.² If disputes have arisen under a contract and the parties thereto enter into a new contract as a means of adjusting such disputes, such adjustment of disputes is a sufficient consideration.³ After a written agreement is made for the sale of land, a subsequent agreement of the vendee to repay the amount received if a certain railroad was not completed in two years, is without consideration.⁴ A street-car company, in order to obtain the consent of another company to use the tracks of the latter, agreed to reconstruct that part of the line which they desired to use, and equip it for use as an electric line. A subsequent agreement by which the company seeking to make use of such line, agreed, in addition to its former liability, to pay the costs incident to widening the track at the option of the other party, was without consideration.⁵

A modification of a prior contract which relieves A from some liability imposed by such prior contract, without imposing any liability upon A in place thereof, and without modifying B's liability in any way, is of no effect as a discharge of such prior contract.⁶ A promise made after a contract is entered into, to extend the time of performance, is without consideration and unenforceable.⁷

If the parties to a written contract fail to express their agreement in the terms thereof, and they execute a new contract to express their real intent, such contract needs no other consideration.⁸

If A and B have entered into a contract and B finds the performance thereof unprofitable, or for some other reason contemplates breach of such contract, B frequently promises additional

1065; *Combs v. Burt & Brabb Lumber Co.* (Ky.), 85 S. W. 227, 27 Ky. Law Rep. 430; *McIntyre v. Mining Co.*, 20 Utah 323, 60 Pac. 552.

² *Brown v. Lowndes County*. — Ala. —, 78 So. 815 (obiter); *Creamery Package Mfg. Co. v. Russell*, 84 Vt. 80, 32 L. R. A. (N.S.) 135, 78 Atl. 718.

³ *Russell v. Lambert*, 14 Ida. 284, L. R. A. 1915B, 20, 94 Pac. 54; *Producers' Coal Co. v. Mifflin Coal Mining Co.*, — Va. —, 95 S. E. 948. See §§ 612 et seq.

⁴ *Pence v. Adams*, 116 Ia. 462, 89 N. W. 1065.

⁵ *Main St., etc., Ry. v. Traction Co.*, 129 Cal. 301, 61 Pac. 937.

⁶ *Arnold v. Scharbauer*, 118 Fed. 1008; *Weed v. Spears*, 193 N. Y. 289, 86 N. E. 10.

⁷ *McIntyre v. Mining Co.*, 20 Utah 323, 60 Pac. 552.

⁸ *Bullock v. Johnson*, 110 Ga. 486, 35 S. E. 703.

compensation to induce A to perform the original contract. Whether B's performance of the original contract is of itself sufficient consideration for A's promise is a question upon which there is a conflict of authority. According to the fundamental theory of consideration,⁹ a consideration for A's promise can exist only if A receives something in return therefor, to which he was not already entitled, or if B gives up some right in return for A's promise, to which B would otherwise have been entitled. In cases of this sort, the only thing that A receives is B's promise to perform the original contract, and A was entitled to this by reason of the original contract. The only thing which B can be said to give up is a legal power, not right, to break the original contract; and he gives this up when the new contract is made only to the extent of promising the performance which he has already promised. For these reasons it is held by a great number of authorities that no consideration exists in such cases for A's promise.¹⁰ While it is difficult to see how any other result could be reached without ignoring the theory of consideration, some authorities have managed to reach the opposite result, and to hold that A's promise in such case is supported by a valuable consideration on the theory that A gets the benefit of the performance of the original contract for which he is evidently willing to pay.¹¹ Among the other difficulties which this theory presents is that in such cases A does not, as a rule, receive B's performance when the new contract is made, but only B's promise to perform his original contract. It is not until B has performed that A receives the performance which by this theory is the consideration for his new promise as distinct from B's promise of performance. Under this theory no consideration could exist until performance. If, however, the consideration which is contemplated by the new parties is B's promise, A's promise must be supported by a sufficient consideration when the promise is made, or else nothing which happens thereafter can furnish consideration for such promise.

§ 2464. Contract performed on one side. If a contract has been performed on one side in full, a modification of the executory part of such contract whereby the original liability of the party who is still to perform remains unmodified, but an additional liability is imposed upon him, is invalid unless a new consideration

⁹ See §§ 514 et seq.

¹¹ See § 590.

¹⁰ See § 589.

supports such new promise.¹ If a contract has been fully performed by one party, his promise not to enforce the executory covenants of such contract against the adversary party, is unenforceable unless there is some additional consideration.² If a contract for the sale of goods has been performed by delivering the goods, a subsequent agreement discharging the liability of the adversary party is invalid unless supported by some additional consideration.³ If a written contract of sale contains a warranty, a subsequent oral warranty is unenforceable unless supported by a valuable consideration.⁴

There are, however, a number of exceptions to this general principle which in themselves are really exceptions to the general theory of consideration. As they have been discussed elsewhere in detail, a mere reference in this connection is all that is necessary. If the contract in question is a negotiable instrument, the cancellation of such instrument by the holder thereof, with intent to discharge the maker from liability, has this effect, and no consideration therefor is necessary.⁵ In some jurisdictions, statutes have been enacted which give to the ordinary unsealed release or to the receipt in full, substantially the same effect as that of the common-law release under seal; and by such statutes such a release or receipt is made to operate as a discharge without consideration.⁶ In some jurisdictions the courts have attempted to reach substantially the same result without the aid of legislation by treating a promise by the creditor to discharge the debtor as a gift of the debt by the creditor to the debtor; and, accordingly, by holding that such promise operates as a discharge even without consideration, since it can be treated as a gift.⁷

§ 2465. Theory that consideration not necessary. In some jurisdictions it is said that the consideration for the original contract is imported into the new contract, and that accordingly the new contract does not need any consideration.¹ In many of these

¹ *Rumely v. Emmons*, 85 Mich. 511, 48 N. W. 636; *Weed v. Spears*, 193 N. Y. 289, 86 N. E. 10.

² *Titus v. Whiteside*, 228 Fed. 965; *George v. Lane*, 80 Kan. 94, 102 Pac. 55; *Tacoma & Eastern Lumber Co. v. Field*, 100 Wash. 79, 170 Pac. 360.

³ *Tacoma & Eastern Lumber Co. v. Field*, 100 Wash. 79, 170 Pac. 360.

⁴ *Rumely v. Emmons*, 85 Mich. 511, 48 N. W. 636.

⁵ See § 601.

⁶ See §§ 541 and 604.

⁷ See § 603.

¹ *England. Stead v. Dawber*, 10 Ad. & El. 57, 52 Wis. 205.

United States. Harrison v. Tampa, 247 Fed. 569.

cases this statement is made with reference to contracts in which a sufficient consideration exists for the new contract, if the original contract was valid,² as where the original contract is executory in part and by the new contract each party is restored to his original position.³ A similar statement has also been made where a contract was entered into to sell stock under a warranty as to the liabilities of the corporation by a subsequent contract, and a certified list of accounts was furnished together with representations that no further liabilities existed.⁴ A agreed to sell to B a part of an interest in A's ship, in part for cash and in part on deferred payments. The ship was subsequently destroyed. A and B thereupon agreed that B would aid A in prosecuting action to recover damages for the loss of such vessel, and that A would pay to B the amount which B had paid for his interest in such vessel. It was held that such modification of the original contract was valid. It was said "to be well settled that the parties to a contract may by mutual agreement vary or modify its terms or rescind it without any new consideration therefor. In the case of a modification or change of a contract the consideration for the original agreement is imported into the new agreement which is substituted for it." It was pointed out, however, that there was a consideration in the release of each party from the obligation of the original agree-

Alabama. *Warren v. Cash*, 143 Ala. 158, 39 So. 124; *Wellden v. Witt*, 145 Ala. 605, 40 So. 126. See, however, that additional consideration is necessary. *Shriner v. Craft*, 166 Ala. 146, 139 Am St. Rep. 19, 28 L. R. A. (N.S.) 450, 51 So. 884.

Massachusetts. *Thomas v. Barnes*, 156 Mass. 581, 31 N. E. 683.

Michigan. *Pulpwood Co. v. Perry*, 158 Mich. 272, 122 N. W. 552.

Texas. *Delta County v. Blackburn*, 100 Tex. 51, 90 S. W. 902 [judgment reversed, *Delta County v. Blackburn*, 93 S. W. 419].

Washington. *Pacific Power & Light Co. v. White*, 104 Wash. 528, 177 Pac. 313.

Wisconsin. *Brown v. Everhard*, 52 Wis. 205, 8 N. W. 725; *Magill v. Stoddard*, 70 Wis. 75, 35 N. W. 346; *Ruege v. Gates*, 71 Wis. 634, 38 N. W. 181.

"The same consideration which existed for the old agreement is imported into the new agreement which is substituted for it." *Stead v. Dawber*, 10 Ad. & El. 57 [quoted in *Brown v. Everhard*, 52 Wis. 205], 8 N. W. 725; *Kelly v. Bliss*, 54 Wis. 187, 11 N. W. 488.

² *Wellden v. Witt*, 145 Ala. 605, 40 So. 126; *Pacific Power & Light Co. v. White*, 96 Wash. 18, Ann. Cas. 1918B, 125, 164 Pac. 602; *Pacific Power & Light Co. v. White*, 104 Wash. 528, 177 Pac. 313.

³ *Wellden v. Witt*, 145 Ala. 605, 40 So. 126.

⁴ *Pacific Power & Light Co. v. White*, 96 Wash. 18, Ann. Cas. 1918B, 125, 164 Pac. 602; *Pacific Power & Light Co. v. White*, 104 Wash. 528, 177 Pac. 313.

ment.⁵ In other jurisdictions, however, this from of statement seems to be taken literally, and it seems to be held that if the original contract possesses sufficient consideration, no consideration for the new contract is necessary.⁶ Under a written contract by which A agrees to cut and bank a certain quantity of logs at a certain price per thousand feet, and also "to break the rollways in the spring," in consideration of which B promises to pay the specified price per thousand, B may discharge A from an obligation to break the rollways in the spring without a new consideration.⁷ A agreed to pay a commission to B in consideration of B's securing a purchaser for A's land for one thousand, six hundred dollars in cash. Before B had secured such a purchaser A agreed orally to pay such commission if B would secure a purchaser for six hundred dollars cash, and the balance on deferred payments secured by a mortgage. B secured a purchaser upon the terms specified in the oral modification. It was held that such oral modification was valid and that B was entitled to recover his commission.⁸ A written contract by which A agrees to take a copy of a biographical dictionary from B, and to pay B a certain price therefor, may be modified subsequently by an oral agreement without any new consideration to the effect that the biographical sketch of A is to be submitted to A by B, and that it is not to be published unless A approves it.⁹ If a contract by which a county agrees to convey school lands has not been performed by a conveyance of such lands, and if the purchaser has not performed further than by giving his obligation therefor, it is held that such contract may be modified by reducing the rate of interest upon the deferred installments of the purchase price.¹⁰

§ 2466. Waiver of right to avoid original contract. If the original contract is invalid,¹ as because of mistake,² as where a

⁵ Kelly v. Bliss, 54 Wis. 187, 11 N. W. 488.

⁶ Delta County v. Blackburn, 100 Tex. 51, 93 S. W. 419; Brown v. Everhard, 52 Wis. 205, 8 N. W. 725; Magill v. Stoddard, 70 Wis. 75, 35 N. W. 346; Ruege v. Gates, 71 Wis. 634, 38 N. W. 181.

⁷ Ruege v. Gates, 71 Wis. 634, 38 N. W. 181.

⁸ McGill v. Stoddard, 70 Wis. 75, 35 N. W. 346.

⁹ Brown v. Everhard, 52 Wis. 205, 8 N. W. 725.

¹⁰ Delta County v. Blackburn, 100

Tex. 51, 93 S. W. 419. This case, however, turned upon the constitutional power of the county, and there was in fact a modification changing the interest from seven per cent. for twelve years to three per cent. for twenty years.

¹ Osborne v. O'Reilly, 42 N. J. Eq. 467, 9 Atl. 209; John King Co. v. Louisville & Nashville Ry., 131 Ky. 46, 114 S. W. 308 [rehearing denied (Ky.), 116 S. W. 1201].

See § 555.

² John King Co. v. Louisville & Nashville Ry., 131 Ky. 46, 114 S. W. 308

contract for excavation is made under a mistake as to the character of the ground to be excavated,³ or because of fraud,⁴ a subsequent contract increasing the compensation to be paid for the performance of the original contract, is supported by sufficient consideration. If the original contract was valid at the outset, but it has subsequently been discharged by breach, the act of the party who is not in default in waiving his right to avoid all liability under such contract is consideration for a new promise.⁵

§ 2467. New and additional consideration. The assumption of personal liability where none before existed,¹ or a waiver of a right of a subcontractor to complete the contract himself or to hire someone other than the chief contractor to complete it,² is a consideration for a modification. Payment by one party in advance of the time at which it is due under the original contract, is consideration for a modification of the original contract reducing the amount to be paid under the original contract.³ If both parties agree to an extension of time for the performance of the contract, the promise of one to grant such an extension is consideration for the promise of the other to grant such extension.⁴ If a party who is originally jointly liable upon a contract has been released therefrom, a subsequent contract by which the party who was originally released is to become liable again upon such contract, is consideration for a promise to release the other original joint party thereto.⁵

§ 2468. New contract on condition precedent. If, by the terms thereof, the new contract has not taken effect,¹ as where it is to take effect when it is reduced to writing, and signed and approved

[rehearing denied (Ky.), 116 S. W. 1201].

³ John King Co. v. Louisville & N. R. Co., 131 Ky. 46, 114 S. W. 308 [rehearing denied (Ky.), 116 S. W. 1201].

⁴ Waters v. White, 75 Conn. 88, 52 Atl. 401; Sisson v. Kaper, 105 Ia. 699, 75 N. W. 490.

⁵ Moorman v. Plummer Lumber Co., 113 La. 429, 37 So. 17; King v. Duluth, Missabe & Northern Ry., 61 Minn. 482, 623 N. W. 1105; Carolina Hardware Co. v. Raleigh Banking & Trust Co., 169 N. Car. 744, 86 S. E. 706.

See § 555.

¹ Carter v. Rhodes, 135 Cal. 46, 66 Pac. 985.

² Pease v. McQuillin, 180 Mass. 135, 61 N. E. 819.

³ Johnson v. Broughton, 183 Ky. 628, 210 S. W. 455.

⁴ Kissack v. Bourke, 224 Ill. 352, 79 N. E. 619.

See § 610.

⁵ People's Savings Bank v. Wright, 183 Ky. 362, 209 S. W. 342 (obiter).

¹ Libby v. Barry, 15 N. D. 286, 107 N. W. 972.

by all the parties thereto, and some of the parties fail to sign and to approve it,² such new contract does not affect the original contract. A new contract which is intended to be executed by both parties to the original contract, and the creditors of one of such parties, does not operate as a discharge of the prior contract where not executed by such creditors.³

§ 2469. New contract invalid on other grounds. Although the later contract may be made by a sufficient offer and acceptance,¹ and although it is supported by sufficient consideration,² it may be invalid and unenforceable for some other reason. If the later contract is invalid and unenforceable for any other reason, it does not abrogate an earlier contract, though it was intended so to do.³

If the second contract is invalid because of mistake as to one of the essential elements of the contract,⁴ such contract does not operate to modify or to discharge the prior contract.⁵ If the original contract is to furnish a vessel to be selected by the shipper, his subsequent act in selecting a vessel which has been lost at sea without the knowledge of either party, does not make a binding contract between the two parties, and no action can be brought thereon.⁶ If the second contract is entered into under a mistake as to an essential element or under a misunderstanding as to the terms, one of the parties thereto, who, on discovering such mistake, performs the original contract, may recover thereunder.⁷

If the second contract is voidable, as by reason of duress,⁸ and the second contract is avoided by reason of such defect, it will not operate to abrogate or modify the earlier contract. If the subsequent contract is invalid because it is entered into on behalf of

² *Libby v. Barry*, 15 N. D. 286, 107 N. W. 972.

³ *Banewur v. Levenson*, 171 Mass. 1, 50 N. E. 10.

¹ See § 2458.

² See §§ 2461 et seq.

³ *Smith v. Miller*, 79 Conn. 624, 66 Atl. 172; *McCoy v. Flynn*, 169 Ia. 622, L. R. A. 1915D, 1064, 151 N. W. 465 (obiter); *Furness v. Fahey*, 127 Md. 333, 96 Atl. 619.

⁴ A prior debt is not affected by usurious renewals. *Cain v. Donner*, 108 Tex. 399, 3 A. L. R. 874, 194 S. W. 1098.

⁵ See ch. IX.

⁶ *Smith v. Miller*, 79 Conn. 624, 66

Atl. 172; *Furness v. Fahey*, 127 Md. 333, 96 Atl. 619 [for former hearing, see *Furness v. Randall*, 124 Md. 101, 91 Atl. 797].

⁷ *Furness v. Fahey*, 127 Md. 333, 96 Atl. 619 [for former hearing, see *Furness v. Randall*, 124 Md. 101, 91 Atl. 797].

⁸ *Smith v. Miller*, 79 Conn. 624, 66 Atl. 172.

⁹ *Weatherford v. McCrocklin* (Ky.), 34 S. W. 24.

The same result follows where the second contract is voidable for fraud. *Frederick v. Hillebrand*, — Mich. —, 165 N. W. 810.

one of the parties to the contract by an unauthorized agent, such contract can not discharge or modify the prior contract.⁸ A subsequent modification of a policy of insurance,¹⁰ or of a contract for the transportation of goods,¹¹ by an unauthorized agent, has no effect upon the original contract.

If the later contract is invalid because its subject-matter is void or illegal,¹² it can not operate to abrogate or to modify the earlier contract.¹³ A subsequent contract which is invalid because it is in restraint of marriage, does not discharge a right of action growing out of a breach of a prior contract to intermarry.¹⁴

If a later contract is unenforceable because of the Statute of Frauds, it can not, if attacked on that ground, abrogate or modify an earlier contract.¹⁵

§ 2470. Effect of breach of new contract on rights arising out of prior contract. Whether it is the making of the new contract or the performance thereof that operates as a discharge of the original contract, is a question that depends on the intent of the parties. In the absence of any affirmative evidence of intention either way, and in cases involving contracts other than those for the payment of money,¹ it is generally held that the making of the new contract operates as a discharge, in whole or in part, of the original contract;² and that, accordingly, if the second contract is not per-

⁸ *United States v. Mt. Holly, etc., Co. v. Caraleigh, etc., Works*, 72 Fed. 244, 18 C. C. A. 535.

Georgia. *Beasley v. Phoenix Ins. Co.*, 140 Ga. 126, 78 S. E. 722; *People's Bank v. Insurance Co.*, 146 Ga. 514, L. R. A. 1917D, 868, 91 S. E. 684.

Massachusetts. *Fletcher v. New York Central & H. R. R. Co.*, 229 Mass. 258, 118 N. E. 294.

Michigan. *Campau v. Detroit*, 106 Mich. 414, 64 N. W. 336.

Ohio. *Baltimore & O. R. Co. v. Jolly*, 71 Ohio 92, 72 N. E. 888.

Virginia. *Rowland Lumber Co. v. Ross*, 100 Va. 275, 40 S. E. 922.

Wisconsin. *Skobis v. Ferge*, 102 Wis. 122, 78 N. W. 426.

¹⁰ *Beasley v. Phoenix Ins. Co.*, 140 Ga. 126, 78 S. E. 722; *People's Bank v. Insurance Co.*, 146 Ga. 514, L. R. A. 1917D, 868, 91 S. E. 684.

¹¹ *Fletcher v. New York Central &*

H. R. R. Co., 229 Mass. 258, 118 N. E. 294.

¹² See ch. XX et seq.

¹³ *Britt v. Aylett*, 11 Ark. 475, 52 Am. Dec. 282; *McCurdy v. Dillon*, 135 Mich. 678, 98 N. W. 746; *McCoy v. Flynn*, 169 Ia. 622, L. R. A. 1915D, 1064, 151 N. W. 465; *Cain v. Bonner*, 108 Tex. 309, 3 A. L. R. 374, 194 S. W. 1098.

¹⁴ *McCoy v. Flynn*, 169 Ia. 622, L. R. A. 1915D, 1064, 151 N. W. 465 (obiter, as action was on new contract).

¹⁵ *Harvey v. Morey*, 22 Colo. 412, 45 Pac. 383.

¹ For inferences arising out of a new contract when the original contract is one for the payment of money, see ch. LXXXI.

² *Hughes v. Brennan Construction Co.*, 24 D. C. App. 90; *Sioux City Stock Yards Co. v. Sioux City Packing Co.*, 110 Ia. 396, 81 N. W. 712; *St. Croix*

formed, the right of the party who is not in default is based upon the second contract, and that he can not go back to the first contract and maintain an action thereon.³ If a building subcontract is rescinded by mutual agreement, and it is agreed that the contract for that part of the work which is not performed shall be awarded to the lowest bidder, the fact that after receiving bids, one of which was lower than that of the original subcontractor, the principal contractor completed the contract himself, does not give to the subcontractor the right to maintain an action upon the original contract.⁴

This rule seems to be at variance with the rule that treats a new contract for the payment of money as *prima facie* conditional payment or collateral security.⁵ It also seems at variance with the rule which permits the party who is not in default, to ignore the contract in case of breach by the adversary party, and to recover on the theory of quasi-contract.⁶

§ 2471. Form of new contract—In general. Except for certain peculiarities due to the fact that the original contract was under seal, or that it was required to be in writing or to be proved by writing,¹ the general rule is that the new contract may abrogate the earlier contract either expressly or by implication. The modification may be by oral contract,² or it may be implied from the conduct of the parties.³ If a contractor has entered into a contract

Co. v. Seacoast Canning Co., 114 Me. 521, 96 Atl. 1059; Napa Valley Wine Co. v. Daubner, 63 Minn. 112, 75 N. W. 143.

³Hughes v. Brennan Construction Co., 24 D. C. App. 90; Sioux City Stock Yards Co. v. Sioux City Packing Co., 110 Ia. 396, 81 N. W. 712; St. Croix Co. v. Seacoast Canning Co., 114 Me. 521, 96 Atl. 1059; Napa Valley Wine Co. v. Daubner, 63 Minn. 112, 65 N. W. 143.

⁴Hughes v. Brennan Construction Co., 24 D. C. App. 90.

⁵See ch. LXXXI.

⁶See ch. LXXXVIII.

¹These peculiarities are discussed in detail in §§ 2472 et seq.

²Murray v. Boyd, 165 Ky. 625, 177 S. W. 468; Faust v. Rohr, 167 N. Car.

360, 83 S. E. 622; Wilson v. Maxon, 56 W. Va. 194, 49 S. E. 123.

³Arkansas. Grider v. Three States Lumber Co., 72 Ark. 190, 79 S. W. 763.

Colorado. Hennessey v. Fleming, 40 Colo. 27, 90 Pac. 77; Princess Amusement Co. v. F. E. Edbrooke Architect Co., 58 Colo. 207, 144 Pac. 893.

Georgia. Bearden Mercantile Co. v. Madison Oil Co., 128 Ga. 695, 58 S. E. 200.

Illinois. Evans v. Howell, 211 Ill. 85, 71 N. E. 854.

Iowa. Sutton v. Griebel, 118 Ia. 78, 91 N. W. 825; Michigan Stove Co. v. Walker, 150 Ia. 363, 130 N. W. 130.

Kansas. Evans v. Jacobitz, 67 Kan. 249, 72 Pac. 848.

Maine. Hilton v. Hanson, 101 Me. 21, 62 Atl. 797.

with the United States, and he requests an extension of time, the conduct of the United States in permitting him to continue without giving a definite answer to such request until after the contract has been performed, and the work has been accepted, is equivalent to an agreement to give a reasonable extension of time.⁴

The fact that one of the parties to the contract has requested the other party in performing it to render services or to furnish articles which are not required by the contract, may amount to a modification of the original contract, so as to include an agreement for such extras together with a promise to pay therefor.⁵ If the owner of property has entered into a building contract and he subsequently requires the contractor to perform extra work,⁶ such as the removal of rubbish from the premises,⁷ such request operates as an implied promise to pay extra compensation for such extra services. The act of a husband and wife, who have entered into a contract of separation, in living together after such contract has been made, operates as a termination of such contract by mutual consent,⁸ since a contract for future separation is invalid.⁹ If a contract, by which A sells certain standing timber to B, provides that the track which B should construct upon the property in removing the timber should become the property of A at the end of the time fixed by the contract, and if A knows and acquiesces in B's conduct in replacing such track with a more permanent structure than the original track, gets in bad condition, and if A acquiesces in B's sale of the iron from such track to C, A's conduct amounts to a modification of the original contract,¹⁰ and C has a right to remove such iron.¹¹ A agreed to buy a share in certain

Massachusetts. *Boyden v. Hill*, 198 Mass. 477, 85 N. E. 413; *Mark v. Stuart-Howland Co.*, 226 Mass. 35, 115 N. E. 42.

Nebraska. *Herpolsheimer v. Christopher*, 76 Neb. 352, 107 N. W. 382.

New Jersey. *Bird v. J. L. Prescott Co.*, 89 N. J. L. 591, 99 Atl. 380.

North Carolina. *Purns v. McFarland*, 146 N. Car. 382, 59 S. E. 1011.

Oklahoma. *Ahrens v. Ahrens*, — Okla. —, 169 Pac. 486.

Vermont. *Davenport v. Crowell*, 79 Vt. 419, 65 Atl. 557.

⁴ *Noel Construction Co. v. United States*, 50 Ct. Cl. 98.

⁵ *Hennessey v. Fleming*, 40 Colo. 27, 90 Pac. 77.

See § 1459.

⁶ *Hennessey v. Fleming*, 40 Colo. 27, 90 Pac. 77.

⁷ *Hennessey v. Fleming*, 40 Colo. 27, 90 Pac. 77.

⁸ *Ahrens v. Ahrens*, — Okla. —, 169 Pac. 486.

⁹ See § 938.

¹⁰ *Grider v. Three States Lumber Co.*, 72 Ark. 190, 79 S. W. 763.

¹¹ *Grider v. Three States Lumber Co.*, 72 Ark. 190, 79 S. W. 763.

property to be purchased. Before completing the purchase he gave notice that he withdrew, and the adversary party secured another subscriber for A's share. This was held to amount to an implied rescission of A's contract by consent.¹² If an insurance company issues a policy containing certain grounds of forfeiture when it knows of the existence of one of such grounds, such clause of forfeiture is thereby waived.¹³ A course of dealing with the agent of an insurance company may waive a provision requiring payment of premiums as a condition precedent to liability.¹⁴ A provision in a policy requiring proof of loss to be submitted in a certain time, is waived by the act of the insurance company in agreeing to pay such loss, thereby causing the insured to delay submitting such proofs.¹⁵

The question of waiver of provisions in insurance policies is often complicated with questions of the authority of the agent by whom such alleged waiver is made. If he has no authority to waive such provision the insurance company is not bound by his acts.¹⁶ Thus under a provision that concurrent insurance should avoid a policy unless the agent indorsed such permission thereon

¹²Sutton v. Griebel, 118 Ia. 78, 91 N. W. 825.

¹³United States. Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. ed. 341.

Indiana. Glens Falls Ins. Co. v. Michael, 167 Ind. 659, 8 L. R. A. (N.S.) 708, 74 N. E. 964, 79 N. E. 905; German Mutual Ins. Co. v. Niewedde, 11 Ind. App. 624, 39 N. E. 534.

Kentucky. Baldwin v. Ins. Co., 107 Ky. 356, 92 Am. St. Rep. 362, 54 S. W. 13.

Michigan. Crossman v. American Ins. Co., 198 Mich. 304, 164 N. W. 428.

Montana. Wright v. Fire Insurance Co., 12 Mont. 474, 19 L. R. A. 211, 31 Pac. 87.

Nebraska. Hanover Fire Ins. Co. v. Bohn, 48 Neb. 743, 58 Am. St. Rep. 719, 67 N. W. 774; German Ins. Co. v. Shader, 1 Neb. (unofficial) 704, 60 L. R. A. 918, 96 N. W. 604.

New York. Hudson v. Glen Falls Ins. Co., 218 N. Y. 133, L. R. A. 1917A, 482, 112 N. E. 728.

Oregon. Arthur v. Ins. Co., 35 Or. 27, 76 Am. St. Rep. 450, 57 Pac. 62.

Texas. Aetna Ins. Co. v. Holcomb, 89 Tex. 404, 34 S. W. 915.

Wisconsin. McQuillan v. Life Association, 112 Wis. 665, 88 Am. St. Rep. 986, 56 L. R. A. 233, 87 N. W. 1069, 88 N. W. 925.

¹⁴Phoenix Mutual Life Ins. Co. v. Doster, 106 U. S. 30, 27 L. ed. 65; Runbeck v. Farmers' & Bankers' Ins. Co., 96 Kan. 186, 150 Pac. 586; Baldwin v. Ins. Co., 107 Ky. 356, 92 Am. St. Rep. 362, 54 S. W. 13.

¹⁵Thompson v. Ins. Co., 136 U. S. 287, 34 L. ed. 408; Kenton Ins. Co. v. Wigginton, 89 Ky. 330, 7 L. R. A. 81, 12 S. W. 668; Flynn v. Orient Ins. Co., 77 N. H. 431, 92 Atl. 737; Rheims v. Standard Fire Ins. Co., 39 W. Va. 672, 20 S. E. 670.

¹⁶Northern Assurance Co. v. Building Association, 183 U. S. 308, 46 L. ed. 213; Ferdinando v. Milwaukee Mechanics' Ins. Co., 81 Wash. 244, 142 Pac. 693.

in writing only, the knowledge of such agent that other insurance exists does not waive such provision of the policy.¹⁷

§ 2472. Formalities necessary to execution of new contract—Original contract of record. The formality with which a new contract modifying or abrogating an earlier contract must be executed, or the kind of evidence by which it must be proved, depends in part upon the formality with which the original contract is executed, or the evidence whereby it must be proved. At common law, obligations were divided into classes with reference to their rank. Judgments and contracts of record were of higher rank than contracts under seal, and contracts under seal were of higher rank than simple contracts. There was, however, no difference in rank between written contracts not under seal and oral contracts. It was a fundamental theory of the common law that no obligation could be modified or discharged by a subsequent voluntary agreement or by a subsequent obligation of any kind, unless the new obligation were of as high rank as the original obligation.¹ While the modern courts which follow this rule are likely to do so in an apologetic fashion, relying upon absolute authority, and conceding that the rule has no vital principle back of it,² the common-law courts did not originally take this position, but they regarded this rule as based upon natural justice, and they declared boldly that it was in accordance with natural law that an obligation could be discharged only by an obligation of at least as high a rank as that whereby it was formed originally.³

At common law it was said that a contract of record could not be discharged except by record.⁴ Even payment was not a discharge unless it was entered of record.⁵ Accord and satisfaction was not a discharge.⁶ A judgment can not be discharged by a simple executory contract.⁷

¹⁷ Northern Assurance Co. v. Building Association, 183 U. S. 308, 46 L. ed. 213.

¹ Kromer v. Heim, 75 N. Y. 574, 31 Am. Rep. 491.

² Spence v. Healey, 8 Exch. 668; McCreery v. Day, 119 N. Y. 1, 16 Am. St. Rep. 793, 6 L. R. A. 503, 23 N. E. 198 (obiter).

This principle is said to be "so well established that it appears to me unnecessary to refer to cases." West v. Blakeway, 2 Man. & G. 729.

³ Blake's Case, 6 Coke 43b.

⁴ Mitchell v. Hawley, 4 Denio (N. Y.) 414, 47 Am. Dec. 260.

⁵ See discussion of original rule in Briley v. Sugg, 21 N. Car. 366, 30 Am. Dec. 172.

See also Boffinger v. Tuyes, 120 U. S. 198, 30 L. ed. 649.

⁶ Lutterford v. Le Mayre, Cro. Jac. 579; Weber v. Couch, 134 Mass. 26, 45 Am. Rep. 274; Mitchell v. Hawley, 4 Denio (N. Y.) 414, 47 Am. Dec. 260.

⁷ Kromer v. Heim, 75 N. Y. 574, 31 Am. Rep. 491 (a case of unexecuted accord).

At modern law, a contract of record, such as a judgment, may be discharged by a subsequent contract taken in satisfaction thereof.⁸ Accord and satisfaction of a judgment is a discharge thereof.⁹

§ 2473. Original contract under seal—At common law. The effect of a new unsealed contract upon liabilities arising out of a sealed contract depends in part on the stage in the historical development of the law at which the effect is to be determined, in part on whether the case is decided in law or in equity, in part on whether the new contract is executory or is performed, in part on whether the new contract was made before breach of the original contract under seal, or after breach thereof, and in part on whether, in the jurisdiction in which the question arises, the seal has its original common-law effect, or whether the simplification of the law has reduced the sealed instrument to a position but little, if any, above that of the written simple contract.¹

At common law, if the original contract was under seal, it could not, before breach, be modified by a subsequent executory agreement not under seal.² This view has been entertained in some jurisdictions in the United States.³ Even if the obligee redelivered the bond to the obligor, under an oral agreement for the discharge thereof, such contract was held to have no legal effect;⁴ and if the obligee later took such bond from the obligor by force before it

⁸ *German Bank v. Iron Works* (la.) 99 N. W. 174.

⁹ *Farmers' Bank v. Groves*, 53 U. S. (12 How.) 51, 13 L. ed. 889; *Ex parte Zeigler*, 83 S. Car. 78, 21 L. R. A. (N.S.) 1005, 64 S. E. 513, 916.

¹ See § 1156.

² *Countess of Rutland's Case*, 5 Coke 25b; *Rogers v. Payne*, 2 Wils. 376; *West v. Blakeway*, 2 M. & G. 729; *Ellen v. Topp*, 6 Exch. 424; *Spence v. Healey*, 8 Exch. 668.

See § 1172.

³ *Arkansas*. *Miller v. Hemphill*, 9 Ark. 488.

Connecticut. *Smith v. Lewis*, 24 Conn. 624, 63 Am. Dec. 180.

Florida. *Tischler v. Kurtz*, 35 Fla. 323, 17 So. 661.

Illinois. *Loach v. Farnum*, 90 Ill.

368; *Goldsborough v. Gable*, 140 Ill. 269, 15 L. R. A. 294, 29 N. E. 722 (also want of consideration); *West Chicago Street Ry. v. Morrison, etc., Co.*, 160 Ill. 288, 43 N. E. 393; *Snow v. Griesheimer*, 220 Ill. 106, 77 N. E. 110 (obiter, as new contract had been performed); *Jones & Dommersnas Co. v. Crary*, 234 Ill. 26, 84 N. E. 691 (obiter, as new contract had been performed); *Jones v. Chamberlain*, 97 Ill. App. 328.

Kentucky. *Kendal v. Talbot*, 8 Ky. (1 A. K. Mar.) 321.

Maine. *Brown v. Staples*, 28 Me. 497, 48 Am. Dec. 504.

New York. *French v. New*, 28 N. Y. 147.

Vermont. *Sherwin v. Salpaugh & Rut. & Bur. R. R. Co.*, 24 Vt. 347.

⁴ *Waberly v. Cockerel*, 1 Dyer 51a.

had been canceled or defaced, and brought action thereon, such facts would not be a defense at law.⁵

Such a contract may be discharged by a subsequent contract not under seal which has been fully performed.⁶ If the subsequent contract not under seal has been so far carried out that the parties can not be restored to their position before entering into it, the original contract under seal is thereby abrogated or modified.⁷

After breach of a sealed contract, the right of action arising out of such breach could be discharged by a subsequent oral agreement,⁸ subject to the same restrictions as in the case of a simple contract.

§ 2474. In equity—Adoption of equitable theory by common law. In equity a contract under seal might be discharged or modified by a subsequent oral contract not under seal.¹ The place of performance,² or the time for performance, of a contract under seal, may be changed by a subsequent oral contract.³ Where law and equity are both administered by the same court and often in the same action, the equity rule permitting the discharge of contracts under seal by subsequent oral executory contracts has been extended to actions at law.⁴ The practical result of the adoption by

⁵ *Waberly v. Cockereh*, 1 Dyer 51a.

⁶ *Illinois*. *Worrell v. Forsyth*, 141 Ill. 22, 30 N. E. 373; *Jones & Dommernas Co. v. Crary*, 234 Ill. 26, 84 N. E. 651 [affirming, *Crary v. Jones & Dommernas Co.*, 138 Ill. App. 225].

Massachusetts. *Drury v. Improvement Co.*, 95 Mass. (13 Alk.) 168.

Minnesota. *Siebert v. Leonard*, 17 Minn. 433; *McClay v. Gluck*, 41 Minn. 193, 42 N. W. 875.

New York. *McCreery v. Day*, 119 N. Y. 1, 16 Am. St. Rep. 793, 6 L. R. A. 503, 23 N. E. 198.

North Carolina. *Davis v. Inscocoe*, 84 N. Car. 396.

Ohio. *Reed v. McGrew*, 5 Ohio Rep. 375.

Virginia. *Bonsack Machine Co. v. Woodrum*, 88 Va. 512, 13 S. E. 994.

West Virginia. *Arbogast v. Mylius*, 55 W. Va. 101, 46 S. E. 809.

⁷ *Snow v. Griesheimer*, 220 Ill. 106,

77 N. E. 110; *Jones & Dommernas Co. v. Crary*, 234 Ill. 26, 84 N. E. 651 [affirming judgment, *Crary v. Jones & Dommernas Co.*, 138 Ill. App. 225]; *Arbogast v. Mylius*, 55 W. Va. 101, 46 S. E. 809.

⁸ *May v. Taylor*, 6 M. & G. 261; *Suydam v. Jones*, 16 Wend. (N. Y.) 180, 25 Am. Dec. 552 (obiter).

¹ *Webb v. Hewitt*, 3 K. & J. 438.

See discussion in *Nash v. Armstrong*, 10 C. B. (N.S.) 259.

Contra, but probably as to law only, *Braddick v. Thompson*, 8 East 344.

² *Kelly v. Skates*, 117 Miss. 886, 78 So. 945.

³ *Tompkins v. Tompkins*, 21 N. J. Eq. 338; *Bigelow v. Rommelt*, 24 N. J. Eq. 115; *Von Syckel v. O'Hearn*, 50 N. J. Eq. 173, 24 Atl. 1024.

⁴ Thus in speaking of the common-law rule the court said: "The application of this rule often produced great

the common law of the theories of equity, and of legislation which permits equitable defenses to be made at law, is that in most jurisdictions a sealed contract may be discharged or modified by a subsequent simple contract,⁵ even though such simple contract is still executory.⁶ A leased a store building to B by a written lease of ten years, at forty-five hundred dollars a year. After the first year, A and B made an oral agreement that the rent was to be reduced to thirty-five hundred dollars for three years. B paid his rent at that rate, and A gave receipts in full. It was held that the oral agreement was of no effect if A chose to avoid it, but that as to the time for which he had received such rent, and given receipts in full, the agreement was binding, and A could not subsequently recover the difference between the original rental and that fixed by the new agreement.⁷ If a sealed contract contains a provision that no part of such contract shall be sublet, such provision may subsequently be waived orally.⁸ If a deed of trust provides that the trustee shall sell the mortgaged property at a specified place, and at the request of the mortgagor the mortgagee consents to sell it at a different place, such oral modification as to the place of sale may be shown in an action brought by the mortgagor to recover possession of the property from the purchaser.⁹

inconvenience and injustice, and the rule itself has been overlaid with distinctions invented by the judges of the common-law courts to escape or mitigate its rigor in particular cases. But in equity the form of the new agreement is not regarded, and under the recent blending of the jurisdictions of law and equity, and the right given by the modern rules of procedure in this country and in England to interpose equitable defenses in legal actions, the common-law rule has lost much of its former importance. * * * It is a necessary consequence of our changed system of procedure that whatever formerly would have constituted a good ground in equity for restraining the enforcement of a covenant or decreeing its discharge, will now constitute a good equitable defense in an action on the covenant itself." *McCreery v. Day*,

119 N. Y. 1, 7, 16 Am. St. Rep. 793, 6 L. R. A. 503, 23 N. E. 198.

⁵ *England. Steeds v. Steeds*, 22 Q. B. D. 537.

United States. Canal Co. v. Ray, 101 U. S. 522, 25 L. ed. 792.

Massachusetts. Tuson v. Crosby, 172 Mass. 478, 52 N. E. 744.

Pennsylvania. McCauley v. Keller, 130 Pa. St. 53, 17 Am. St. Rep. 758, 18 Atl. 607.

⁶ *Ryan v. Dunlap*, 17 Ill. 40, 63 Am. Dec. 334; *Adams v. Battle*, 125 N. Car. 152, 34 S. E. 245; *McCauley v. Keller*, 130 Pa. St. 53, 17 Am. St. Rep. 758, 18 Atl. 607.

⁷ *McKenzie v. Harrison*, 120 N. Y. 260, 17 Am. St. Rep. 638, 8 L. R. A. 257, 24 N. E. 458.

⁸ *Gannon v. Shepard*, 156 Mass. 355, 31 N. E. 296.

⁹ *Kelly v. Skates*, 117 Miss. 886, 78 So. 945.

Unless the difficulties created by common-law rules of pleading persist, an action may be brought at modern law upon a contract which is made up of the original contract under seal, and an unsealed modification thereof.¹⁰

If the parties have entered into a contract under seal, they may subsequently enter into an oral contract upon a different subject-matter, and the validity of such oral contract will not be affected by the fact that the original contract was under seal, even though the subsequent contract is collateral to the original contract.¹¹ Thus A and B entered into a sealed contract, whereby A conveyed his interest in partnership property to B. It was subsequently discovered that certain property had been omitted from such instrument. A subsequent oral contract between A and B conveying such omitted property is valid.¹² If A and B have entered into a cropping lease for every other year, a subsequent oral contract with reference to a crop to be raised in an intervening year is enforceable.¹³

Where common-law rules of pleading persist, covenant will not lie upon an unsealed modification of a sealed contract, even if the new contract has been performed.¹⁴

§ 2475. Original contract required by law to be in writing. If the contract is in writing, but not under seal, the question of the formality with which a subsequent contract must be executed, or the means whereby it must be proved, depends upon which of the classes of contracts the original contract is. If the original contract is one which is required by law to be in writing, it can not, of course, be modified by a subsequent oral agreement, and remain a contract of that class. The question, then, is whether the subse-

¹⁰United States. *Canal Co. v. Ray*, 101 U. S. 522, 25 L. ed. 792; *District of Columbia v. Iron Works*, 181 U. S. 453, 45 L. ed. 948.

Colorado. Platte Land Co. v. Hubbard, 12 Colo. App. 465, 56 Pac. 64.

Massachusetts. Munroe v. Perkins, 26 Mass. (9 Pick.) 298, 20 Am. Dec. 475; *Tuson v. Crosby*, 172 Mass. 478, 52 N. E. 744.

New York. Fleming v. Gilbert, 3 Johns. (N. Y.) 628; *Homer v. Ins. Co.*, 67 N. Y. 478.

Pennsylvania. Le Fevre v. Le Fevre,

4 S. & R. (Pa.) 241, 8 Am. Dec. 696; *McCombs v. McKennan*, 2 W. & S. (Pa.) 216, 37 Am. Dec. 305; *Prouty v. Kreamer*, 199 Pa. St. 273, 49 Atl. 66.

¹¹*Luddington v. Goodnow*, 168 Mass. 223, 46 N. E. 627; *Jensen v. Anderson*, 50 Utah 515, 167 Pac. 811.

¹²*Luddington v. Goodnow*, 168 Mass. 223, 46 N. E. 627.

¹³*Jensen v. Anderson*, 50 Utah 515, 167 Pac. 811.

¹⁴*Phillips, etc., Co. v. Seymour*, 91 U. S. 646, 23 L. ed. 341; *J. C. Winship Co. v. Wineman*, 77 Ill. App. 161.

quent oral agreement is of no effect, or whether it reduces the contract from this class to that of oral contracts. If the contract is one which is required by statute to be in writing, and this statute is passed by the legislature for the protection of the public, such a contract can not be modified or waived by subsequent oral agreement.¹ A public contract which by statute must be let to the lowest bidder on advertisement for bids, can not be modified in a substantial element after it has once been let.² The fact that the contract contains an express provision for such a modification, does not make the modification valid in such cases.³ If, however, the statute does not require the contract to be in writing, but merely requires that modifications of such contract shall be recorded, the adversary party to the contract is not prejudiced by the failure of the proper officer to record the modification. The new contract, therefore, even if not recorded, operated to modify or abrogate the earlier contract.⁴

If the contract is required by statute to be in writing, but the statute is not passed from motives of public policy, a subsequent oral modification or abrogation of such contract is valid if it has the elements of a valid contract. The effect of such new contract is to reduce the entire contract to an oral contract, or to a contract which is partly in writing and partly oral, or else to discharge the original contract entirely.

If the contract is one which is required by the rules of the law-merchant to be in writing,⁵ such as a negotiable instrument, a subsequent oral agreement modifying such contract has been held to be enforceable,⁶ except as to a subsequent holder in due course without notice.⁷

§ 2476. Original contract required by law to be proved in writing—New contract executory and within Statute of Frauds. If the

¹ *Malone v. Philadelphia*, 147 Pa. St. 416, 23 Atl. 628.

² *Campau v. Detroit*, 106 Mich. 414, 64 N. W. 336.

³ *Malone v. Philadelphia*, 147 Pa. St. 416, 23 Atl. 628.

⁴ *Ede v. Knight*, 93 Cal. 159, 28 Pac. 860.

⁵ *Boyd v. Kelley*, 111 Miss. 629, 71 So. 897.

⁶ *Iowa. Lahn v. Koep*, 139 Ia. 349, 62 L. R. A. (N.S.) 327, 115 N. W. 877.

Mississippi. Boyd v. Kelley, 111 Miss. 629, 71 So. 897.

New Hampshire. Grafton Bank v. Woodward, 5 N. H. 99, 20 Am. Dec. 566.

North Carolina. Acme Mfg. Co. v. McCormick, 175 N. Car. 277, 95 S. E. 555.

Wisconsin. Grace v. Lynch, 80 Wis. 166, 49 N. W. 751.

⁷ See §§ 2436 et seq.

original contract is one which is required by law to be proved by writing, the effect of a subsequent oral modification or discharge of such contract depends in part upon the theory of the effect of the Statute of Frauds, in part upon the covenant of the original contract which is modified by the oral agreement, in part upon the interest which has been acquired under the original contract or under the oral modification, and in part upon the extent to which the original contract or the oral modification has been performed.

If the original contract is executory and it is sought to modify it by a subsequent oral executory agreement so that a new contract will result, which contains provisions bringing it within the operation of the Statute of Frauds, such new contract, according to the weight of authority, is unenforceable, since it is partly proved by writing and partly proved by oral evidence, and since it contains provisions which bring it within the operation of the Statute of Frauds.¹ Accordingly, a subsequent oral agreement which includes a new subject-matter,² or an oral agreement for

¹ **England.** *Hickman v. Haynes*, L. R. 10 C. P. 508; *Marshall v. Lynn*, 6 Mees. & W. 109.

United States. *Swain v. Seamans*, 76 U. S. (9 Wall.) 254, 19 L. ed. 554; *Reid v. Plate Glass Co.*, 85 Fed. 193, 29 C. C. A. 110; *Lawyer v. Post*, 109 Fed. 512, 47 C. C. A. 491; *Snow v. Nelson*, 113 Fed. 353.

California. *Smith v. Taylor*, 82 Cal. 533, 23 Pac. 217; *Platt v. Butcher*, 112 Cal. 634, 44 Pac. 1060.

Connecticut. *Malkan v. Hemming*, 82 Conn. 293, 73 Atl. 752.

Georgia. *Augusta Southern R. R. Co. v. Kilby Co.*, 106 Ga. 864, 33 S. E. 28.

Kansas. *Autem v. Mayer Coal Co.*, 98 Kan. 379, 158 Pac. 13.

Indiana. *Bradley v. Harter*, 156 Ind. 499, 60 N. E. 139.

Kentucky. *Davis v. Parish*, Litt. Sel. Cas. (Ky.) 153, 12 Am. Dec. 287; *McConathy v. Lanham*, 116 Ky. 735, 76 S. W. 535.

Maryland. *Walter v. Bloede Co.*, 94 Md. 80, 50 Atl. 433.

Massachusetts. *Whittier v. Dana*, 92 Mass. (10 All.) 326.

Michigan. *Abell v. Munson*, 18 Mich. 306, 100 Am. Dec. 165.

Minnesota. *Burns v. Real Estate Co.*, 52 Minn. 31, 53 N. W. 1017.

Missouri. *Warren v. Mayer Mfg. Co.*, 161 Mo. 112, 61 S. W. 644; *Rucker v. Harrington*, 62 Mo. App. 481.

Oklahoma. *Bonicamp v. Starbuck*, 25 Okla. 483, L. R. A. 1917B, 141, 106 Pac. 839; *Price v. McDowell*, 52 Okla. 608, 153 Pac. 640.

Texas. *Bullis v. Mining Co.*, 75 Tex. 540, 12 S. W. 397; *Sanborn v. Murphy*, 86 Tex. 437, 25 S. W. 610.

Washington. *Woolen v. Sloan*, 94 Wash. 551, 162 Pac. 985.

Wisconsin. *Saveland v. Ry.*, 118 Wis. 267, 95 N. W. 130.

² *Clark v. Fey*, 121 N. Y. 470, 24 N. E. 703; *Castro v. Illies*, 13 Tex. 229; *Saveland v. Western Wisconsin Ry.*, 118 Wis. 267, 95 N. W. 130.

extending the time of performance,³ such as extension of time of performance of a contract for the sale of realty,⁴ including a contract for the sale of growing timber,⁵ are all of them illustrations of contracts within the terms of the Statute of Frauds, the terms of which are proved partly by writing and partly by oral evidence; and such contracts are unenforceable if an original contract of such type would be unenforceable. An oral modification of a contract for the sale of land, which provides for payment therefor by the exchange of realty, instead of by payment in money, as provided by the original contract,⁶ or a modification of a written lease by the terms of which the lessor is to make certain repairs and the lessee is to pay an additional rent,⁷ are each of them unenforceable for this reason. In most of these cases, some act or forbearance has taken place in reliance upon the oral agreement.

§ 2477. Modification of consideration. In some jurisdictions the consideration is said not to be any part of the contract,¹ and accordingly an oral modification of the consideration is enforceable if such oral modification does not affect the covenant on the part of the party who was to do an act within the statute, and if it is limited to the promise of the adversary party, which is a consideration for such covenant.² A written oil and gas lease, to be extended from year to year as long as production continues, upon a payment of specified royalty, may subsequently be so modified by parol as to discharge the lessee from liability as to such royalty.³ A written contract for the sale of land, which provides for the time of payment, may be modified by a subsequent oral contract, changing the time for making such payment.⁴ If the oral contract provides for the payment of certain monthly installments, and the delivery of the deed when the purchase price is paid in full, a subsequent oral

³King v. Crone, 114 Ark. 121, 169 S. W. 238; Hawkins v. Studdard, 132 Ga. 265, 131 Am. St. Rep. 190, 63 S. E. 862; McConathy v. Lanham, 116 Ky. 735, 76 S. W. 536.

⁴Lawyer v. Post, 109 Fed. 512, 47 C. C. A. 491 (obiter); King v. Crone, 114 Ark. 121, 169 S. W. 238; Platt v. Butcher, 112 Cal. 634, 44 Pac. 1060.

⁵Clark v. Guest, 54 O. S. 298, 43 N. E. 862.

⁶Bradley v. Harter, 156 Ind. 499, 60 N. E. 139.

⁷Bonicamp v. Starbuck, 25 Okla. 483, L. R. A. 1917B, 141, 106 Pac. 839.

¹See §§ 1349 et seq.

²Anderson v. Moore, 145 Ill. 61, 33 N. E. 848; Crawford v. Gas Co., 183 Pa. St. 227, 38 Atl. 595.

³Crawford v. Gas Co., 183 Pa. St. 227, 38 Atl. 595.

⁴Anderson v. Moore, 145 Ill. 61, 33 N. E. 848.

contract to accept the rest of the purchase money with interest on deferred payments at once, gives the vendee a right to a deed for the property upon tender of such amount.⁵

§ 2478. Modification of performance. In some jurisdictions the courts hold that the Statute of Frauds affects the original contract, but that it does not affect the performance thereof.¹ Under this theory, accordingly, it is held that an oral executory modification which affects merely the performance of the contract, is operative and modifies the corresponding provisions of the original contract.² Under this theory, an oral extension of time for paying the purchase price, is enforceable if it is made before the expiration of the time for payment fixed by the terms of the original contract.³

§ 2479. Effect of acts of reliance on new contract. The fact that one of the parties to an oral contract within the terms of the Statute of Frauds, has acted in reliance thereon, is ordinarily held not to affect the enforceability of the contract as long as such acts of reliance do not amount to performance as withdraws the contract from the operation of the Statute of Frauds,¹ or to technical part performance.²

In some jurisdictions, however, the act of one of the parties in relying upon an oral modification so that his rights under the original contract will be prejudiced, if he is not permitted to show such oral modification, has been regarded as sufficient to justify the court in enforcing the oral modification without regard to the Statute of Frauds.³ If the parties have acted in reliance upon an oral agreement for extension of time of performance, so that the rights of one will be forfeited under the terms of the original

⁵ *Anderson v. Moore*, 145 Ill. 61, 33 N. E. 848.

¹ *Cummings v. Arnold*, 44 Mass. (3 Met.) 496, 37 Am. Dec. 155; *Roxbury Painting & Decorating Co. v. Nute*, — Mass. —, 4 A. L. R. 680, 123 N. E. 391; *Wallace v. Kelly*, 148 Mich. 336, 118 Am. St. Rep. 580, 111 N. W. 1049.

² *Welch v. McIntosh*, 89 Kan. 47, 130 Pac. 641; *Stearns v. Hall*, 63 Mass. (9 Cush.) 31; *Roxbury Painting & Decorating Co. v. Nute*, — Mass. —, 4 A. L. R. 680, 123 N. E. 391; *Cummins v.*

Beavers, 103 Va. 230, 106 Am. St. Rep. 881, 48 S. E. 891 (obiter).

³ *Brush-Swan Electric Light Co. v. Electric Co.*, 41 Fed. 163; *Stearns v. Hall*, 63 Mass. (9 Cush.) 31; *Bullis v. Presidio Mining Co.*, 75 Tex. 540, 12 S. W. 397.

¹ See §§ 1363 et seq.

² See § 1371.

³ *Williams v. Segers*, 147 Ga. 219, 93 S. E. 215; *Wallace v. Kelly*, 148 Mich. 336, 118 Am. St. Rep. 580, 111 N. W. 1049; *Andersonian Investment Co. v. Wade*, — Wash. —, 184 Pac. 327.

contract if he is not permitted to show such oral extension, some jurisdictions permit such oral extension to be shown.⁴ This principle has been applied to extension of time of oral contracts for the sale of standing timber,⁵ and to oral contracts for extending the period of redemption from a mortgage.⁶

The same principle has been applied to an oral agreement accelerating the time of performance if such oral agreement has been performed.⁷

§ 2480. Performance or part performance of new contract.

Complete performance is held to withdraw the contract from the operation of the statute,¹ and accordingly a complete performance of an oral modification of a contract within the Statute of Frauds is held to operate as a discharge of the original contract.² An oral modification of a provision in a contract for the sale of realty with reference to the land to be conveyed, operates as a discharge of the original contract if such oral modification has been fully performed, and if such performance has been accepted by the adversary party.³

Technical part performance prevents the operation and effect of the Statute of Frauds, at least in equity.⁴ Accordingly, an oral modification of a written contract, within the Statute of Frauds, operates as a discharge if there has been part performance of such oral modification.⁵ An oral modification of a contract for the sale of land, which is performed by surrendering possession under such

⁴ *Murray v. Boyd*, 165 Ky. 625, 177 S. W. 468; *Wright v. Cline*, 172 Ky. 514, 189 S. W. 425; *Thomas v. Hall*, 116 Me. 140, 100 Atl. 502; *Wallace v. Kelly*, 148 Mich. 336, 118 Am. St. Rep. 580, 111 N. W. 1049; *Scheerschmidt v. Smith*, 74 Minn. 224, 77 N. W. 34.

⁵ *Murray v. Boyd*, 165 Ky. 625, 177 S. W. 468; *Wright v. Cline*, 172 Ky. 514, 189 S. W. 425; *Wallace v. Kelly*, 148 Mich. 336, 118 Am. St. Rep. 580, 111 N. W. 1049.

⁶ *Thomas v. Hall*, 116 Me. 140, 100 Atl. 502.

⁷ *Williams v. Segers*, 147 Ga. 219, 93 S. E. 215.

¹ See §§ 1363 et seq.

² *England. Hickman v. Haynes*, L. R. 10 C. P. 598.

United States. Swain v. Seamans, 76 U. S. (9 Wall.) 254, 19 L. ed. 554.

Massachusetts. Cumminge v. Arnold, 44 Mass. (3 Met.) 486, 37 Am. Dec. 155; *Whittier v. Dana*, 92 Mass. (10 All.) 326.

New Jersey. Long v. Hartwell, 34 N. J. L. 116.

Oregon. Rogers v. Maloney, 85 Or. 61, 165 Pac. 357.

³ *Long v. Hartwell*, 34 N. J. L. 116.

⁴ See §§ 1371 et seq.

⁵ *Rogers v. Maloney*, 85 Or. 61, 165 Pac. 357; *Marsh v. Despard*, 56 W. Va. 132, 49 S. E. 24.

oral modification, operates as a discharge.⁶ If the original written contract provides for the sale of certain realty by A to B, and subsequently B surrenders such realty to A under an oral agreement by which title to such realty is to remain in A, and A is to release such realty to B, such oral modification may be shown.⁷

§ 2481. Oral rescission of original contract. The oral agreement sometimes provides for terminating the original contract without substituting any executory provisions in its place. According to the weight of authority, such an oral agreement is enforceable,¹ since the statute provides the means by which a contract may be proved if it is sought to bring an action thereon, but makes no provisions as to the means by which such contract may be terminated. If the original contract is one which by its terms can not be performed within the year, a subsequent oral agreement terminating such contract is accordingly held to be enforceable.² A right to cut and use timber, which is created by a written contract, may be waived by an oral agreement.³ It has even been held that if the original contract creates some interest in realty, a subsequent oral discharge of such contract is enforceable, even though the statute specifically provides that the surrender of an interest in realty, except surrenders by act or operation of law, must be in writing.⁴

The courts are not unanimous, however, as to the effect of an oral contract terminating a prior written contract which is within the provision of the Statute of Frauds; and in some jurisdictions

⁶ *Marsh v. Despard*, 56 W. Va. 132, 49 S. E. 24.

⁷ *Marsh v. Despard*, 56 W. Va. 132, 49 S. E. 24.

¹ *United States. Hansen v. Uniform Seamless Wire Co.*, 243 Fed. 177, 156 C. C. A. 43 [affirming decree, 235 Fed. 616].

Indiana. Ferguson v. Boyd, 169 Ind. 537, 81 N. E. 71, 82 N. E. 1004.

Iowa. Henderson v. Beatty, 124 Ia. 163, 99 N. W. 716.

Kansas. Ely v. Jones, 101 Kan. 672, 168 Pac. 1102 [disapproving, *Carr v. Williams*, 17 Kan. 575].

North Dakota. Haugen v. Skjerveheim, 13 N. D. 616, 102 N. W. 311.

Ohio. Reed v. McGrew, 5 Ohio 375.

Oregon. Elliott v. Bozorth, 52 Or. 391, 97 Pac. 632.

Utah. Cutwright v. Union Savings & Investment Co., 33 Utah 486, 14 Am. & Eng. Ann. Cas. 725, 94 Pac. 984.

Wisconsin. Hutchins v. Da Costa, 88 Wis. 371, 60 N. W. 427; *Maxon v. Gates*, 112 Wis. 196, 88 N. W. 54.

² *Hansen v. Uniform Seamless Wire Co.*, 243 Fed. 177, 156 C. C. A. 43 [affirming decree, 235 Fed. 616].

³ *Lee v. Hawks*, 68 Miss. 660, 13 L. R. A. 633, 9 So. 828.

⁴ *Hutchins v. Da Costa*, 88 Wis. 371, 60 N. W. 427.

it is held that an oral contract can not operate as a discharge of such original written contract.⁵ This theory has been invoked where the original contract created an interest in land,⁶ and especially where the statute which controls such transaction, requires the surrender of an interest in land, other than the surrender by operation of law, to be in writing.⁷ Under such statute, the executory oral contract for terminating the original written contract, is held not to be a surrender by operation of law.⁸

Unless it appears that the parties intended to terminate the original contract in case they could not modify it by subsequent oral agreement, it will be presumed that the parties intended to terminate or modify such oral agreement solely for the purpose of substituting therefor the subsequent oral agreement. Accordingly, if such oral agreement is itself unenforceable, the original contract will remain in full force and effect, unaffected by the attempted oral rescission or modification.⁹

§ 2482. New contract containing no provisions within the Statute of Frauds. The new contract may so modify the original contract that the provisions in the original contract which brought it within the operation of the Statute of Frauds are entirely eliminated. In such cases, in jurisdictions in which the original contract may be rescinded by oral agreement,¹ the new contract is enforceable,² since a transaction of this sort amounts to an oral rescission of the original contract, and to the making of a new contract which contains no provisions which would bring it within the operation of the Statute of Frauds.³

Since the Statute of Frauds applies to executory covenants, and not to those which have been performed,⁴ a contract which was originally within the Statute of Frauds, but which has been per-

⁵ Carr v. Williams, 17 Kan. 575 [disapproved, Ely v. Jones, 101 Kan. 572, 168 Pac. 1102]; Grunow v. Salter, 118 Mich. 148, 76 N. W. 325; Stewart v. McLaughlin, 126 Mich. 1, 85 N. W. 266, 87 N. W. 218; Pratt v. Morrow, 45 Mo. 404, 100 Am. Dec. 381; Thill v. Johnston, 60 Wash. 393, 111 Pac. 225.

⁶ Thill v. Johnston, 60 Wash. 393, 111 Pac. 225.

⁷ Grunow v. Salter, 118 Mich. 148, 76 N. W. 325; Stewart v. McLaughlin,

126 Mich. 1, 85 N. W. 266, 87 N. W. 218.

⁸ Stewart v. McLaughlin, 126 Mich. 1, 85 N. W. 266, 87 N. W. 218; Maxon v. Gates, 112 Wis. 196, 88 N. W. 54.

⁹ Sanderson v. Graves, L. R. 10 Exch. 234.

¹ See § 2481.

² Williams v. Moss's Empires, Lim. [1915], 3 K. B. 242.

³ Williams v. Moss's Empires, Lim. [1915], 3 K. B. 242.

⁴ See §§ 1363, 1364, seq.

formed as to the covenants which brought it into the terms of the statute, may be modified by a subsequent oral agreement as to the remaining covenants,⁸ since a contract of this sort would not have been within the scope or operation of the statute in the first instance.

§ 2483. Original contract merely in writing. If the contract is one which is in writing, but is not required by law to be in writing, or to be proved by writing, such contract may be modified by a subsequent oral agreement, if such agreement contains within itself the elements of a valid contract.¹ The parties may abandon or modify a written contract by an implied agreement which is to be

⁸ *McKenzie v. Stewart*, 196 Ala. 241, 72 So. 109; *Manlove v. Lemmon*, 272 Ill. 120, 111 N. E. 739; *Murray v. Boyd*, 165 Ky. 625, 177 S. W. 468.

¹ *United States*. *Teal v. Bilby*, 123 U. S. 572, 31 L. ed. 263; *Hull v. Pitrat*, 45 Fed. 94.

Alabama. *Elliott v. Howison*, 146 Ala. 568, 40 So. 1018.

District of Columbia. *Cumberland, etc., Co. v. Wheatley*, 9 D. C. App. 334.

Florida. *Robinson v. Hyer*, 35 Fla. 544, 17 So. 745; *Gunby v. Drew*, 45 Fla. 350, 34 So. 305.

Iowa. *Lamb's Estate v. Morrow*, 140 Ia. 89, 18 L. R. A. (N.S.) 226, 117 N. W. 1118; *Lefebure v. Lord*. — Ia. —, 167 N. W. 651.

Kentucky. *John King Co. v. Louisville & N. R. Co.*, 131 Ky. 46, 114 S. W. 308 [rehearing denied, 116 S. W. 1201].

Louisiana. *Levy v. Levy*, 139 La. 274, 71 So. 507.

Maine. *Hilton v. Hanson*, 101 Me. 21, 62 Atl. 797.

Michigan. *Smith v. Kelley*, 115 Mich. 411, 73 N. W. 385; *Grand Traverse Fruit & Produce Exchange v. Thomas Canning Co.*, 200 Mich. 95, 166 N. W. 878.

Minnesota. *Van Santvoord v. Smith*, 79 Minn. 316, 82 N. W. 642; *Hagstrom*

v. McDougall, 131 Minn. 389, 155 N. W. 391.

Nebraska. *Bryant v. Thesing*, 46 Neb. 244, 64 N. W. 967; *Strahl v. Grocer Co. (Neb.)*, 98 N. W. 1043.

New York. *Solomon v. Vallette*, 152 N. Y. 147, 46 N. E. 324.

North Carolina. *May v. Getty*, 140 N. Car. 310, 53 S. E. 75; *Acme Manufacturing Co. v. McCormick*, 175 N. Car. 277, 95 S. E. 555.

North Dakota. *Quinlivan v. Dennstedt Land Co.*, — N. D. —, 168 N. W. 51.

Oregon. *Moll v. Roth Co.*, 77 Or. 593, 152 Pac. 235.

Pennsylvania. *Moore v. Carter*, 146 Pa. St. 402, 23 Atl. 243; *Neff's Estate*, 185 Pa. St. 98, 39 Atl. 830; *Beatty v. Larzelere*, 194 Pa. St. 605, 45 Atl. 653; *Achenbach v. Stoddard*, 253 Pa. St. 338, 98 Atl. 604; *Robert Grace Contracting Co. v. Norfolk & W. Ry. Co.*, 259 Pa. St. 241, 102 Atl. 956 (obiter).

Utah. *Morgan v. Child*, 47 Utah 417, 155 Pac. 451.

Vermont. *Davenport v. Crowell*, 79 Vt. 419, 65 Atl. 557.

Virginia. *J. P. Houck Tanning Co. v. Clinedinst*, 118 Va. 131, 86 S. E. 851.

Washington. *Dignan v. Spurr*, 3 Wash. 309, 28 Pac. 529; *Wallace v. Babcock*, 93 Wash. 392, 160 Pac. 1041.

inferred from their acts and conduct.² Where A agreed in writing to construct a boiler and engine in B's barge within a given time, such contract may be subsequently modified by an oral agreement between A and B, fixing the time at which such barge is to be delivered to A.³ A written contract for the sale of a machine, to be paid for before delivery, may subsequently be modified by the oral agreement of the parties that the vendee shall have the right to make trial of such machine, and to return it if not satisfactory, followed by delivery to vendee of the machine without demanding payment therefor.⁴ A written agreement by A, an attorney, to manage litigation for B for two and one-half per cent. of the amount recovered, if the allowance by the viewers is final, and five per cent. of the recovery, if the case is appealed to the court for trial, may be modified after verdict is obtained in court by an agreement that if A prevents a new trial, and prevents a reduction of the verdict, he shall have everything above a certain sum; that if the verdict is reduced below such sum, and above another sum, A is to receive nothing; and that if the verdict is reduced below such latter sum, B is to take a new trial, and pay A ten per cent. of the recovery upon the second trial.⁵

If a written contract is modified in part by a subsequent oral agreement, it is said, in some jurisdictions, to be reduced entirely to an oral contract.⁶

A written contract which has been signed by all the parties thereto, may be modified by a subsequent written contract, agreed to by all the parties, but signed only by the party who surrenders a right or advantage which the original contract gave him.⁷

Wisconsin. *Wisconsin Sulphite Fibre Co. v. D. K. Jeffris Lumber Co.*, 132 Wis. 1, 111 N. W. 237.

"It is well settled that parties who have undertaken contractual obligations by an agreement in writing may nevertheless enter into a new parol agreement creating obligations separate from the old ones and at variance with them, and such new agreement will be binding, unless the contract is one required by the statute to be in writing." *Quinlivan v. Dennstedt Land Co.*, — N. D. —, 168 N. W. 51.

²*Hillis v. McMunn*, 232 Ill. 488, 83 N. E. 963; *May v. Getty*, 140 N. Car.

310, 53 S. E. 75; *Davenport v. Crowell*, 79 Vt. 419, 65 Atl. 557.

For waiver of breach as a ground of discharge or as a cause of action for damages, see ch. LXXXIV.

³*Manistee Iron Works Co. v. Lumber Co.*, 92 Wis. 21, 65 N. W. 863.

⁴*McGregor v. Register Co.*, 86 Ga. 439, 12 S. E. 683.

⁵*Beatty v. Larzelere*, 194 Pa. St. 605, 45 Atl. 653.

⁶*Malone v. R. R.*, 157 Pa. St. 430, 27 Atl. 756.

⁷*Bray v. Loomer*, 61 Conn. 456, 23 Atl. 831.

If the written contract provides for payment or tender of money, oral evidence showing that such provision has been modified or discharged is admissible.⁸ As between principal and agent, the agent may show by oral evidence that his written authority,⁹ such as his power of attorney,¹⁰ was modified. If a contract of partnership is in writing, the partners may show as between themselves that such written contract was modified by oral agreement after it was made.¹¹ Even if a contract of indorsement is regarded as being in writing, oral evidence of a subsequent agreement by which the indorser agreed to collect such instrument as agent for the indorsee, is admissible.¹²

§ 2484. Effect of parol-evidence rule. The parol-evidence rule which forbids the introduction of evidence of prior or contemporaneous oral negotiations to vary or contradict the terms of a written contract, has no application to cases in which it is sought to prove by oral evidence a new contract which was made after the original written contract was made. Contracts which are in writing merely because the parties thereto chose to reduce them to writing offer no technical difficulties to subsequent oral modifications. Accordingly, the parol-evidence rule does not prevent the parties to a written contract, not under seal, and not required by law to be in writing or to be proved by writing, from making subsequent oral modifications of its terms.¹ A subsequent oral settle-

⁸ *Wallace v. Babcock*, 93 Wash. 392, 160 Pac. 1041.

⁹ *Levy v. Levy*, 139 La. 274, 71 So. 507.

¹⁰ *Levy v. Levy*, 139 La. 274, 71 So. 507.

¹¹ *Morgan v. Child*, 47 Utah 417, 155 Pac. 451.

¹² *Moll v. Roth Co.*, 77 Or. 593, 152 Pac. 235.

¹ *United States*. *Wood v. Ft. Wayne*, 119 U. S. 312, 30 L. ed. 416; *The Sapho*, 94 Fed. 545, 36 C. C. A. 395 [reversing, 89 Fed. 366]; *Pecos Valley Bank v. Evans-Snider-Buel Co.*, 107 Fed. 654, 46 C. C. A. 534.

Alabama. *Hartford, etc., Co. v. Attalla*, 119 Ala. 59, 54 So. 845; *Andrews v. Tucker*, 127 Ala. 602, 29 So. 34.

California. *Katz v. Bedford*, 77 Cal. 319, 1 L. R. A. 826, 19 Pac. 523.

Colorado. *Hurlburt v. Dusenbery*, 26 Colo. 240, 57 Pac. 860.

Florida. *Gunby v. Drew*, 45 Fla. 350, 34 So. 305.

Illinois. *Palmer v. Bennett*, 96 Ill. App. 281; *Chicago, etc., Co. v. Moran*, 187 Ill. 316, 58 N. E. 335 [affirming, 85 Ill. App. 543].

Indiana. *Toledo, etc., Ry. v. Levy*, 127 Ind. 168, 26 N. E. 773.

Iowa. *Lamb's Estate v. Morrow*, 140 Ia. 89, 18 L. R. A. (N.S.) 226, 117 N. W. 1118; *Lefebure v. Lord*, — Ia. —, 167 N. W. 651.

Kentucky. *John King Co. v. Louisville & N. R. Co.*, 131 Ky. 46, 114 S. W. 308 [rehearing denied, *John King Co.*

ment making an account stated;² a subsequent extension of time;³ a subsequent agreement that a policy, the premium for which by its terms was payable in advance, should take effect at once, the insurer holding the policy until the premium was paid;⁴ to deliver a note to an agent of the adversary party;⁵ or providing that a note already indorsed should be received as security and not as payment,⁶ may all be used as modifications of prior written contracts.

A subsequent agreement by a vendor, on valuable consideration, to give different warranties from those in the original written contract of sale, can be enforced.⁷ The subsequent modification can be most readily shown after it has been performed in full.⁸ By statute, in some jurisdictions, subsequent oral modifications of written contracts can be enforced only when partly performed. If purely executory they are unenforceable.⁹ The oral modifica-

v. Louisville & N. R. Co., 116 S. W. 1201].

Massachusetts. Bartlett v. Stanchfield, 148 Mass. 394, 2 L. R. A. 625, 19 N. E. 549.

Michigan. Moore v. Locomotive Works, 14 Mich. 266; Mouat v. Bamlet, 123 Mich. 345, 82 N. W. 74.

Minnesota. Hagstrom v. McDougall, 131 Minn. 389, 155 N. W. 391.

Missouri. Conrad v. Fisher, 37 Mo. App. 352, 8 L. R. A. 147.

Nebraska. Strahl v. Western Grocer Co. (Neb.), 98 N. W. 1043.

North Carolina. Harris v. Murphy, 119 N. Car. 34, 56 Am. St. Rep. 656, 25 S. E. 708; Acme Manufacturing Co. v. McCormick, 175 N. Car. 277, 95 S. E. 555.

North Dakota. Wadge v. Kittleson, 12 N. D. 452, 97 N. W. 856; Quinlivan v. Dennstedt Land Co., — N. D. —, 168 N. W. 51.

Oregon. Cline v. Shell, 43 Or. 372, 73 Pac. 12.

Pennsylvania. Cunningham v. Church, 159 Pa. St. 620, 28 Atl. 490; Achenbach v. Stoddard, 253 Pa. St. 338, 98 Atl. 604.

Tennessee. Chicago, etc., Co. v. Barry (Tenn. Ch. App.), 52 S. W. 451.

Virginia. J. P. Houck Tanning Co. v. Clinedinst, 118 Va. 131, 86 S. E. 851.

Washington. Carstens v. Earles, 26 Wash. 676, 67 Pac. 404; Andersonian Investment Co. v. Wade, — Wash. —, 184 Pac. 327.

Wisconsin. Wisconsin Sulphite Fibre Co. v. D. K. Jeffris Lumber Co., 132 Wis. 1, 111 N. W. 237.

See ch. LXIX.

² Krueger v. Dodge, 15 S. D. 159, 87 N. W. 965.

³ Bannon v. Aultman, 80 Wis. 307, 27 Am. St. Rep. 37, 49 N. W. 967.

⁴ Prudential Ins. Co. v. Sullivan, 27 Ind. App. 30, 59 N. E. 873.

⁵ Stokes v. Polley, 164 N. Y. 266, 68 N. E. 133.

⁶ Willow River Lumber Co. v. Furniture Co., 102 Wis. 636, 78 N. W. 762.

⁷ McCormick Harvesting Mach. Co. v. Hiatt (Neb.), 95 N. W. 627.

⁸ Town v. Jepsen, 133 Mich. 673, 95 N. W. 742.

⁹ Thompson v. Gorner, 104 Cal. 168, 43 Am. St. Rep. 105, 37 Pac. 900; Mackenzie v. Hodgkin, 126 Cal. 591, 77 Am. St. Rep. 209, 59 Pac. 36; Henahan v. Hart, 127 Cal. 656, 60 Pac. 426; Armington v. Stelle, 27 Mont. 13, 69 Pac. 115.

tion is not partly performed unless something has been done which the party performing was not bound to do under the original contract.¹⁰ A statute which requires performance of an oral alteration of a written contract is held to have no application to an oral contract which is intended by the parties as a substitute for the original written contract.¹¹

If the original contract is in writing, and it is sought to modify such contract by an oral agreement or to discharge it, it must be shown that the oral agreement was made subsequent to the written contract, since if it was entered into at substantially the same time, the oral contract is unenforceable by reason of the parol-evidence rule.¹² If a written contract for building a house does not require the contractor to paper the walls, an oral agreement entered into at substantially the same time, providing that the contractor shall paper the walls, is unenforceable.¹³

Under pretext of showing an oral contract entered into subsequently to the written contract, the party who wishes to show such oral contract can not show oral representations made by the adversary party before such written agreement was made.¹⁴

§ 2485. Express covenant against oral modification. If the written contract contains an express provision that no change or modification thereof can be made, except by writing, to be signed by one or both parties, the parties to such contract may, nevertheless, modify or abrogate it by subsequent oral agreement, since the oral agreement will operate as a waiver of the terms of the contract inconsistent therewith, including that term which requires subsequent modification to be in writing.¹ Questions of this sort are often presented in building contracts, where it is provided that

¹⁰ *Mackenzie v. Hodgkin*, 126 Cal. 591, 77 Am. St. Rep. 209, 59 Pac. 36.

¹¹ *Stockton Harvester & Agricultural Works v. Glenn's Falls Ins. Co.*, 121 Cal. 167, 53 Pac. 585; *Pearsall v. Henry*, 163 Cal. 314, 95 Pac. 154 [judgment affirmed on rehearing, *Pearsall v. Henry*, 153 Cal. 314, 95 Pac. 159].

¹² See ch. LXIX.

¹³ *McGuinness v. Shannon*, 154 Mass. 96, 27 N. E. 881.

¹⁴ *Studebaker Corp. v. Miller*, 169 Ky. 90, 183 S. W. 256.

¹ *United States Fire Ins. Associa-*

tion v. Wickham, 141 U. S. 584, 35 L. ed. 860; *Insurance Co. v. Wilkinson*, 80 U. S. (13 Wall.) 222, 20 L. ed. 617.

Alabama. Insurance Co. v. Williams, — Ala. —, 77 So. 159.

Illinois. Chicago, etc., R. R. v. Moran, 187 Ill. 316, 58 N. E. 335; *Foster v. McKeown*, 192 Ill. 339, 61 N. E. 514; *Concord Apartment House Co. v. O'Brien*, 228 Ill. 360, 81 N. E. 1038.

Kentucky. Illinois Central R. R. Co. v. Manion, 113 Ky. 7, 101 Am. St. Rep. 345, 67 S. W. 40.

Maine. Copeland v. Hewett, 96 Me. 525, 53 Atl. 36.

modifications or contracts for extra work must be in writing, and subsequent oral agreements for extra work or modifications are held valid.² A provision that no extra work shall be done without a written order from the architect or engineer, and an express agreement as to the extra cost has no application to extra work ordered by the owner under a provision of the contract allowing him so to do.³ A provision in a subcontract for constructing a railroad, that stone could be substituted for that specified only on the written consent of the engineer of the contractor, may be waived by subsequent oral contract.⁴ A provision in a building contract, that work can not be sublet without the written consent of the owner first had, may be waived by a subsequent oral agreement.⁵

New York. *Pechner v. Ins. Co.*, 65 N. Y. 195; *Beatty v. Guggenheim Exploration Co.* — N. Y. —, 122 N. E. 378.

Ohio. *Expanded Metal Fire-Proofing Co. v. Noel Construction Co.*, 87 O. S. 428, 101 N. E. 348.

Washington. *Ridhie v. State*, 39 Wash. 95, 81 Pac. 79.

"The question would answer itself if it were not for the covenant that there shall be no waiver or amendment not evidenced by a writing. The employer sets up this covenant to nullify its oral consent. The employe asserts that the covenant is nugatory. Those who make a contract may unmake it. The clause which forbids a change may be changed like any other. The prohibition of oral waiver may itself be waived. 'Every such agreement is ended by the new one which contradicts it.' *Westchester Ins. Co. v. Earle*, 33 Mich. 143, 153. What is excluded by the one act is restored by another. You may put it out by the door; it is back through the window. Whenever two men contract, no limitation self-imposed can destroy their power to contract again. *Pechner v. Phoenix Ins. Co.*, 65 N. Y. 195, 204, 205; *Solomon v. Vallette*, 152 N. Y. 147, 151. 46 N. E. 324; *Ins. Co. v. Norwood*, 69 Fed. 71, 16 C. C. A. 136; *McElroy v. Assur. Co.*, 94 Fed. 990, 36 C. C. A. 615; *Westchester Ins. Co. v. Earle*, supra; *Ewart*

on the Law of Waiver, p. 286." *Beatty v. Guggenheim Exploration Co.* — N. Y. —, 122 N. E. 378.

See to the opposite effect, *Headley v. Cavileer*, 82 N. J. L. 635, 48 L. R. A. (N.S.) 564, 82 Atl. 908.

² **Alabama.** *Davis v. Badders*, 95 Ala. 348, 10 So. 422.

Illinois. *Chicago, etc., Ry. v. Moran*, 187 Ill. 316, 58 N. E. 335.

Kentucky. *Illinois Central R. R. Co. v. Manion*, 113 Ky. 7, 101 Am. St. Rep. 345, 67 S. W. 40.

Minnesota. *Michaud v. MacGregor*, 61 Minn. 198, 63 N. W. 479.

Nebraska. *McLeod v. Genius*, 31 Neb. 1, 47 N. W. 473; *Jobst v. Hayden Bros.*, 84 Neb. 735, 50 L. R. A. (N.S.) 501, 121 N. W. 957.

Ohio. *Expanded Metal Fire-Proofing Co. v. Noel Construction Co.*, 87 O. S. 428, 101 N. E. 348.

Washington. *Crowley v. Guaranty Co.*, 29 Wash. 268, 69 Pac. 784.

³ *Concord Apartment House Co. v. O'Brien*, 228 Ill. 360, 81 N. E. 1036; *Jobst v. Hayden*, 84 Neb. 735, 50 L. R. A. (N.S.) 501, 121 N. W. 957; *Cooper v. Hawley*, 60 N. J. L. 560, 38 Atl. 964.

⁴ *Chicago, etc., Ry. v. Moran*, 187 Ill. 316, 58 N. E. 335.

⁵ *Bartlett v. Stanchfield*, 148 Mass. 394, 2 L. R. A. 625, 19 N. E. 549; *Gannon v. Shepard*, 156 Mass. 355, 31 N. E. 296.

The party for whose benefit such provision is inserted may modify or waive it.⁶ A provision in a written contract to the effect that no charge for extra services shall be made unless the contract for such extra services is previously made in writing, does not prevent the parties from modifying such provision by subsequent oral agreement.⁷ A provision that the architect has authority to modify plans only by written order has been held to be for the benefit of the owner alone, and hence subject to modification by him, without the consent of the contractor.⁸ Such provision has been held to be for the benefit of both owner and contractor, and to be modified only with the consent of both.⁹ A provision in an insurance policy to the effect that certain provisions thereof could be modified only by writing, indorsed on the policy, may be modified by a subsequent oral contract.¹⁰ The original view entertained by the courts was that such written provisions in insurance policies could not be waived by subsequent oral contracts.¹¹

Unless it is waived, however, such a provision prevents recovery for extra work.¹² The party who claims that such provision against oral modification has been waived must be able to establish the fact of such waiver.¹³

§ 2486. Express covenant as affecting authority of agent.
While the principal may enter into an oral modification of a writ-

⁶ *Copeland v. Hewett*, 96 Me. 525, 53 Atl. 36.

⁷ *Richie v. State*, 39 Wash. 95, 81 Pac. 79.

⁸ *Consaul v. Sheldon*, 35 Neb. 247, 52 N. W. 1104; *De Mattos v. Jordan*, 15 Wash. 378, 46 Pac. 402.

⁹ *Northern Light Lodge v. Kennedy*, 7 N. D. 146, 73 N. W. 524. (Criticizing the opinions in the cases in the previous note as obiter.)

¹⁰ *Alabama. Insurance Co. v. Williams*, — Ala. —, 77 So. 159.

Kansas. Continental Ins. Co. v. Pearce, 39 Kan. 396, 7 Am. St. Rep. 537, 18 Pac. 291.

Michigan. Westchester, etc., Ins. Co. v. Earle, 33 Mich. 143.

New York. Pechner v. Ins. Co., 65 N. Y. 195.

Tennessee. American Central Ins

Co. v. McCrea, 76 Tenn. (8 Lea) 513, 41 Am. Rep. 647.

Provision against other insurance. *Firemen's Fund Ins. Co. v. Norwood*, 69 Fed. 71, 16 C. C. A. 136; *Morrison v. Ins. Co.*, 69 Tex. 353, 5 Am. St. Rep. 63, 6 S. W. 605.

¹¹ *Carpenter v. Ins. Co.*, 41 U. S. (16 Pet.) 495, 10 L. ed. 1044.

¹² *Heard v. Dooly County*, 101 Ga. 619, 28 S. E. 996; *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280; *Headley v. Cavileer*, 82 N. J. L. 635, 48 L. R. A. (N.S.) 74, 82 Atl. 908; *Coorsen v. Ziehl*, 103 Wis. 381, 79 N. W. 562; *Davis v. La Crosse Hospital Assn.*, 121 Wis. 579, 99 N. W. 351.

¹³ *Schneider v. Ann Arbor*, 195 Mich. 599, 162 N. W. 110; *Minnesota Northwestern Fire & Marine Ins. Co. v. Connecticut Fire Ins. Co.*, 105 Minn. 483, 117 N. W. 825.

ten contract in spite of a covenant in such contract against oral modification,¹ such covenant may operate as a restriction upon the power of an agent to modify the contract on behalf of his principal by oral modification or waiver.² If an architect or engineer is authorized to modify the plans only by a written order, he has no authority to modify the plans by oral instructions.³ If an insurance agent is authorized to waive conditions only by written waiver, his oral waiver is inoperative.⁴

Such restrictions upon the powers of agents are usually construed rather strictly. A provision requiring modifications of the written contract to be itself in writing, has been held to impose no restriction upon the power of such agent to waive conditions.⁵

If the agent who modifies a provision of a contract by oral agreement has in fact authority to modify it, his oral agreement is binding on his principal, although the contract provides that modifications must be in writing and signed by certain other designated officers.⁶

§ 2487. Statutory rule as to oral modification. In some states it is provided expressly by statute that a written contract can be only modified by a subsequent written contract or by an executed

¹ See § 2485.

² Georgia. *Rome Industrial Ins. Co. v. Eldson*, 136 Ga. 592, 75 S. E. 657.

Iowa. *Chicago Lumber & Coal Co. v. Garmer*, 132 Ia. 282, 109 N. W. 780.

New York. *Quinlan v. Providence Washington Ins. Co.*, 133 N. Y. 356, 28 Am. St. Rep. 645, 31 N. E. 31.

Ohio. *Baltimore & Ohio Ry. v. Jolly*, 71 Ohio St. 92, 72 N. E. 888.

Wisconsin. *Carey v. German-American Ins. Co.*, 84 Wis. 80, 36 Am. St. Rep. 907, 20 L. R. A. 267, 54 N. W. 18.

A provision in a written contract to the effect that such contract can not be modified except in writing can not be waived by an agent unless such agent is shown to have had authority to bind his principal by an oral contract. *Baltimore & Ohio Ry. v. Jolly*, 71 O. S. 92, 72 N. E. 888.

³ *Chicago Lumber & Coal Co. v. Garmer*, 132 Ia. 282, 109 N. W. 780; *Baltimore & Ohio Ry. v. Jolly*, 71 Ohio

St. 92, 72 N. E. 888; *Gibbs v. School District*, 195 Pa. St. 396, 46 Atl. 91.

⁴ *Rome Industrial Ins. Co. v. Eldson*, 136 Ga. 592, 75 S. E. 657; *Walsh v. Hartford Fire Ins. Co.*, 73 N. Y. 5; *Quinlan v. Providence-Washington Ins. Co.*, 133 N. Y. 356, 28 Am. St. Rep. 645, 31 N. E. 31; *Morgan v. American Central Ins. Co.*, 80 W. Va. 1, L. R. A. 1917D, 1049, 92 S. E. 84; *Carey v. German-American Ins. Co.*, 84 Wis. 80, 36 Am. St. Rep. 907, 20 L. R. A. 267, 54 N. W. 18.

⁵ *Industrial Mutual Indemnity Co. v. Thompson*, 83 Ark. 575, 10 L. R. A. (N.S.) 1064, 104 S. W. 200; *Viele v. Germania Ins. Co.*, 28 Ia. 9, 96 Am. Dec. 83; *American Ins. Co. v. Gallatin*, 48 Wis. 36, 3 N. W. 772.

⁶ *Industrial Mutual Indemnity Co. v. Thompson*, 83 Ark. 575, 10 L. R. A. (N.S.) 1064, 104 S. W. 200; *Lamberton v. Connecticut Fire Ins. Co.*, 39 Minn. 129, 1 L. R. A. 223, 39 N. W. 76.

oral agreement.¹ Under such a statute an executory oral agreement, even if otherwise valid, can not operate to modify a prior written contract.² Under such a statute, however, a prior written contract may be discharged or modified by a subsequent executory contract which has been performed in full.³

Under such statutes there is a conflict of authority as to what constitutes an executed contract. An agreement between an insurance company and a policy-holder, after a loss, fixing the amount of the liability of the company, is not a "modification" of the policy within the meaning of the statute, forbidding executory oral modifications of written contracts.⁴ On the other hand, a written contract for sinking a well, provided that if four and a half inch piping were used, the price should be fifteen hundred dollars; but if three-inch piping had to be used, the price should be nine hundred and fifty dollars. Subsequently, after four and a half inch piping could be and was used for the greater part of the distance, the parties agreed orally that three and a half inch piping should be used for the rest of the distance and that the price should be fifteen hundred dollars. Pipe of this size was put in, and more than nine hundred and fifty dollars was paid. It was held that the

¹ *Pearsall v. Henry*, 163 Cal. 314, 95 Pac. 154 [judgment affirmed on rehearing, *Pearsall v. Henry*, 153 Cal. 314, 95 Pac. 159]; *Quinlivan v. Dennstedt Land Co.*, — N. D. —, 168 N. W. 51; *Levin v. Hunt*, — Okla. —, 172 Pac. 940 (obiter); *Clark v. Sallaska*, — Okla. —, 4 A. L. R. 746, 174 Pac. 506; *Emerson-Brantingham Implement Co. v. Ware*, — Okla. —, 174 Pac. 1066.

² *United States. Northern Wyoming Land Co. v. Butler*, 252 Fed. 971.

California. *Erenberg v. Peters*, 66 Cal. 114, 4 Pac. 1091; *Benson v. Shotwell*, 103 Cal. 163, 37 Pac. 147; *Thompson v. Garner*, 104 Cal. 168, 45 Am. St. Rep. 81, 37 Pac. 900.

Montana. *Kinsman v. Stanhope*, 50 Mont. 41, L. R. A. 1916C, 443, 144 Pac. 1083.

North Dakota. *Reeves v. Bruening*, 13 N. D. 157, 100 N. W. 241; *Annis v. Burnham*, 15 N. D. 577, 108 N. W. 549;

Quinlivan v. Dennstedt Land Co., — N. D. —, 168 N. W. 51.

Oklahoma. *Emerson-Brantingham Implement Co. v. Ware*, — Okla. —, 174 Pac. 1066.

South Dakota. *Mettel v. Gales*, 12 S. D. 632, 82 N. W. 181.

In *Mettel v. Gales*, 12 S. D. 632, 82 N. W. 181, this statutory rule is spoken as common law doctrine, apparently on the theory that it is the same thing as the parol evidence rule.

³ *Pearsall v. Henry*, 153 Cal. 314, 95 Pac. 154 [judgment affirmed on rehearing, *Pearsall v. Henry*, 153 Cal. 314, 95 Pac. 159]; *Reeves v. Bruening*, 13 N. D. 157, 100 N. W. 241.

⁴ *Stockton, etc., Works v. Ins. Co.*, 121 Cal. 167, 53 Pac. 565. The court also put their ground of decision in this case upon the fact that the new agreement was in part performance, since the insured had furnished proofs of loss under the contract.

contractor could not recover the balance, as the contract was still executory.⁵ If a written contract consists of a note which is given for an automobile and a chattel mortgage on such automobile, such written contract can not be modified by a subsequent agreement that the seller should pay for the maintenance of the automobile, and for the living expenses of the buyer, and that in consideration thereof the buyer would use the automobile for hire, and that he would turn over to the seller all the money received for the use thereof until the balance of the purchase money should be paid, as long as the subsequent contract was not performed in full.⁶

If the statute provides that a written contract can not be altered by a subsequent oral executory contract, such statute is held to have no application to a subsequent contract which provides for rescinding the original contract for voluntary agreement, and by substituting therefor a new oral agreement.⁷

§ 2488. Evidence of new contract. If a dispute of fact arises as to the existence of a new contract, which modifies or abrogates a prior contract, the burden of proof is upon the party who alleges such modification.¹ In most jurisdictions it is held or assumed that proof of such contract is sufficient if its existence is established by a preponderance of the evidence.² In some jurisdictions, however, it is said that the degree of proof to establish a modification of a written contract is as great as is necessary to reform a written contract on the ground of mistake in expression.³ Some of the courts which allow an oral contract to modify a prior written contract, hold that proof of such new oral agreement must be clear.⁴

⁵ *Mettel v. Gales*, 12 S. D. 632, 82 N. W. 181.

⁶ *Kinsman v. Stanhope*, 50 Mont. 41, L. R. A. 1916C, 443, 144 Pac. 1083.

⁷ *Pearsall v. Henry*, 153 Cal. 314, 95 Pac. 154 [judgment affirmed on rehearing, *Pearsall v. Henry*, 153 Cal. 314, 95 Pac. 159]; *Levin v. Hunt*, — Okla. —, 172 Pac. 940; *Hart v. Frost*, — Okla. —, 175 Pac. 257.

¹ *United States. Cowen Co. v. Houck Mfg. Co.*, 249 Fed. 285.

Arkansas. *Bagnell Tie & Timber Co. v. Goodrich*, 82 Ark. 547, 102 S. W. 228. **Colorado.** *Schulze v. Shea*, 37 Colo. 337 [sub nomine, *Schulze v. Shea*, 86 Pac. 117].

Iowa. *Beck v. Umshler*, 139 Ia. 378, 116 N. W. 138.

Pennsylvania. *Phillips v. American Cement Tile Mfg. Co.*, 220 Pa. St. 141, 69 Atl. 589.

² *Bagnell Tie & Timber Co. v. Goodrich*, 82 Ark. 547, 102 S. W. 228; *Schulze v. Shea*, 37 Colo. 337 [sub nomine, *Schulze v. Shea*, 86 Pac. 117]; *Beck v. Umshler*, 139 Ia. 378, 116 N. W. 138.

³ *Phillips v. American Cement Tile Mfg. Co.*, 220 Pa. St. 141, 69 Atl. 589.

For the degree of proof requisite in reformation for mistake in expression, see § 2234.

⁴ *Watson v. Janion*, 6 Or. 137; *Boyes v. Ramsden*, 34 Or. 253, 55 Pac. 538; *Kent v. Kent (Va.)*, 34 S. E. 32.

Whether such contract has been made or not, is a question of fact for the jury,⁵ except where the contract is in writing and its execution is conceded by the parties.

§ 2489. Effect of new contract—Total or partial discharge by new contract. The new contract may amount to a modification of the prior contract leaving some of its terms in force and continuing the original liability with such modifications, or it may operate as a termination of all liability under the original contract.¹ Whether the new contract is a modification of the original contract, or whether it supersedes the original contract entirely and replaces it for all purposes, is a question which depends primarily upon the intent of the parties.²

If the rights of third persons are not affected, the new contract, if valid, may have either effect, according to the will of the parties expressed in such contract, and ascertained by the ordinary rules of construction.³

If the original contract is terminated rightfully by one of the parties, a subsequent contract upon the same subject-matter will be regarded as a new and independent contract, and not a modification of the original contract.⁴ If a public corporation is authorized by statute to terminate a contract for public improvement, and it exercises such right, and thereafter makes a new contract with the same contractor for the same improvement, the new contract will be regarded as distinct from the original contract, and it will be

⁵ *Iowa-Minnesota Land Co. v. Conner*, 136 Ia. 674, 112 N. W. 820; *Morecraft v. Allen*, 78 N. J. L. 729, L. R. A. 1915B, 1, 75 Atl. 920.

¹ *Iowa. Blake v. Osmundson*, 178 Ia. 121, 159 N. W. 766.

Minnesota. Mulcahy v. Dieudonne, 103 Minn. 352, 115 N. W. 636.

North Dakota. Chesley v. Soo Lignite Coal Co., 19 N. D. 18, 121 N. W. 73.

Oregon. Aya v. Morson, 90 Or. 647, 178 Pac. 207.

Utah. Schwab Safe & Lock Co. v. Snow, 47 Utah 199, 152 Pac. 171.

Vermont. Davenport v. Crowell, 79 Vt. 419, 65 Atl. 557.

² *Maryland. District National Bank v. Mordecai*, — Md. —, 105 Atl. 586.

Minnesota. Mulcahy v. Dieudonne, 103 Minn. 352, 115 N. W. 636.

New Jersey. Morecraft v. Allen, 78 N. J. L. 729, L. R. A. 1915B, 1, 75 Atl. 920.

Oregon. Aya v. Morson, 90 Or. 647, 178 Pac. 207.

Pennsylvania. Robert Grace Contracting Co. v. Norfolk & W. Ry. Co., 259 Pa. St. 241, 102 Atl. 956.

Texas. Alabama Oil & Pipe Line Co. v. Sun Co., 99 Tex. 606, 92 S. W. 253 [judgment reversed (Tex. Civ. App.), 90 S. W. 202].

³ See ch. LXIII.

⁴ *People v. Metz*, 193 N. Y. 148, 85 N. E. 1070 [order affirmed on rehearing, 86 N. E. 986].

subject to a statute which was enacted after the first contract was made and before the second contract was made.⁵ If it is doubtful whether a subsequent transaction is intended to modify a prior contract or to carry it into effect, it would ordinarily be presumed that it was to carry it into effect rather than to modify it.⁶

§ 2490. Express provision as to effect of new contract on original contract. If the new contract abrogates the earlier contract by express terms, no question of the intention of the parties can usually arise.¹ In such case it abrogates it in toto unless some restriction is made in the later contract, preventing such total abrogation.²

In order to operate as a discharge or modification of an earlier contract, the new contract must appear to have been so intended. A new contract of equal degree with an earlier one, and upon the same subject-matter, will not abrogate or merge the earlier contract, if the parties make an express agreement that it shall not so operate.³ A new contract intended to confirm and ratify a prior contract can not operate as a discharge thereof.⁴

§ 2491. No express provision as to effect—New contract consistent with original contract. If the new contract does not provide either for abrogating the original contract or for retaining it in force, the question of the effect of the second contract upon the first turns on the question whether the second contract is consistent with the first contract in whole or in part.

If the second contract is consistent with the first, the original contract remains in full force and effect. A contract providing for making certain changes in the construction of a furnace does not abrogate an earlier contract between the same parties, whereby

⁵ *People v. Metz*, 193 N. Y. 148, 85 N. E. 1070 [order affirmed on rehearing, 86 N. E. 986].

⁶ *Bellaire Stove Co. v. Midland Steel Co.*, 66 O. S. 1, 63 N. E. 587.

¹ *Green v. Ry.*, 92 Fed. 873, 35 C. C. A. 68; *Sheats v. Scott*, 123 Ala. 642, 32 So. 573; *Arnold v. Pawtucket*, 21 R. I. 15, 41 Atl. 576.

² *De Baumont v. Webster*, 71 Fed. 226; *Union, etc., Co. v. Johnson*, 72 Fed. 147, 18 C. C. A. 490; *Youngberg v.*

South End Warehouse Co., 177 Cal. 504, 171 Pac. 97; *Swarts v. Narragansett Electric Lighting Co.*, 26 R. I. 388, 59 Atl. 77 [rehearing denied, 26 R. I. 436, 59 Atl. 111]; *Hutchinson v. Holmes Sanitarium*, 93 Wis. 23, 66 N. W. 700.

³ *Alferitz v. Ingalls*, 83 Fed. 964; *Landvoigt v. Paul*, 27 D. C. App. 423; *Gray v. Jones*, 47 Or. 40, 81 Pac. 813.

⁴ *Landvoigt v. Paul*, 27 D. C. App. 423; *Lowell v. Washington County R. R.*, 90 Me. 80, 37 Atl. 869.

one agrees to sell such furnace to the other.¹ A agreed to make a machine for B, according to certain plans and specifications. There was no guaranty that the machine would do the work for which it was intended. Subsequently the parties found that some of the plans and specifications were imperfect, and A agreed to examine the drawings and specifications and correct them if there was anything imperfect or defective therein. It was held that the new agreement did not amount to a warranty that the machine would do the work for which it was made.² Conversely, if there is an express guaranty in the original contract, a modification of the plans and specifications does not operate as a discharge of the covenant of guaranty.³ B bought A's poultry and grocery business, and A agreed not to engage in the poultry business while B remained therein. Subsequently A bought some real estate and B's poultry business, and B agreed not to engage in the poultry business in a certain territory for a specified time. It was held that the latter contract did not merge the earlier one.⁴ An author and publisher made a contract fixing the quality of the books to be published and the price therefor. A subsequent oral modification as to the first edition will not abrogate the written contract as to subsequent editions.⁵ Two contracts of different dates, which are not inconsistent each with the other, and one of which appears to be in part performance of the other, are to be enforced together. The second does not abrogate the first.⁶

Conduct of the parties in continuing to act under the old contract after they have entered into the new contract, tends to show that both the contracts are to be in effect, as far as they are not inconsistent with each other.⁷ If the two contracts are consistent, the second does not operate as a rescission or modification of the first.⁸ The new contract consists, in such cases, of the terms of the new agreement, together with the terms of the original contract

¹ Uhlig v. Barnum, 43 Neb. 584, 61 N. W. 749.

² Johnson v. Freemann, 160 Pa. St. 317, 28 Atl. 780; Swarts v. Narragansett Electric Lighting Co., 26 R. I. 388, 60 Atl. 77 [rehearing denied, 26 R. I. 436, 39 Atl. 111].

³ Duggleby v. Lewis Roofing Co., 139 Ia. 432, 116 N. W. 711.

⁴ Adams v. Adams, 160 Ind. 61, 66 N. E. 153.

⁵ Keely v. Hartranft, 178 Pa. St. 384, 35 Atl. 984.

⁶ Rhoades v. Ry., 49 W. Va. 494, 53 L. R. A. 170, 39 S. E. 209.

⁷ Robert Grace Contracting Co. v. Norfolk & W. Ry. Co., 259 Pa. St. 241, 102 Atl. 956.

⁸ Trumbull v. Harris, 102 Ark. 669, 145 S. W. 547; Cutler v. Spens, 191 Mich. 603, 158 N. W. 224.

which are not inconsistent with such new terms.⁹ If the original contract consists of a letter which refers to a formal agreement, and such formal agreement, a modification of the terms of the formal agreement by a new contract, does not alter the terms of the original agreement any further than such express modification, the letter remains a part of the contract as modified.¹⁰ If the original contract provides for the payment of a certain price and for the application of royalties thereon, a subsequent agreement reducing the price does not modify the remaining provisions of the original contract with reference to the application of such royalties.¹¹ To operate as a discharge in the absence of an express agreement to that effect, the new contract must be clearly inconsistent with the continued existence of the original contract. A sold a blacksmith shop to B, and agreed, as a part of the consideration, not to engage in that business in that town. The fact that A and B subsequently formed a partnership in such business, did not as a matter of law discharge such contract absolutely. Accordingly, if, after the termination of such partnership, A continues such business, he is liable upon his covenant.¹² A subsequent agreement between a contractor and a subcontractor, whereby the contractor finishes the work for the subcontractor, and agrees to pay him any balance over and above the cost of completing such work, does not operate as a complete discharge by abandonment of the original contract.¹³ A contract by a railway to furnish cars is consistent with a subsequent formal contract for the transportation of live stock,¹⁴ and such formal contract for transportation does not merge the original contract to furnish cars.¹⁵ Modifications of a building contract do not abrogate it entirely, as long as the alterations and changes leave it possible to follow the original contract.¹⁶ A contract for erecting a mill, provided that the foundations should be laid in cement and mortar, except the foundations for machinery, which should be laid in Portland cement. The

⁹ *McDowell v. Hemming Mfg. Co.*, — N. J. —, 102 Atl. 680.

¹⁰ *Canadian Impl. Co. v. Lea*, 74 N. J. Eq. 234, 69 Atl. 455.

¹¹ *Hoffman v. Murphy*, 44 Colo. 107, 96 Pac. 780.

¹² *Drown v. Forrest*, 63 Vt. 557, 14 L. R. A. 80, 22 Atl. 612.

¹³ *Pease v. McQuillin*, 180 Mas 135, 61 N. E. 819.

¹⁴ *Clark v. Ulster and Delaware Railroad Co.*, 189 N. Y. 93, 121 Am. St. Rep. 848, 13 L. R. A. (N.S.) 164, 81 N. E. 766.

¹⁵ *Clark v. Ulster and Delaware Railroad Co.*, 189 N. Y. 93, 121 Am. St. Rep. 848, 13 L. R. A. (N.S.) 164, 81 N. E. 766.

¹⁶ *Hood v. Smiley*, 5 Wyom. 70, 36 Pac. 866.

walls were to be laid in lime mortar, except certain cappings, which were to be in Portland cement. A subsequent modification of the contract substituted Louisville cement for Portland cement in all the brick-work, except the machinery foundations and the cappings. It was held that this change referred only to the kind of cement to be used, and did not affect the contract as to the amount of brick which was to be laid in cement.¹⁷ An agreement between the owner and the contractor, which provides for the use of less expensive material, is said not to imply an agreement to make a corresponding reduction in the contract price.¹⁸ If A has sold stock to B, under a contract by which A agrees to repurchase such stock in a year, upon the happening of a certain event, and by which it was agreed that as between A and B such stock should be regarded as the property of A, such contract is not terminated as a matter of law by the fact that B gives to A an option upon such stock,¹⁹ or that B gives to A authority to sell such stock.²⁰

A building contract is not abrogated by a subsequent agreement changing the plans and specifications and providing for omitting certain provisions of the contract.²¹ A building contract is not abrogated by the owner's making payments direct to the laborers and materialmen, with the consent of the contractor.²²

A modification which merely extends the time for performance leaves the remaining provisions in full force.²³ A provision in a new agreement, accelerating the time for performance, does not discharge the original contract except as far as it is inconsistent therewith.²⁴ A modification of the terms of payment does not operate as a discharge of the entire contract.²⁵ A renewal of a certificate of indebtedness does not operate as a modification of the rights of the parties under the original obligation.²⁶ If A and B have entered into a contract by which A has executed a note to B under a contract by which A is to be entitled to vote stock

¹⁷ Perkins Oil Co. v. Eberhart, 107 Tenn. 409, 64 S. W. 760.

¹⁸ Thomas W. Finucane Co. v. Board of Education, 190 N. Y. 76, 82 N. E. 737.

¹⁹ Corey v. Woodin, 195 Mass. 464, 81 N. E. 260.

²⁰ Corey v. Woodin, 195 Mass. 464, 81 N. E. 260.

²¹ Gray v. Jones, 47 Or. 40, 81 Pac. 813.

²² Lane v. Hardware Co., 121 Ala. 296, 25 So. 809.

²³ Underwood v. Wolf, 131 Ill. 425, 19 Am. St. Rep. 40, 23 N. E. 598.

²⁴ Security Trust & Life Ins. Co. v. Ellsworth, 129 Wis. 349, 109 N. W. 125.

²⁵ Cohen v. P. E. Harding Construction Co., 41 R. I. 242, 103 Atl. 702.

²⁶ Dunn v. Bank, 74 W. Va. 594, L. R. A. 1915B, 168, 82 S. E. 758.

enough to elect two directors in a given corporation, the renewal of such note without an express reference to the remaining provisions of such contract does not operate as a discharge thereof.²⁷ A written memorandum to the effect that delay in performance of a prior contract shall not affect the rights of the adversary party, is not regarded as a new contract which terminates the original contract,²⁸ but it is rather an admission of the original contract and an evidence of the intention that it shall remain in effect except as to the legal consequences of such delay.²⁹

As far as the new contract is inconsistent with the earlier contract, however, it thereby abrogates and supersedes it.³⁰ A employed B for a term of years for a compensation, which was to be a certain per cent. of the profits. B was not to draw out his profits unless with A's consent. Subsequently B assigned to X the amount of the profits belonging to B for the first year, and A assented thereto, and promised to pay such amount to X. Such new contract was held to abrogate that part of the original contract, giving A the option to retain such profits in the business until the end of the contract and the right to set off against such profits any damage for B's subsequent violation of the contract.³¹ A sold B land for a certain sum down and the balance due in three installments. B was to have the option of avoiding the contract before the first installment became due and forfeiting the amount paid down. Subsequently A extended the time for paying the first installment. This was held to extend the time within which B could avoid the sale.³² However, a subsequent contract modifying only the grade of work to be done has been held to leave in full force such a provision as to the power of the engineer.³³

§ 2492. No express provision as to effect—New contract entirely inconsistent with original contract. A subsequent contract

²⁷ Canadian Impl. Co. v. Lea, 74 N. J. Eq. 234, 69 Atl. 455.

²⁸ Landvoigt v. Paul, 27 D. C. App. 423.

²⁹ Landvoigt v. Paul, 27 D. C. App. 423.

³⁰ Canada. Ross v. Barry, 19 Can. S. C. 360.

United States. American, etc., Co. v. Ry., 47 Fed. 343.

Connecticut. Bray v. Loomer, 61 Conn. 456, 23 Atl. 831.

Iowa. Chandler v. Knott, 86 Ia. 113, 53 N. W. 88.

Minnesota. Gray v. Barge, 47 Minn. 498, 50 N. W. 1014.

Pennsylvania. Robert Grace Contracting Co. v. Norfolk & W. Ry. Co., 259 Pa. St. 241, 102 Atl. 956.

³¹ Grosse v. Sweet, 188 Ill. 555, 59 N. E. 432 [affirming, 80 Ill. App. 418].

³² Thayer v. Allison, 109 Ill. 180.

³³ McCauley v. Keller, 130 Pa. St. 53, 17 Am. St. Rep. 758, 18 Atl. 607.

which does not by express terms abrogate an earlier contract, will, nevertheless, operate as a discharge thereof if it is inconsistent with such earlier contract.¹ If the later contract does not expressly abrogate the earlier in toto, but is inconsistent therewith, the scope of the later contract determines whether any part of the earlier contract is in force. If the later contract between the parties covers the same subject-matter and has the same scope as the earlier contract, but is in whole or in part inconsistent therewith, the later contract abrogates the earlier contract in toto and is the only contract upon the subject between the parties.² Thus an oral agreement to convey or devise land, even if otherwise enforceable.

¹ **United States.** *Cleveland City Ry. Co. v. Cleveland*, 94 Fed. 385; *Fox v. Tyler*, 109 Fed. 258, 48 C. C. A. 356.

Georgia. *Kirklin v. Loan Association*, 107 Ga. 313, 33 S. E. 83.

Kentucky. *Menefee v. Rankins*, 158 Ky. 78, 164 S. W. 365.

Massachusetts. *Holt v. Silver*, 169 Mass. 435, 48 N. E. 837.

Michigan. *Robinson v. Ry.*, 84 Mich. 658, 48 N. W. 205.

Minnesota. *Fitzhugh v. Harrison*, 75 Minn. 481, 78 N. W. 95.

Montana. *Frank v. Cobban*, 20 Mont. 168, 50 Pac. 423.

Nebraska. *Hall v. Eccles*, 46 Neb. 880, 65 N. W. 1058; *Nebraska National Bank v. Clark*, 58 Neb. 183, 78 N. W. 527.

New York. *Wood v. Whitehead Bros. Co.*, 165 N. Y. 545, 59 N. E. 357.

Pennsylvania. *Green v. Paul*, 155 Pa. St. 126, 25 Atl. 867; *Thompson v. Craft*, 238 Pa. St. 125, 85 Atl. 1107.

Washington. *Sherman v. Sweeny*, 29 Wash. 321, 69 Pac. 1117.

Wyoming. *Hogan v. Peterson*, 8 Wyom. 49, 59 Pac. 162.

² **England.** *Patmore v. Colburn*, 1 Crompt. M. & R. 65.

Canada. *Penman Mfg. Co. v. Broadhead*, 21 Can. S. C. 713.

United States. *Housekeeper Publishing Company v. Swift*, 97 Fed. 290, 38 C. C. A. 187.

California. *Bourn v. Dowdell* (Cal.), 50 Pac. 695.

Illinois. *Stow v. Russell*, 36 Ill. 18; *Harrison v. Polar Star Lodge*, 116 Ill. 279, 5 N. E. 543.

Indiana. *McDonough v. Kane*, 75 Ind. 181.

Kentucky. *Walton-Wilson-Rodes Co. v. McKittrick*, 141 Ky. 415, 132 S. W. 1049.

Maine. *Paul v. Meservey*, 58 Me. 419.

Maryland. *Howard v. Railroad Co.*, 1 Gill. (Md.) 311; *Linz v. Schuck*, 106 Md. 220, 124 Am. St. Rep. 481, 11 L. R. A. (N.S.) 789, 67 Atl. 286.

Missouri. *Chrisman v. Hodges*, 75 Mo. 413; *Tuggles v. Callison*, 143 Mo. 527, 45 S. W. 291.

New Jersey. *Morecraft v. Allen*, 78 N. J. L. 729, L. R. A. 1915B, 1, 75 Atl. 920.

New York. *Renard v. Sampson*, 12 N. Y. 561; *McCreery v. Day*, 119 N. Y. 1, 16 Am. St. Rep. 793, 6 L. R. A. 503, 23 N. E. 198.

Oregon. *Spreckel v. Bender*, 30 Or. 577, 48 Pac. 418.

Texas. *Burke v. Purifoy*, 21 Tex. Civ. App. 202, 50 S. W. 1089.

Washington. *Tribble v. Yakima Valley Transportation Co.*, 100 Wash. 589, 171 Pac. 544.

West Virginia. *Myers v. Carnahan*, 61 W. Va. 414, 57 S. E. 134.

is avoided by the promisee's accepting a subsequent lease of such land, inconsistent with his rights under such contract.³ An option to buy the fee is not as a matter of law, however, surrendered by taking a lease upon such realty.⁴ A agreed with B, a street railway company, to construct iron work and appliances for certain curves, at a certain rate per foot. Subsequently, by mutual agreement, the parties changed the weight of the iron to be used, and modified the specifications so as to make one curve where there had before been three. The distance was thus lengthened. It was held that in the absence of an express agreement to the effect that the same price per foot was to be paid, that such contract abrogated the original contract as to the rate per foot which A was to receive.⁵ A contract between a municipal corporation and a street railway company, by which a certain rate of fare to be charged by a railway company is agreed upon, and the railway company assumes a liability for paving a certain place along its tracks, for which it was not before liable, and agrees to charge but one fare for transportation over its whole line, whereas before it was entitled to charge in some cases more than one fare, abrogates the original contract between such railway company and city, fixing the rate of fare and reserving to the city the right to make subsequent changes in such rates.⁶ A contract for the sale of a certain number of tons of cotton seed at a certain price, is abrogated by a new contract between the parties for the sale of a less number of tons at an increased price.⁷ If a new contract is entered into between the parties, upon the same subject-matter, as an alleged prior contract, it has been held that the protest of one of the parties claiming rights under such alleged prior contract, does not prevent the new contract from abrogating the earlier one.⁸ So if a contract is rescinded when only partly performed, and a new contract entered into to pay for the work done, such contract abrogates a provision of the earlier contract as to the time of payment.⁹ A new contract for construction abrogates a provision in a prior con-

³ *Harmon v. Harmon*, 51 Fed. 113; *Unger v. Unger*, 65 O. S. 495, 63 N. E. 67.

⁴ *Wade v. Oil Co.*, 45 W. Va. 380, 32 S. E. 160.

⁵ *Marshall, etc., Co. v. Traction Co.*, 138 Pa. St. 266, 22 Atl. 23.

⁶ *Cleveland City Ry. v. Cleveland*, 94 Fed. 385.

⁷ *Consumers' Cotton-Oil Co. v. Ashburn*, 81 Fed. 331. (The new contract was made after the vendor had repudiated his original contract to sell at a lower price.)

⁸ *United States v. Lamont*, 155 U. S. 303, 39 L. ed. 160.

⁹ *South End Improvement Co. v. Harden* (N. J. Eq.), 52 Atl. 1127.

tract providing that the engineer's decision upon certain matters should be final.¹⁰ A contract by which A agrees to support B for life, in consideration of the rents of certain property belonging to B, is terminated by a contract by which B pays to A a certain sum of money in full settlement of all rights and liabilities under the contract.¹¹

§ 2493. New contract partially inconsistent with prior contract. If the new contract covers a subject-matter which is only in part the same as that covered by the old contract, the new contract abrogates the old only in so far as it is inconsistent therewith.¹

§ 2494. Effect of new contract upon subsequent rights arising out of original contract. If the parties have made a new contract which is intended to supersede the original contract, the rights of the parties to the transaction are necessarily based upon the second contract.¹ If a new contract provides for an extension of time, either express or by fair implication, failure to perform within the time fixed by the original contract can not be treated as a breach or as a discharge.² If the builder under instructions from the archi-

¹⁰ Chicago, etc., Ry. v. Moran, 187 Ill. 316, 58 N. E. 335 [affirming, 85 Ill. App. 543]; Galveston v. Devlin, 84 Tex. 319, 19 S. W. 395; Tribble v. Yakima Valley Transportation Co., 100 Wash. 589, 171 Pac. 544.

¹¹ Morecraft v. Allen, 78 N. J. L. 729, L. R. A. 1915B, 1, 75 Atl. 920.

¹ United States. Alferitz v. Ingalls, 83 Fed. 964.

Alabama. Mobile Electric Co. v. Mobile, — Ala. —, 79 So. 39.

California. Griffith v. Grogan, 12 Cal. 317; McCrary v. Bowers, 20 Cal. 86; Welch v. Allington, 23 Cal. 322.

Colorado. Hoffman v. Murphy, 44 Colo. 107, 96 Pac. 780.

Connecticut. Beattie v. McMullen, 80 Conn. 160, 67 Atl. 488.

Illinois. Dale v. Kingsley, 163 Ill. 433, 45 N. E. 281; Hills v. McMunn, 232 Ill. 488, 83 N. E. 963.

Iowa. Duggleby v. Lewis Roofing Co., 139 Ia. 432, 116 N. W. 711.

Maryland. North v. Mallory, 94 Md. 305, 51 Atl. 89.

Massachusetts. Corey v. Woodin, 195 Mass. 464, 81 N. E. 280.

New Jersey. Canadian Imp. Co. v. Lea, 74 N. J. Eq. 234, 69 Atl. 455; McDowell v. Hemming Mfg. Co., — N. J. —, 102 Atl. 680.

New York. Clark v. Ulster and Delaware Railroad Co., 189 N. Y. 93, 121 Am. St. Rep. 848, 13 L. R. A. (N.S.) 164, 81 N. E. 766.

Tennessee. Perkins Oil Co. v. Eberhart, 107 Tenn. 409, 64 S. W. 760.

Vermont. Pike v. Pike, 69 Vt. 535, 38 Atl. 265.

West Virginia. Myers v. Carnahan, 61 W. Va. 414, 57 S. E. 134.

Wisconsin. Security Trust & Life Ins. Co. v. Ellsworth, 129 Wis. 349, 109 N. W. 125.

¹ Hughes v. Brennan Construction Co., 24 D. C. App. 90.

² Nothwang v. Harrison, 126 Ark. 548, 191 S. W. 2; Hills v. McMunn, 232 Ill. 488, 83 N. E. 963.

tect departs from the plans, the owner of the building can not on that account make a deduction from the contract price.³ In an action for specific performance of the contract as modified, an answer setting up the original contract and the failure to perform such original contract, is insufficient.⁴

No action can in such cases be maintained on the original contract.⁵ If a contract for cutting timber has been extended by the voluntary agreement of the parties, the owner of the land can not maintain an action against the adversary party for cutting timber after the expiration of the original contract, but before the expiration of the time as thus extended.⁶

If the original contract has been modified by a subsequent valid agreement, action may be brought upon the contract as thus modified,⁷ and recovery may be had for breach thereof.⁸ If the parties to a building contract enter into a new contract whereby the original contract is modified, the contractor can recover more than the original contract price, if he has done more work than was originally contracted for.⁹

If a written contract is modified by subsequent oral agreement, an action must be brought upon the contract as modified.¹⁰ An action can not be brought upon the original contract,¹¹ even if the new contract is broken,¹² still less if it is performed.¹³

Discharge by a new contract does not affect the liabilities of either party to the contract to third parties. If A enters into a contract with B, whereby B agrees to construct certain buildings, or do certain work for A, and A and B subsequently discharge such contract by mutual agreement, A does not thereby incur any liability to persons having subcontracts with B.¹⁴

³ *Smith v. Trust Co.*, 97 Ia. 117, 66 N. W. 84.

⁴ *Hills v. McMunn*, 232 IH. 488, 83 N. E. 963.

⁵ *Hayes v. Orr*, 47 Fed. 286; *Nothwang v. Harrison*, 126 Ark. 548, 191 S. W. 2; *Pittsburgh, etc., R. R. v. Smith*, 26 O. S. 124.

⁶ *Nothwang v. Harrison*, 126 Ark. 548, 191 S. W. 2.

⁷ *Good v. Smith*, 44 Or. 578, 76 Pac. 354; *Hatch v. Gorlinski*, 31 Utah 446, 88 Pac. 406.

⁸ *Hatch v. Gorlinski*, 31 Utah 446, 88 Pac. 406.

⁹ *Smith v. Salt Lake City*, 83 Fed. 784; *Chicago, etc., Ry. v. Moran*, 187

Ill. 316, 58 N. E. 335; *Murphy v. Bank*, 184 Pa. St. 208, 39 Atl. 143; *Fitzgerald v. Walsh*, 107 Wis. 92, 81 Am. St. Rep. 824, 82 N. W. 717.

¹⁰ *Iroquois Furnace Co. v. Hardware Co.*, 201 Ill. 297, 66 N. E. 237.

¹¹ *Herreshoff v. Misch*, 21 R. I. 524, 45 Atl. 145.

¹² *Sioux City Stock Yards Co. v. Sioux City Packing Co.*, 110 Ia. 396, 81 N. W. 712; *Napa Valley Wine Co. v. Daubner*, 63 Minn. 112, 65 N. W. 143.

¹³ *Lost Lake Lumber Co. v. Smith*, 29 Wash. 713, 70 Pac. 134.

¹⁴ *Peake v. New Orleans*, 139 U. S. 342, 35 L. ed. 131; *School District v. Thomas*, 51 Neb. 740, 71 N. W. 731.

§ 2495. Effect of new contract upon prior rights arising under original contract. Whether a new contract discharges all rights which have arisen under the original contract, or whether such new contract is intended to leave intact the rights which had already vested under the prior contract, is a question which depends upon the intention of the parties. If such intention is clear, full effect must be given to it, whether the parties agree that all claims under the prior contract shall be discharged,¹ or whether they agree that all claims arising under the prior contract shall remain in effect, notwithstanding the making of the new contract. If the new contract provides in express terms for the ending of all rights under a prior contract, full effect must be given to such provision, although the new contract also recites the termination of the former contract by a notice, and such notice was not legally sufficient therefor.²

The practical difficulty arises in cases in which no express provision has been made, either for the discharge of such claims or for their continuation. There is a conflict of authority as to the rights of the parties in such a case, whether their rights are to be explained as proceeding out of their presumed intention, or whether they are to be explained on the theory of the legal consequences of their act. In some jurisdictions it is held that in the absence of a provision to the contrary, a new contract discharges all rights of action arising under the first contract,³ including claims for damages and quasi-contractual rights arising out of the original contract.⁴ If the original contract is broken by one of the parties and a new contract is then made, which is performed by the party who broke the first contract, it is held under this theory that no right of action survives against the party who broke the original contract.⁵ If A agreed to sell to B articles at a certain price, and on his refusal to deliver them A and B enter into a new contract for the purchase of the same article at an increased price, it is held that B

¹ *Swarts v. Narragansett Electric Lighting Co.*, 26 R. I. 388, 59 Atl. 77 [rehearing denied, 26 R. I. 436, 59 Atl. 111].

See also, ch. LXXXVIII.

² *Swarts v. Narragansett Electric Lighting Co.*, 26 R. I. 388, 59 Atl. 77 [rehearing denied, 26 R. I. 436, 59 Atl. 111].

³ *Badger Manufacturing Co. v. United States*, 49 Ct. Cl. 538; *Swarts v. Nar-*

ragansett Electric Lighting Co., 26 R. I. 388, 59 Atl. 77 [rehearing denied, 26 R. I. 436, 59 Atl. 111]; *Agel v. F. R. Patch Mfg. Co.*, 77 Vt. 13, 58 Atl. 792.

⁴ *Eames Vacuum Brake Co. v. Prosser*, 157 N. Y. 289, 51 N. E. 986.

⁵ *Goebel v. Linn*, 47 Mich. 489, 41 Am. Rep. 723, 11 N. W. 284; *Agel v. F. R. Patch Mfg. Co.*, 77 Vt. 13, 58 Atl. 792.

has no right of action against A for breach of the original contract.⁶

In other jurisdictions it is held that in the absence of specific agreement the termination of the prior contract by a subsequent agreement does not discharge existing rights of action for breach,⁷ or quasi-contractual rights growing out of the original contract.⁸ If A had agreed to deliver certain goods to B in certain installments, and A fails to make such deliveries, it is held that B's right of action for such breach is not discharged by a subsequent contract between A and B, whereby B agrees to accept such articles if they are delivered.⁹ If A has advanced money,¹⁰ or has rendered services,¹¹ to B, in part performance of a contract which has subsequently been abandoned by mutual agreement, A may recover the reasonable value of such performance.¹² Termination of a contract by mutual agreement may leave one of the parties free to recover reasonable compensation for services or property furnished thereunder, although but for such termination by mutual agreement he would have been unable to recover without showing performance.

§ 2496. Provision in contract for subsequent modification. Provision is frequently made in contracts for subsequent modification thereof. Modifications which are made pursuant to such provisions are ordinarily regarded as not intended to affect the existence and validity of the original contract, but merely as subsidiary contracts entered into for the performance thereof.¹ The presumption against a total discharge of the original contract by mutual consent is stronger than it would be in cases where no such provision in the original contract existed.² If a building contract contains a pro-

⁶ Goebel v. Linn, 47 Mich. 489, 41 Am. Rep. 723, 11 N. W. 284; Blodgett v. Foster, 120 Mich. 392, 79 N. W. 625; Agel v. F. R. Patch Mfg. Co., 77 Vt. 13, 66 Atl. 792.

See § 589.

⁷ Frankfurt-Barnett Co. v. William Prym Co., 237 Fed. 21, L. R. A. 1918A, 602; Alabama Oil & Pipe Line Co. v. Sun Co., 99 Tex. 606, 92 S. W. 253 [judgment reversed (Tex. Civ. App.), 90 S. W. 202].

⁸ Sherman v. Buffinton, 228 Mass. 139, 117 N. E. 33; Murphy v. Dalton, 139 Mich. 79, 102 N. W. 277.

⁹ Frankfurt-Barnett Co. v. William Prym Co., 237 Fed. 21, L. R. A. 1918A, 602.

¹⁰ Murphy v. Dalton, 139 Mich. 79, 102 N. W. 277.

¹¹ Sherman v. Buffinton, 228 Mass. 139, 117 N. E. 33.

¹² Sherman v. Buffinton, 228 Mass. 139, 117 N. E. 33.

¹ Gray v. Jones, 47 Or. 40, 81 Pac. 813.

² Gray v. Jones, 47 Or. 40, 81 Pac. 813.

vision to the effect that the owner may make alterations and additions without affecting its validity, and that an allowance shall be made for the value thereof, a subsequent agreement changing the plans and specifications and eliminating certain parts of the original contract, does not operate as an abandonment of the original contract and a substitution of the new contract therefor.³ Such a provision, however, does not authorize the owner to make a radical change in the subject-matter of the contract.⁴ A similar provision in a contract for the construction of a dam to be built of masonry, does not authorize the owner to change such contract to one for the construction of a dam to be made of earth with a core of masonry,⁵ at least if the contract provides that the contractor is to take in payment bonds secured by a mortgage upon such completed structure.⁶

A contract which provides that it is to be performed under the supervision and inspection,⁷ or to the satisfaction,⁸ of the engineer or architect of the owner, does not authorize such engineer or architect to modify such contract so as to require the contractor to furnish more expensive work at the price fixed by the contract,⁹ or to require a change in the method of construction.¹⁰ A contract in writing, for grading a street, in which the employer reserves the right to decide how much work is to be done, and to stop the work at any time, is not abrogated by a subsequent request by the employer that the contractor should increase his working force to such number of men as could complete the grading within a certain time. The employer may subsequently exercise his right to stop the work.¹¹

IV

NOVATION

§ 2497. Novation—Nature and meaning. Novation is a term derived from novatio of the Roman law, but its use in common law

³ Gray v. Jones, 47 Or. 40, 81 Pac. 313.

⁴ National Contracting Co. v. Hudson River Water Power Co., 192 N. Y. 209, 84 N. E. 965.

⁵ National Contracting Co. v. Hudson River Water Power Co., 192 N. Y. 209, 84 N. E. 965.

⁶ National Contracting Co. v. Hudson River Water Power Co., 192 N. Y. 209, 84 N. E. 965.

⁷ Beattie v. McMullen, 80 Conn. 160, 67 Atl. 488.

⁸ Fontano v. Robbins, 22 D. C. App. 253.

⁹ Beattie v. McMullen, 80 Conn. 160, 67 Atl. 488.

¹⁰ Fontano v. Robbins, 22 D. C. App. 253.

¹¹ Beers v. Town Site Co., 97 Wis. 212, 72 N. W. 870.

is in some respects different from the corresponding term at Roman law. At Roman law a novatio was the transmutation of a prior debt into another obligation.¹ The name was employed at Roman law because the new obligation between the parties superseded the original obligation. Since the term was used in this sense, it is evident that the Roman law made no attempt, as far as name was concerned, to distinguish between forms of novation in which the parties to the original debt were made parties to the new obligation and those forms of novation in which a new and different debtor was substituted for the debtor from whom the original debt was due and owing.

On the other hand, at common law it became necessary to distinguish between these two cases. It was regularly said, although perhaps it was not so regularly meant, that the consideration must move from the promisee.² After the Statute of Frauds was enacted, a promise by one to answer for the debt, default or miscarriage of another, could not be enforced unless such contract could be proved in writing.³ A debt could not be assigned at common law, as distinguished from the law-merchant, so that the assignee could sue in his own name.⁴ Accord executory, without satisfaction, was inoperative as a discharge of the original liability. The common-law courts, however, held that none of these principles applied to cases in which B was indebted to A, and C was indebted to B, and by mutual agreement between A, B and C, C agreed to pay his indebtedness to A, B agreed to discharge his obligation to C, and A agreed to discharge his obligation to B. If such transaction could be upheld, the result of it would be that C was indebted to A, and that A's claim against B and B's claim against C had both disappeared. Such effect was given by the common law to this transaction, and as a result it became necessary to distinguish it in some way from the ordinary contracts in which a third person furnished the consideration,⁵ from contracts in which a third person agreed to answer for the debt, default or miscarriage of another,⁶ and from assignments.⁷ Accordingly, this kind of a trans-

¹ "Novatio est prioris debiti in aliam obligationem, vel civilem vel naturalem, transfusio atque translatio, hoc est cum ex praecedenti causa ita nova constituatur, ut prior perematur. Novatio enim a novo nomen accipit et a nova obligatione." Digest Lib. 46, 2, 1.

² See § 530.

³ See §§ 1218 et seq.

⁴ See ch. LXXI.

⁵ See §§ 530 et seq.

⁶ See §§ 1218 et seq.

⁷ See ch. LXXI.

action was set apart from other transactions, and it was referred to as a novation in the more limited sense of the term.

§ 2498. Elements of novation in narrower sense. If B is indebted to A, and C is indebted to B, and by mutual agreement between A, B and C, C agrees to pay his indebtedness to A, B agrees to discharge his obligation to C, and A agrees to discharge his obligation to B, the transaction is a novation in the more limited sense of the term, and the covenants discharging B and C are valid and supported by a valuable consideration.¹ The simplest form of novation is here given, consisting of two original debts and three parties. It is, of course, perfectly possible that there may be several debts and a corresponding increase in the number of parties.²

A new promise from the substituted debtor and a release of the claim against the substituted debtor are essential elements of a novation.³ Hence, if B, the original debtor, keeps silent when C,

¹ **England.** *Noble v. National Discount Co.*, 5 H. & N. 224.

United States. *Holloway v. White-Dunham Shoe Co.*, 151 Fed. 216, 10 L. R. A. (N.S.) 704; *Rensselaer & S. R. Co. v. Irwin*, 240 Fed. 726 [affirming decree, 239 Fed. 739, and certiorari denied, 246 U. S. 671, 62 L. ed. 931].

Florida. *Mills v. McMillan*, — Fla. —, 82 So. 812.

Iowa. *Watt v. German Sav. Bank*, 183 Ia. 346, 165 N. W. 397.

Indiana. *Kitchell v. Schneider*, 180 Ind. 589, 103 N. E. 647.

Massachusetts. *Stowell v. Gram*, 184 Mass. 562, 69 N. E. 342.

Michigan. *Weingarden v. Folly Theatre Co.*, 189 Mich. 220, 155 N. W. 501.

Oklahoma. *McFarland v. Mayo*, — Okla. —, L. R. A. 1917C, 901, 162 Pac. 753; *Burford v. Hughes*, — Okla. —, 182 Pac. 689.

Oregon. *Clark-Woodward Drug Co. v. Hot Lake Sanatorium Co.*, 75 Or. 234, 146 Pac. 135.

Washington. *Davis v. Gutheil*, 87 Wash. 596, 152 Pac. 14.

West Virginia. *Lutz v. Williams*, 79

W. Va. 609, L. R. A. 1918A, 76, 91 S. E. 460.

Wisconsin. *Lane v. Magdeburg*, 81 Wis. 344, 51 N. W. 562.

The adoption of a contract by a third person is a form of novation for which a valuable consideration is necessary. *Edwards v. Heralds of Liberty*, — Pa. St. —, 107 Atl. 324.

See *Novation*, by James Barr Ames, 6 *Harvard Law Review*, 184.

See also, *Liability of Maker of Check after Certification*, by Francis R. Jones, 6 *Harvard Law Review*, 138.

² *Mills v. McMillan*, — Fla. —, 82 So. 812; *Henry v. Ritenour*, 31 Ind. 136; *Lester v. Bowman*, 39 Ia. 611; *Finan v. Babcock*, 58 Mich. 301, 25 N. W. 294.

³ **Alabama.** *Pugh v. Barnes*, 108 Ala. 167, 19 So. 370.

California. *Pimental v. Marques*, 109 Cal. 406, 42 Pac. 159; *Carpy v. Dowdell*, 131 Cal. 495, 63 Pac. 778.

Illinois. *Walker v. Wood*, 170 Ill. 463, 48 N. E. 919.

Indiana. *Cox v. Baltimore & O. S. W. R. Co.*, 180 Ind. 495, 50 L. R. A. (N.S.) 453, 103 N. E. 337.

the new promisor, makes a verbal agreement with the creditor, A, because B is too sick to talk, no novation exists.⁴ The consent of the original debtor, C, is an essential element of the novation,⁵ either to discharge B from his liability to C,⁶ or to enable A to maintain an action against C.⁷ The consent of the original creditor is also necessary.⁸ Hence, if B hires C and agrees that C shall be paid by receiving goods from the firm of A and B, and C buys goods on credit from such firm, no novation exists if A has not assented to such arrangement, and B must pay his obligation to the firm, and recover his indebtedness from C.⁹ The assent of the parties may be implied¹⁰ as well as expressed. It is not necessary that the parties should all assent to the transaction at the same moment. If A and B agree and notify C of their agreement and he subsequently assents thereto, the contract of novation is valid if C's assent is given while the agreement between A and B stands ready for C's acceptance, like an unrevoked offer.¹¹ To amount to a novation, the original obligation owing by the original debtor

Iowa. *Kirchman v. Coal Co.*, 112 Ia. 668, 52 L. R. A. 318, 84 N. W. 939.

Kentucky. *McGowan v. People's Bank*, — Ky. —, 213 S. W. 579.

Michigan. *Dean v. Ellis*, 108 Mich. 240, 65 N. W. 971; *Darling v. Rutherford*, 125 Mich. 70, 83 N. W. 999.

Minnesota. *Hanson v. Nelson*, 82 Minn. 220, 84 N. W. 742.

Oklahoma. *Burford v. Hughes*, — Okla. —, 182 Pac. 689.

Vermont. *In re Lemerise*, 73 Vt. 304, 50 Atl. 1062.

West Virginia. *Lutz v. Williams*, 79 W. Va. 609, L. R. A. 1918A, 76, 91 S. E. 460.

Wisconsin. *Cook v. Durham*, 61 Wis. 15, 20 N. W. 670; *Miley v. Heaney*, 168 Wis. 58, 169 N. W. 64; *Elkey v. Seymour*, 169 Wis. 223, 172 N. W. 138.

A promise which is intended as an additional security can not operate as a novation. *McGowan v. People's Bank*, — Ky. —, 213 S. W. 579.

⁴*Hanson v. Nelson*, 82 Minn. 220, 84 N. W. 742.

⁵*Dean v. Ellis*, 108 Mich. 240, 65 N.

W. 971; *Gaar v. Rogers*, 46 Okla. 67, 148 Pac. 161.

⁶*Illinois, etc., Co. v. Wagon Co.*, 112 Fed. 737, 50 C. C. A. 604; *Carpy v. Dowdell*, 131 Cal. 495, 63 Pac. 778; *In re Lemerise*, 73 Vt. 304, 50 Atl. 1062.

⁷*Darling v. Rutherford*, 125 Mich. 70, 83 N. W. 999.

⁸**California.** *Chapin v. Brown*, 101 Cal. 500, 35 Pac. 1051.

Indiana. *Kitchell v. Schneider*, 180 Ind. 589, 103 N. E. 647.

Iowa. *Park v. Best*, 176 Ia. 7, 157 N. W. 233.

Oklahoma. *McFarland v. Mayo*, — Okla. —, L. R. A. 1917C, 901, 162 Pac. 753.

Oregon. *Clark-Woodward Drug Co. v. Hot Lake Sanitorium Co.*, 75 Or. 234, 146 Pac. 135.

⁹*Kirchman v. Coal Co.*, 112 Ia. 668, 52 L. R. A. 318, 84 N. W. 939.

¹⁰*Whitney v. Ins. Co.*, 127 Cal. 464, 59 Pac. 897; *Shoemaker Piano Mfg. Co. v. Bernard*, 70 Tenn. (2 Lea) 353.

¹¹*McLaren v. Hutchinson*, 22 Cal. 187, 83 Am. Dec. 59; *Comley v. Dazian*, 114 N. Y. 161, 21 N. E. 135.

must be extinguished.¹² If the original obligation survives, the transaction can not amount to a novation, whatever else it may be, since there can be no consideration for C's promise to pay A if C is to remain liable to B.

In a jurisdiction in which the private seal still has its common-law effect, the contract of novation must, apparently, be under seal if one of the prior contracts, which it is sought to discharge by the contract of novation, is under seal.¹³

§ 2499. Effect of novation in narrower sense. As a result of such contract, C is discharged from his liability to B, and B is discharged from his liability to A.¹ A may maintain an action against

¹² England. *Cuxon v. Chadley*, 3 B. & C. 591.

Alabama. *Perry v. Gallagher*, — Ala. —, 75 So. 396.

Michigan. *Wierman v. Bay City-Michigan Sugar Co.*, 142 Mich. 422, 106 N. W. 75.

Minnesota. *Hanson v. Nelson*, 82 Minn. 220, 84 N. W. 742.

Oklahoma. *McFarland v. Mayo*, — Okla. —, L. R. A. 1917C, 901, 162 Pac. 753.

Rhode Island. *Cohen v. P. E. Harding Construction Co.*, 41 R. I. 242, 103 Atl. 702.

West Virginia. *Stuckey v. Middle States Loan, Bldg. & C. Co.*, 61 W. Va. 74, 8 L. R. A. (N.S.) 814, 55 S. E. 996.

Wisconsin. *Miley v. Heaney*, 168 Wis. 58, 169 N. W. 64.

"Nor did the contract of December 3, 1909, relieve Williams from the obligation so imposed. As he was not a party to it, and it did not deal with the question of his liability, it can not be regarded as having effected a novation. His checks were not surrendered. The contract does not in terms release him, and there is no evidence in its terms, or elsewhere, tending to prove it was taken in satisfaction or payment of the debt. The taking of collateral security from the debtor or a

stranger does not effect a novation. *Yerby v. Lynch*, 3 Gratt. 460. Novation involves extinguishment of the old debt. *Chenoweth v. National Bldg. Asso.*, 59 W. Va. 653, 53 S. E. 559." *Lutz v. Williams*, 79 W. Va. 609, L. R. A. 1918A, 76, 91 S. E. 460.

¹³ *Mills v. McMillan*, — Fla. —, 82 So. 812.

¹ United States. *Holloway v. White-Dunham Shoe Co.*, 151 Fed. 216, 10 L. R. A. (N.S.) 704; *Rensselaer & S. R. Co. v. Irwin*, 249 Fed. 726 [affirming decree, 239 Fed. 739, and certiorari denied, 246 U. S. 671, 62 L. ed. 931].

Georgia. *Dillard v. Dillard*, 118 Ga. 97, 44 S. E. 885.

New Jersey. *Schlicher v. Whyte*, 65 N. J. Eq. 404, 54 Atl. 1125 [affirming without report, *Schlicher v. Vogel*, 61 N. J. Eq. 156, 47 Atl. 448].

New York. *Munson v. Magee*, 161 N. Y. 192, 55 N. E. 916.

Ohio. *Union Central Life Ins. Co. v. Hoyer*, 66 O. S. 344, 64 N. E. 435.

Oklahoma. *McFarland v. Mayo*, — Okla. —, L. R. A. 1917C, 901, 162 Pac. 753.

Virginia. *Barnes v. Crockett*, 111 Va. 240, 36 L. R. A. (N.S.) 464, 68 S. E. 983.

Wisconsin. *Elkey v. Seymour*, 169 Wis. 223, 172 N. W. 136.

C,² and may enforce the obligation against C, even in jurisdictions where a person for whose benefit a contract is made can not enforce it at law.³ Hence, a subsequent attaching creditor of B's, who attempts by garnishee process against C to enforce B's claim against C, can not recover as against A's claim.⁴ If the new contract is unconditional the promisor is bound thereby, although the original claim was conditional and such condition was broken after the contract of novation.⁵ If A enters into the contract of novation in good faith and without notice of a defense which C might have made as against B, C can not set up such defense as against A.⁶

§ 2500. Novation in wider sense. The term novation is also used to indicate a contract between the same parties as a prior contract, intended as a discharge of such prior contract and as a substitution therefor.¹ In this sense the term is substantially equivalent to the novation of the Roman law.² The questions which are presented under novation of this sort are the same that have been

² *Castle v. Persons*, 117 Fed. 835, 54 C. C. A. 133.

³ *Griffin v. Cunningham*, 183 Mass. 505, 67 N. E. 680.

⁴ *Commercial National Bank v. Kirkwood*, 184 Ill. 139, 56 N. E. 405 [affirming, 85 Ill. App. 235].

⁵ *Barnes v. Crockett*, 111 Va. 240, 36 L. R. A. (N.S.) 464, 68 S. E. 983.

⁶ *Burford v. Hughes*, — Okla. —, 182 Pac. 689 (defense of fraud).

¹ *United States. Monitor Drill Co. v. Mercer*, 163 Fed. 943, 20 L. R. A. (N. S.) 1065.

Alabama. Hopkins v. Jordan, — Ala. —, 77 So. 710.

Maryland. District National Bank v. Mordecai, — Md. —, 105 Atl. 586.

Montana. Kinsman v. Stanhope, 50 Mont. 41, L. R. A. 1916C, 443, 144 Pac. 1083.

New Jersey. Morecraft v. Allen, 78 N. J. L. 729, L. R. A. 1915B, 1, 75 Atl. 920.

New York. Bandman v. Finn, 185 N. Y. 508, 12 L. R. A. (N.S.) 1134, 78 N. E. 175.

Rhode Island. Cohen v. P. E. Hard-

ing Construction Co., 41 R. I. 242, 103 Atl. 702.

West Virginia. Dunn v. Bank of Union, 74 W. Va. 594, L. R. A. 1915B, 168, 82 S. E. 758.

See §§ 2457 et seq.

² "The insistence of appellants is that when Holloway acted or assumed to act (as the case was) as Mrs. Jordan's agent, and took a note and mortgage from Adams for \$1,100 to Mrs. Jordan, she was thereby bound in such sense as that it was 'a kind of accord and satisfaction' (*Bandman v. Finn*, 185 N. Y. 508, 78 N. E. 175, 12 L. R. A. (N.S.) 1135) as to the Hopkins note and mortgage; that in law and in fact it amounted to novation. *McDonnell v. Ala. Gold Life Ins. Co.*, 85 Ala. 401, 414, 5 South. 120. Mr. Justice Somerville gives a general definition of a novation in *McDonnell's* case, *supra*, as follows:

"A novation, under the rules of the civil law, whence the term has been introduced into the modern nomenclature of our common-law jurisprudence, was a mode of extinguishing one obli-

considered under the subject of new contract as discharge,³ or that will be considered under the subject of a new contract as payment.⁴ No novation of this sort exists unless the parties intend the new contract as a satisfaction of the prior contract.⁵ Accordingly, the acceptance of a note,⁶ or a receiver's certificate,⁷ is not such novation. So the mere acceptance of a new certificate of deposit from a banking partnership does not discharge the estate of a deceased partner from liability on a certificate of deposit issued when such partner was alive and a member of the firm.⁸

V

ACCORD AND SATISFACTION

§ 2501. Definition and nature. The definitions of accord and satisfaction are of two different types. In the earlier definition the emphasis is laid upon the satisfaction alone, rather than upon the accord and satisfaction as two distinct ideas. "Accord is a satisfaction agreed upon between the party injuring and the party injured, which, when performed, is a bar of all actions upon this account."¹ In other definitions emphasis is laid upon the idea of the accord as distinct from the satisfaction. An accord is said to be an agreement between two persons, one of whom is under some legal liability to another, which may grow either out of tort or out

gation by another, the substitution, not of a new paper or note, but of a new obligation, in lieu of an old one; the effect of which was to pay, dissolve or otherwise discharge it.

"From this definition it follows that there must have been (1) a previous valid obligation; (2) an agreement of all the parties thereto, to the new contract or obligation; (3) an agreement that it was an extinguishment of the old contract or obligation; and (4) that the fact must be that the new contract or obligation was a valid one between the parties thereto. *Pope v. Vajen*, 121 Ind. 317, 330, 22 N. E. 308, 6 L. R. A. 688; *Morris v. Whitmore*, 27 Ind. 418; *McClellan v. Robe*, 93 Ind. 298; *Clark v. Billings*, 59 Ind. 508." *Hopkins v. Jordan*, — Ala. —, 77 So. 710.

³ See §§ 2547 et seq.

⁴ See ch. LXXXI.

⁵ *Monitor Drill Co. v. Mercer*, 163 Fed. 943, 20 L. R. A. (N.S.) 1065; *Kinsman v. Stanhope*, 50 Mont. 41, L. R. A. 1916C. 443, 144 Pac. 1083; *Morecraft v. Allen*, 78 N. J. L. 729, L. R. A. 1915B, 1, 75 Atl. 920; *Stuckey v. Middle States Loan, Bldg. & C. Co.*, 61 W. Va. 74, 8 L. R. A. (N.S.) 814, 55 S. E. 996.

⁶ *Hughes v. Mattes*, 104 La. 218, 28 So. 1006.

⁷ *State Bank v. Sewing Machine Co.*, 90 Va. 411, 39 S. E. 141.

⁸ *Henry v. Caruthers*, 196 Ill. 136, 63 N. E. 629 [affirming, 95 Ill. App. 562]; *In re Gardner's Estate*, 199 Pa. St. 524, 49 Atl. 346.

¹ 3 Blackstone's Comm., 15.

of contract, by which the party who is subject to such liability agrees to give to the other, or to forbear for the other, some legal right in satisfaction of such original legal liability: and satisfaction is said to be the performance of the accord.²

The difference between these two types of definition is rather one of emphasis, however, than of substance. The first definition is never so construed as to permit the injured party to terminate liability by offering or delivering something in satisfaction of his liability, unless the adversary party agrees to accept the thing thus offered.³ On the other hand, the other definition does not mean that there must necessarily be two separate transactions at separate times; the first by which the accord is entered into, and the second by which the accord is performed and satisfaction is rendered. If a thing is offered as a satisfaction, and it is so received, the transaction amounts to an accord and satisfaction, although there has been no prior accord.⁴

Accord and satisfaction is therefore a means by which a prior liability of some sort is discharged by voluntary agreement. It is

² **Colorado.** *Colorado Tent & Awning Co. v. Denver Country Club*, — Colo. —, 176 Pac. 494.

Illinois. *Canton Union Coal Co. v. Parlin & Orendorff Co.*, 215 Ill. 244, 106 Am. St. Rep. 162, 74 N. E. 143.

Kansas. *Harrison v. Henderson*, 67 Kan. 194, 100 Am. St. Rep. 386, 62 L. R. A. 760, 72 Pac. 875; *Lantry Contracting Co. v. Atchison, T. & S. F. Ry. Co.*, 102 Kan. 799, 172 Pac. 527.

Missouri. *Zinke v. Knights of the Maccabees*, 275 Mo. 660, 205 S. W. 1.

New York. *Reilly v. Barrett*, 220 N. Y. 170, 115 N. E. 453.

Ohio. *Frost v. Johnson*, 8 Ohio 393; *Ellis v. Bitzer*, 2 Ohio St. 89.

Wisconsin. *Rettinghouse v. Ashland*, 106 Wis. 595, 82 N. W. 555.

See also, *Swan v. Great Northern Railway Co.*, — N. D. —, L. R. A. 1918F, 1063, 168 N. W. 657.

"To constitute a valid accord and satisfaction, there must be two debts contracted, one of which must precede the other in point of time, and be extinguished by the substitution of the

latter in performance or acceptance." *Gunn v. Fryberger*, — Okla. —, 176 Pac. 248.

"An accord and satisfaction is said to be an agreement between two persons, one of whom has a right of action against the other, that the latter should do or give, and the former accept, something in satisfaction of the right of action different from, and usually less than, what might be legally enforced. When the agreement is executed, and the satisfaction has been made, it is called an 'accord and satisfaction.'" *Reliance Life Insurance Co. v. Garth*, 102 Ala. 91, 68 So. 871 [cited in *Brown v. Lowndes County*, — Ala. —, 78 So. 815].

On the subject of accord and satisfaction generally, see *Accord and Satisfaction*, by Samuel Williston, 17 *Harvard Law Review*, 459.

³ See § 2503.

⁴ **United States.** *United States v. Adams*, 74 U. S. (7 Wall.) 463, 19 L. ed. 249; *United States v. Child*, 79 U. S. (12 Wall.) 232, 20 L. ed. 360; *Hem-*

a form of discharge by new contract; but it is distinct from the ordinary types of such discharge for two reasons. On the one hand, it is a means of discharge which applies to tort as well as to contract. On the other hand, accord and satisfaction, considered historically,⁶ antedates the simple executory contract, and accordingly it operated as a discharge of pre-existing liabilities long before such liabilities could be discharged by the ordinary form of new contract. For these reasons the distinction between the ordinary type of new contract and accord and satisfaction is still insisted upon, although as will be seen subsequently,⁷ the original distinction between accord and satisfaction, and discharge by new contract, after simple executory contracts were recognized at common law, is gradually disappearing.

While it is sometimes said that accord and satisfaction presupposes a dispute of some sort, and is therefore in effect a compromise of a disputed claim,⁷ this is never taken as literally true. Many cases of accord and satisfaction are undoubtedly cases involv-

ingway v. Stansell, 106 U. S. 399, 27 L. ed. 245.

Colorado. Colorado Tent & Awning Co. v. Denver Country Club. — Colo. —, 176 Pac. 494; Stanley-Thompson Liquor Co. v. Southern Colorado Mercantile Co., — Colo. —, 178 Pac. 577.

Illinois. Canton Union Coal Co. v. Parlin & Orendorff Co., 215 Ill. 244, 106 Am. St. Rep. 162, 74 N. E. 143; Janci v. Cerny, 287 Ill. 359, 122 N. E. 507.

Maryland. Scheffenacker v. Hoopes, 113 Md. 111, 29 L. R. A. (N.S.) 205, 77 Atl. 130.

Missouri. Zinke v. Knights of the Maccabees, 275 Mo. 660, 205 S. W. 1.

Ohio. Seeds, Grain & Hay Co. v. Conger, 83 O. S. 169, 32 L. R. A. (N.S.) 380, 93 N. E. 892.

West Virginia. Bennett v. Federal Coal & Coke Co., 70 W. Va. 456, 40 L. R. A. (N.S.) 588, 74 S. E. 418.

⁶ See § 2502.

⁷ See § 2515.

⁷ "An accord is an agreement, an adjustment, a settlement of former difficulty, and presupposes a difference, a

disagreement, as to what is right. A satisfaction, in its legal significance in this connection, is a performance of the terms of the accord. If such terms require a payment of a sum of money, then that such payment has been made.

"In this case there is no evidence of any disagreement between the parties prior to the sending of the account and remittance accompanying it. Plaintiff in error contends, however, that, because such remittance was denominated 'a balance,' its acceptance constituted an accord and satisfaction, and cites a number of authorities where courts have held that a remittance made as a balance, and the acceptance of the same, amounted to an accord and satisfaction. These cases have all been carefully examined, and in every one there appears to have been a prior disagreement, a contention as to what amount was due, so that a remittance, being denominated a balance, carried with it to the creditor, as a fair conclusion, that it was intended by the debtor to be in full of all demands. Without the requirement being made

ing disputes as to the existence or the amount of the claim.⁶ At the same time this is by no means an essential element of accord and satisfaction. If a legal right which amounts to a valuable consideration is offered, and accepted as satisfaction of a pre-existing claim, an accord and satisfaction exists, although the pre-existing claim was undisputed and although the amount thereof was liquidated.⁷ Emphasis on a previous dispute is made in cases in which there is no new and additional consideration for the accord and satisfaction, and in which, therefore, the consideration must be found in the compromise of an existing dispute, if the accord and satisfaction is to be upheld.

§ 2502. History of accord and satisfaction. Accord and satisfaction appears in English law long before simple executory contracts are recognized at common law,¹ as a means by which a liability in tort could be discharged.² In the reign of Edward I, it seemed worth while to the counsel for the plaintiff to object to such defense if supported by oral evidence alone, but it did not seem worth while to the court to give any reasons for overruling such objection.³ As the simple executory contract came to be recognized, the defense of accord and satisfaction was extended to liability arising upon such contracts without question. Its sufficiency as a defense in such cases was assumed, and the questions which were considered involved the validity of the accord, the

by the debtor that, if the creditor accepts and retains the proffered amount, he must do so in full satisfaction of his demand, or without accompanying and surrounding circumstances fairly indicating that such was the purpose and object of the debtor in making the remittance, a creditor can not be said so to have accepted a payment. To constitute an accord and satisfaction in law, dependent upon the offer of the payment of money, it is necessary that the money be offered in full satisfaction of the demand or claim of the creditor, and be accompanied by such acts or declarations as amount to a condition that, if the money be accepted, it is to be in full satisfaction, and be of such character that the cred-

itor is bound so to understand such offer." *Harrison v. Henderson*, 67 Kan 194, 100 Am. St. Rep. 386, 82 L. R. A. 760, 72 Pac. 875.

⁶ See § 2510.

⁷ See §§ 2507 and 2508.

¹ See §§ 25 et seq.

² This rule is said to be one which has existed at English law from time immemorial. See *Specialty Contracts and Equitable Defenses*, by James Barr Ames, 9 *Harvard Law Review*, 49 (55).

In Fitzherbert's *Grand Abridgment*, this subject appears under the headings "Accord and Concord," and "Barre." In Rolle's *Abridgment* it appears under the heading "Accord."

³ Y. B. 21 and 22, ed. I (Rolls Series), 386.

sufficiency of the satisfaction, and the sufficiency of such a defense as against liabilities on sealed instruments and other formal obligations.

§ 2503. Elements of accord and satisfaction—The accord—Offer and acceptance. The accord is ordinarily a simple executory contract which possesses the same elements as those of the simple executory contract which has already been discussed.¹

In order to establish the existence of an accord, it must be shown that the minds of the two parties met upon the same proposition,² and that the thing which was offered by one party as a satisfaction was accepted by the other as satisfaction.³ Payment of a part of a liability does not amount to an accord and satisfaction unless the party to whom such liability is due understands that such payment is made in full satisfaction of his claim.⁴

An understanding of this sort, however, like other simple contracts, need not be in any specific form.⁵ It is sufficient if the entire transaction, including what the parties did, as well as what they said, and including the surrounding circumstances, as well as any formal agreement, shows that the one party offered something in satisfaction of a prior liability due from him to the adversary party and that the other party thus accepted it. If the parties actually understand that the transaction is intended to dis-

¹ See ch. V et seq.

² *Arkansas*. Breckenridge v. Hearne Timber Co., — Ark. —, 204 S. W. 981.

Idaho. Heath v. Potlatch Lumber Co., 18 Ida. 42, 27 L. R. A. (N.S.) 707, 108 Pac. 343.

Iowa. Jacobs v. Jacobs, 130 Ia. 10, 114 Am. St. Rep. 402, 104 N. W. 489.

Kansas. Matheney v. El Dorado, 82 Kan. 720, 28 L. R. A. (N.S.) 980, 109 Pac. 166.

Nevada. Wolf v. Humboldt County, 36 Nev. 26, 45 L. R. A. (N.S.) 762, 131 Pac. 964.

New York. Fuller v. Kemp, 138 N. Y. 231, 20 L. R. A. 785, 33 N. E. 1034.

North Dakota. Paulson v. Ward County, 23 N. D. 601, 42 L. R. A. (N.S.) 111, 137 N. W. 486.

Vermont. Jones v. Campbell, — Vt. —, L. R. A. 1918A, 1056, 102 Atl. 102.

³ Breckenridge v. Hearne Timber Co. — Ark. —, 204 S. W. 981; Jacobs v. Jacobs, 130 Ia. 10, 114 Am. St. Rep. 402, 104 N. W. 489; Shahan v. Bayer Vehicle Co., 179 Ia. 923, 162 N. W. 221; Wolf v. Humboldt county, 36 Nev. 26, 45 L. R. A. (N.S.) 762, 131 Pac. 964; Jones v. Campbell, — Vt. —, L. R. A. 1918A, 1056, 102 Atl. 102.

⁴ Jacobs v. Jacobs, 130 Ia. 10, 114 Am. St. Rep. 402, 104 N. W. 489; Harrison v. Henderson, 67 Kan. 194, 100 Am. St. Rep. 386, 62 L. R. A. 760, 72 Pac. 875.

⁵ Lilly v. Verser, — Ark. —, 203 S. W. 31; Colorado Tent & Awning Co. v. Denver Country Club, — Colo. —, 176 Pac. 494; Zinke v. Knights of the Maccabees, 275 Mo. 660, 205 S. W. 1; Laughhead v. H. C. Frick Coke Co., 209 Pa. St. 368, 103 Am. St. Rep. 1014, 58 Atl. 685.

charge a pre-existing liability, a receipt in full is sufficient.⁶ An accord and satisfaction may exist, although the original obligation was evidenced by a note and mortgage, and the party to whom the satisfaction was paid did not surrender the note or release the mortgage or give a receipt for such satisfaction.⁷

On the other hand, the payment of a thing of value can not amount to an accord and satisfaction unless both parties understand that it is to have such effect.⁸ A payment which is understood to be a partial payment,⁹ such as a payment on account,¹⁰ can not operate as an accord and satisfaction.

An apparent exception to this exists in cases in which interest is a mere incident to the debt, there being no express promise on the part of the debtor to pay interest; and payment of the principal is made in full and a receipt given therefor.¹¹ In such cases a subsequent action will not lie to recover interest.¹² This result, however, is to be explained on the theory that the interest is a mere incident and not on the ordinary principles of accord and satisfaction.¹³

§ 2504. Check as offer. If the offer which is claimed to be the basis of an accord is made by sending a check and the like, which is marked "in full," and the acceptance which is relied upon consists in accepting and cashing such check, a number of questions have been presented, on some of which there have been inconsistent decisions, due largely to ignoring the different sets of circumstances under which a check of this sort may be sent.

Such a check may be sent when no dispute between the parties of any sort has arisen when both parties assume that the account is true and correct. In such a case the fact that such check purports to be in full or for balance, does not amount to an offer of

⁶ *Laughead v. H. C. Frick Coke Co.*, 200 Pa. St. 368, 103 Am. St. Rep. 1014, 58 Atl. 685.

⁷ *Lilly v. Verser*, — Ark. —, 203 S. W. 31.

⁸ *Heath v. Potlatch Lumber Co.*, 18 Ida. 42, 27 L. R. A. (N.S.) 707, 108 Pac. 343; *Lantry Contracting Co. v. Atchison, T. & S. F. Ry. Co.*, 102 Kan. 799, 172 Pac. 527.

⁹ *Heath v. Potlatch Lumber Co.*, 18

Ida. 42, 27 L. R. A. (N.S.) 707, 108 Pac. 343.

¹⁰ *Lantry Contracting Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 102 Kan. 799, 172 Pac. 527.

¹¹ *Bennett v. Federal Coal & Coke Co.*, 70 W. Va. 456, 40 L. R. A. (N.S.) 588, 74 S. E. 418.

¹² *Bennett v. Federal Coal & Coke Co.*, 70 W. Va. 456, 40 L. R. A. (N.S.) 588, 74 S. E. 418.

¹³ See § 602.

an accord, since the party to whom it is sent would not understand that there was any question of accord and satisfaction. In such cases the words "in full," or "for balance," and the like, would naturally be regarded by the party to whom the check was sent as the recital of a fact, rather than the offer of a contract. In cases of this sort, the receipt and use of the check is not regarded as an acceptance, since no offer has been communicated to the party to whom the check was sent.¹

On the other hand, the check may be sent after a dispute has arisen between the parties. In such a case, leaving for discussion elsewhere the sufficiency of the consideration,² the act of the debtor in sending a check which is marked "in full" and the like, should ordinarily be regarded by the creditor as an offer of an accord.

¹ *Harrison v. Henderson*, 67 Kan. 194, 100 Am. St. Rep. 386, 62 L. R. A. 760, 72 Pac. 875; *Canadian Fish Co. v. McShane*, 80 Neb. 551, 14 L. R. A. (N.S.) 443, 114 N. W. 594.

See also, *Heath v. Potlatch Lumber Co.*, 18 Ida. 42, 27 L. R. A. (N.S.) 707, 108 Pac. 343.

"To make the receipt of a part of the debt a discharge of the whole, there must be a new consideration, or a voluntary compromise of a disputable or disputed demand, by which each party yields something, or an accord and satisfaction by which a new contract is substituted. In this case there was no new consideration, and the contention of the defendant must be sustained, if at all, upon the theory that it was the compromise of a disputed claim. It is to be observed that there had been no actual dispute between the parties up to the time of the sending of defendant's letter above quoted. Assuming that the defendant was sincere in his contention (and we must so assume to make the claim a disputable one) and that he was actually mistaken in such claim (and this was found by the district judge upon sufficient evidence, as we have seen), we must conclude that he did not know of any dispute between the plaintiff and

himself, but that he inclosed the check for \$54.47 in the letter of June 5th, not as a compromise or settlement, but as full payment of an undisputed claim. The letter does not reveal any knowledge on the part of the defendant that the plaintiff was claiming the transaction to have been a sale. We have, therefore, presented the question whether, where a debtor remits by mail a sum less than the amount due, but which he in good faith believes to be all that is due or claimed by the creditor, the fact that he marks the check on the margin, 'In full to date,' or in the account which he renders describes it as 'check to balance in full,' such payment is made in settlement of a disputed claim. We think the question must be answered in the negative. No intention to offer this payment as a compromise is apparent from the letter and its accompanying inclosure, and the plaintiff was not bound to so consider it. He was justified in treating it as the act of an honest debtor remitting less than was due under a mistake as to the nature of the contract." *Canadian Fish Co. v. McShane*, 80 Neb. 551, 14 L. R. A. (N.S.) 443, 114 N. W. 594.

² See §§ 2506 et seq.

If he accepts the check and makes use of it, the question is then presented whether such act is an acceptance or whether his declaration made to the creditor, that he does not accept the check in full can operate as a rejection of the offer, leaving his act in cashing the check a wrongful act. This is a special phase of the general question whether an offer which is to be accepted by an act can be rejected if the person to whom the offer is made declares that he rejects it, but, nevertheless, takes advantage of such offer by doing an act which would be a wrong if it were not for such offer.³ In cases of this sort, it is held by the great weight of authority that the act of the party to whom the check is sent in accepting such check and in making use thereof, operates as an acceptance of the offer,⁴ even though the party to whom the check is sent notifies the party who sent it that he does not accept such check as full payment of his claim.⁵ The fact that the party who sent the

³ See §§ 188 et seq.

⁴ *United States*. Chicago, M. & St. P. R. Co. v. Clark, 178 U. S. 333, 44 L. ed. 1099.

Arkansas. Barham v. Bank, 94 Ark. 158, 27 L. R. A. (N.S.) 439, 126 S. W. 394; Barham v. Kizzia, 100 Ark. 251, 140 S. W. 6.

Colorado. Colorado Tent & Awning Co. v. Denver Country Club, — Colo. —, 176 Pac. 494; Stanley-Thompson Liquor Co. v. Southern Colorado Mercantile Co., — Colo. —, 178 Pac. 577.

Illinois. Canton Union Coal Co. v. Parlin & Orendorff Co., 215 Ill. 244, 106 Am. St. Rep. 162, 74 N. E. 143.

Iowa. Sparks v. Spaulding Mfg. Co., 158 Ia. 491, 139 N. W. 1083; Shahan v. Bayer Vehicle Co., 179 Ia. 923, 162 N. W. 221.

Kansas. Neely v. Thompson, 68 Kan. 193, 75 Pac. 117.

Kentucky. Cunningham v. Standard Constr. Co., 134 Ky. 198, 119 S. W. 765.

Mississippi. Cooper v. Yazoo & M. Valley R. Co., 82 Miss. 634, 35 So. 162.

Missouri. Pollman & Bros. Coal & Sprinkling Co. v. St. Louis, 145 Mo. 651, 47 S. W. 563.

Nebraska. T. M. Partridge Lumber

Co. v. Phelps-Burruss Lumber & Coal Co., 91 Neb. 396, 136 N. W. 65.

New York. Nassoiy v. Tomlinson, 148 N. Y. 326, 51 Am. St. Rep. 695, 42 N. E. 715.

North Carolina. Petit v. Woodlief, 115 N. Car. 120, 20 S. W. 208.

Ohio. Seeds Grain & Hay Co. v. Conger, 83 O. S. 160, 32 L. R. A. (N.S.) 380, 93 N. E. 892.

Pennsylvania. Washington Natural Gas Co. v. Johnson, 123 Pa. St. 576, 10 Am. St. Rep. 553, 16 Atl. 799.

Rhode Island. Hull v. Johnson, 22 R. I. 66, 46 Atl. 182.

Wisconsin. Thomas v. Columbia Phonograph Co., 144 Wis. 470, 129 N. W. 622.

The same result follows acceptance of a tender of money. *Potter v. Douglass*, 44 Conn. 541.

⁵ **Arkansas.** Barham v. Bank, 94 Ark. 158, 27 L. R. A. (N.S.) 439, 126 S. W. 394.

Illinois. Ostrander v. Scott, 161 Ill. 339, 43 N. E. 1089.

Kansas. Neely v. Thompson, 68 Kan. 193, 75 Pac. 117.

Kentucky. Cunningham v. Standard Constr. Co., 134 Ky. 198, 119 S. W. 765.

check does not reply to a notice that such check is not accepted in full, does not operate as an assent to such modification of such offer in sending it.⁶ The fact that the party to whom the check is sent has it certified, operates as an acceptance of the check and of the offer of accord.⁷

In some jurisdictions it is held that sending a check which purports to be in full, or which is accompanied by a receipt which purports to be in full, is not of itself an offer of an accord, even though there was a dispute over the rights and liabilities of the parties arising out of the transaction in settlement of which such check is sent and received.⁸ If A holds B's note, it is held that B's act in sending to A a receipted bill for a claim which B asserts

Maryland. *Scheffenacker v. Hoopes*, 113 Md. 111, 29 L. R. A. (N.S.) 205, 77 Atl. 130.

Michigan. *Tanner v. Merrill*, 108 Mich. 58, 62 Am. St. Rep. 687, 31 L. R. A. 171, 65 N. W. 664.

Missouri. *Pollman & Bros. Coal & Sprinkling Co. v. St. Louis*, 145 Mo. 651, 47 S. W. 563.

Nebraska. *Treat v. Price*, 47 Neb. 875, 66 N. W. 834.

New York. *Nassoiy v. Tomlinson*, 148 N. Y. 326, 51 Am. St. Rep. 695, 42 N. E. 715.

Ohio. *Seeds Grain & Hay Co. v. Conger*, 83 O. S. 169, 32 L. R. A. (N. S.) 380, 93 N. E. 892.

Rhode Island. *Hull v. Johnson*, 22 R. I. 66, 46 Atl. 182.

⁶ *Seeds Grain & Hay Co. v. Conger*, 83 O. S. 169, 32 L. R. A. (N.S.) 380, 93 N. E. 892.

⁷ *Scheffenacker v. Hoopes*, 113 Md. 111, 29 L. R. A. (N.S.) 205, 77 Atl. 130.

⁸ *Ziegler v. McFarland*, 147 Pa. St. 607, 23 Atl. 1045; *Dimmick v. Banning*, 256 Pa. St. 295, 100 Atl. 871.

"The circumstances under which the payment by defendants was made and accepted do not constitute an accord and satisfaction of the whole balance due plaintiffs. The mere fact that a creditor receives less than the amount claimed with knowledge that the debt-

or denies indebtedness beyond that amount, does not in itself constitute an accord and satisfaction. *Amsler v. McClure*, 238 Pa. 409, 414. To establish accord and satisfaction, payment should be offered in full satisfaction of the demand and be accompanied by acts and declarations amounting to express notice that the payment is conditional and if accepted must be received in satisfaction of the claim. *Societe Anonyme Pour La Fabrication De La Soie De Chardonnnet v. Loeb, Lipper & Co.*, 239 Pa. 264; *Foye v. Lilley Coal & Coke Co.*, 251 Pa. 409, 417. The letter written by defendants contained an account and concluded with the statement, 'We therefore beg to enclose herewith voucher and check for \$2,042.51, being the difference between our loss of \$13,561.70 and your invoices of May and June shipments. Kindly sign voucher, returning same, and oblige.' The check was in the ordinary form. The voucher merely set forth the items showing the balance due from defendants, from which was deducted the amount claimed by them as damages. The receipt at the end was 'in full for the above account.' This is the only clause on which a claim of accord and satisfaction can be based. We find no express statement in the letter or elsewhere to the effect

against A, together with an amount of money which when added to the amount shown in the receipt equals the amount due on the note, is not an offer of an accord, and A's act in accepting such payment is not an acceptance.⁹ If B sends to A a voucher, check and receipt for goods sold by A to B, deducting therefrom the loss due to delay in performance on A's part, A's act in accepting and making use of such check is held not to amount to an accord and satisfaction, since B's communication did not amount to an offer thereof.¹⁰

In some jurisdictions language has been used which seems to indicate that the court believes that even if the offer of accord

that the check, if accepted, would be considered as a compromise of the claim, or that it was tendered as such, or that acceptance thereof would be considered a waiver of plaintiffs' right to the balance of their claim. On the contrary, the letter expressly states the payment was made in settlement of 'the difference between' the amount of the plaintiffs' claim and defendants' loss. In view of this statement, the clause in the receipt reciting the check to be 'in full for the above account,' merely amounts to a receipt in full for the balance of the account and leaves no room for the contention of a tender as a compromise in settlement of the entire claim of plaintiffs. The letter and receipt together, therefore, lacked the essential element of notice of a tender in full satisfaction of plaintiffs' claim. This may in fact have been the intention of defendants. The burden, however, was on them to expressly inform plaintiffs of such intention, either by express words or by circumstances conclusively establishing such intention. Not having done so, their check was merely a payment of part of the undisputed claim and does not bar plaintiffs from suing for the balance. The case on its facts is similar to *Ziegler v. McFarland*, 147 Pa. 607, where plaintiff held defendant's note given for the purchase-money of a

horse, and in paying the note defendant remitted a certain sum in cash and a receipted bill for the use of the horse while in plaintiff's hands, the two amounts aggregating the face of the note. There was no express statement, however, that payment was made on condition that the amount remitted should be accepted in full for the note, and it was held there was no accord and satisfaction. *Polin v. Weisbrot*, 52 Pa. Superior Ct. 312, was a dispute over the correct amount of plaintiff's bill and the communication stated the accompanying check was sent in settlement of the account in accordance with the statement submitted, with the words at the bottom, 'Please receipt and return.' In the present case the letter merely contained notice that the check was in payment of 'the difference between' plaintiffs' account which was admitted and a demand arising by way of set-off or counterclaim. Under these circumstances we must hold the notice to plaintiffs was insufficient to establish an acceptance of the check as a payment of the balance of their claim." *Dimmick v. Banning*, 256 Pa. St. 295, 100 Atl. 871.

⁹ *Zeigler v. McFarland*, 147 Pa. St. 607, 23 Atl. 1045.

¹⁰ *Dimmick v. Banning*, 256 Pa. St. 295, 100 Atl. 871.

which accompanies the check or which is incorporated therein is unequivocal, and is by its terms to be in full settlement of the existing dispute, the party to whom the check is sent may make use of such check, and yet may avoid the effect of such act as an acceptance of such offer by notifying the adversary party that he does not accept such offer of accord.¹¹ It is possible to explain most of these cases, however, on the theory of consideration, since there was either no genuine dispute and the claim was liquidated, or else the amount of the check was no greater than the amount which was conceded to be due from the party by whom it was sent.¹²

§ 2505. Receipts in full. The principles which control the effect of a receipt in full are substantially those which control where checks are sent in full. If no dispute has arisen,¹ as where the receipt in full is given for a share of profits, the amount of which is unknown to the party who gave such receipt so that the receipt is given in reliance upon the statement of the adversary party,² no accord and satisfaction can exist. If the parties know that no settlement is intended, a receipt "on account" can not be treated as an accord and satisfaction.³ A receipt which purports merely to be "in full of all obligations to date," and which is for the amount actually due at such date, is not an accord and satisfaction as to claims which one party contends will become due at a subsequent time,⁴ such as a claim arising for an alleged breach of contract.⁵

§ 2506. Consideration—General principles. As in the case of contracts generally,¹ a valuable consideration is an essential element of a valid accord and satisfaction.²

¹¹ Day v. McLea, 22 Q. B. Div. 610 (probably a case of want of consideration). [See, Hirachand Punamchand v. Temple (1911), 2 K. B. 330]; Rosenfield v. Fortier, 94 Mich. 29, 53 N. W. 930; Krauser v. McCurdy, 174 Pa. St. 174, 34 Atl. 518.

¹² See §§ 596 and 619.

¹ McGinnis v. McGinnis, 274 Mo. 285, 202 S. W. 1087.

² McGinnis v. McGinnis, 274 Mo. 285, 202 S. W. 1087.

³ Lantry Contracting Co. v. Atchison, Topeka & Santa Fe Ry. Co., 102 Kan. 799, 172 Pac. 527.

⁴ Gross v. Allen, 182 Ia. 429, 165 N. W. 993.

⁵ Gross v. Allen, 182 Ia. 429, 165 N. W. 993.

¹ See §§ 537 et seq.

² England. Fitch v. Sutton, 5 East 230; Foakes v. Beer, 9 App. Cas. 605.

Alabama. Scott v. Rawls, 150 Ala. 399, 48 So. 710.

Since from the nature of the transaction, there is, on the one hand, a pre-existing liability of some sort either existing or at least asserted by one of the parties, and on the other, something of value given or promised in satisfaction of such liability, a valuable consideration is always present, except in cases in which the claim is for money or for something the value of which is fixed by law in money, and the thing given or promised in satisfaction of such claim is money, or something the value of which is fixed by law in money.³ As these questions have already been discussed in connection with the general doctrine of consideration,⁴ it is necessary here merely to refer to them to show their application to accord and satisfaction.

§ 2507. Claim liquidated and not in dispute—No additional consideration. If the claim, on the one side, is undisputed and is for a liquidated sum of money, it is held in most jurisdictions that accord and satisfaction can not exist if the debtor pays or promises to pay a less amount of money and if no other and further consideration exists.¹ The fact that the debtor borrowed the money from

Massachusetts. *Brookes v. White*, 43 Mass. (2 Met.) 233, 37 Am. Dec. 95; *Gilson v. Nesson*, 198 Mass. 598, 17 L. R. A. (N.S.) 1208, 84 N. E. 854.

Minnesota. *Demeules v. Jewel Tea Co.*, 103 Minn. 150, 123 Am. St. Rep. 315, 14 L. R. A. (N.S.) 954, 114 N. W. 733.

Wisconsin. *Prairie Grove Cheese Mfg. Co. v. Luder*, 115 Wis. 20, 89 N. W. 138, 90 N. W. 1085.

³ See §§ 635 et seq.

⁴ See ch. XIX.

¹ **Alabama.** *Abercrombie v. Goode*, 187 Ala. 310, 65 So. 816.

Arizona. *Phillips v. Graham County*, 17 Ariz. 208, 149 Pac. 755; *State v. Gregg*, 18 Ariz. 121, 157 Pac. 227.

Colorado. *Schlessinger v. Schlessinger*, 39 Colo. 44, 8 L. R. A. (N.S.) 863, 88 Pac. 970; *Weber v. Head Camp*, 60 Colo. 529, 154 Pac. 728.

Florida. *Jordy v. Maxwell*, 62 Fla. 236, 56 So. 946.

Illinois. *Woodbury v. United States*

Casualty Co., 284 Ill. 227, 120 N. E. 8; *Janci v. Cerny*, 287 Ill. 369, 122 N. E. 507.

Kentucky. *Call v. Pinson*, 180 Ky. 367, 202 S. W. 963.

Massachusetts. *Whittaker Chain Tread Co. v. Standard Auto Supply Co.*, 216 Mass. 204, 51 L. R. A. (N.S.) 315, 103 N. E. 695.

Minnesota. *Foster County State Bank v. Lammers*, 117 Minn. 94, 134 N. W. 501.

Nevada. *Wolfe v. Humboldt County*, 36 Nev. 26, 45 L. R. A. (N.S.) 762, 13 Pac. 964.

New Jersey. *Castelli v. Jereissati*, 80 N. J. L. 295, 78 Atl. 227; *Decker v. Smith*, 88 N. J. L. 630, 96 Atl. 915.

Oklahoma. *Sherman v. Pacific Coast Pipe Co.*, — Okla. —, L. R. A. 1917A, 716, 159 Pac. 333.

Oregon. *Schumacher v. Moffitt*, 71 Or. 79, 142 Pac. 353.

Pennsylvania. *Tustin v. Philadelphia & R. Coal & I. Co.*, 250 Pa. St. 425, 95 Atl. 595.

a third person to make such payment, does not amount to a consideration.²

The rule applies as well to claims the value of which is fixed by law in money,³ such as fees of a public officer,⁴ as it does to claims for money.

While this rule has been adopted and enforced by the great weight of authority, and while it is the necessary result of the general rule requiring a consideration, and requiring adequacy where the consideration on each side is money or something the value of which is fixed by law in money, the general dissatisfaction with some of the results of the doctrine of consideration has manifested itself in especial disapproval of this rule, and it has been said even by the courts that recognize the rule itself that it is technical and artificial and without foundation in reason.⁵

An attempt has been made to evade the rule that payment of a less sum than the full amount of a liquidated and undisputed debt is not a consideration by having the transaction assume the form of a gift or a sale by the creditor to the debtor of the balance of the debt. As to the effect of this device there has been a conflict of authority. It has been held that the creditor may give to the debtor the balance of the debt.⁶ This is no doubt true if the debtor had paid the full amount of the debt to the creditor, but as applied to accord and satisfaction it results in upholding a gift without delivery. In other jurisdictions it has been held that the debtor can not buy his debt from the creditor for less than the full amount thereof,⁷ and that if such attempt is made, the creditor may recover the difference between the full amount of the debt and the amount thus paid.⁸

If the debt is embodied in a negotiable instrument, the cancellation or surrender of such instrument operated as a discharge of

South Carolina. *Parker v. Mayes*, 85 S. Car. 419, 137 Am. St. Rep. 912, 67 S. E. 559.

Utah. *Smoot v. Checketts*, 41 Utah 211, Ann. Cas. 1915C, 1113, 125 Pac. 412.

West Virginia. *Nixon v. Kiddy*, 66 W. Va. 355, 66 S. E. 500.

See §§ 596 et seq.

²*Schlessinger v. Schlessinger*, 30 Colo. 44, 8 L. R. A. (N.S.) 863, 88 Pac. 970.

³*Wolfe v. Humboldt County*, 36 Nev. 26, 45 L. R. A. (N.S.) 762, 131 Pac. 964.

⁴*Wolfe v. Humboldt County*, 36 Nev. 26, 45 L. R. A. (N.S.) 762, 131 Pac. 964.

⁵*Sigler v. Sigler*, 98 Kan. 524, L. R. A. 1917A, 725, 158 Pac. 864; *Brooks v. White*, 43 Mass. (2 Met.) 283, 37 Am. Dec. 95; *Harper v. Graham*, 20 Ohio 105; *Bolt v. Dawkins*, 16 S. Car. 198.

⁶*Gray v. Barton*, 65 N. Y. 68, 14 Am. Rep. 181.

⁷*Bourgeois v. Edwards*, — N. J. Eq. —, 104 Atl. 447.

⁸*Bourgeois v. Edwards*, — N. J. Eq. —, 104 Atl. 447.

the debt without any consideration;⁹ and accordingly the surrender or cancellation of the instrument or receipt of a part of the amount due had the same effect.¹⁰ If the contract is in writing but is not negotiable, the cancellation of such instrument has no legal effect.¹¹

An apparent exception to the rule that payment of part of a liquidated and undisputed debt is not a discharge of the entire debt, arises in cases in which there is no express covenant to pay interest, and interest is a mere incident of the principal. In cases of this sort, a creditor who has accepted the principal in full payment, can not maintain an action to recover the interest.¹²

The dissatisfaction of some of the courts, with the rule that payment of less than the full amount of an undisputed and liquidated debt is not a consideration, has resulted in language disapproving such rule, and asserting that such payment may be a consideration.¹³ In one of these cases, however, the question was not involved, since the debt was evidenced by a negotiable instrument which was surrendered by the creditor to the debtor.¹⁴ In the other case, it appeared that there might have been some other consideration, and accordingly it was held to be error to direct a verdict against the debtor for the balance due upon the original debt.¹⁵

§ 2508. Additional consideration. The courts that enforce this rule show in their attempts to find some technical consideration in the transaction which would support the accord and satisfaction, that they regard the rule itself as a technicality.¹ If the less amount is paid before it is due,² or if it is paid at a place different

⁹ See § 601.

¹⁰ See § 610.

See also, *Brown v. Lowndes County*, — Ala. —, 78 So. 815.

¹¹ *Schlessinger v. Schlessinger*, 39 Colo. 44, 8 L. R. A. (N.S.) 863, 88 Pac. 970.

¹² *Bassick Gold Mine Co. v. Beardsley*, 49 Colo. 275, 33 L. R. A. (N.S.) 852, 112 Pac. 770; *Bennett v. Federal Coal & Coke Co.*, 70 W. Va. 456, 40 L. R. A. (N.S.) 588, 74 S. E. 418.

See § 602.

¹³ *Clayton v. Clark*, 74 Miss. 499, 60 Am. St. Rep. 521, 37 L. R. A. 771, 21

So. 565; *Frye v. Hubbell*, 74 N. H. 358, 17 L. R. A. (N.S.) 1197, 68 Atl. 325.

See § 596.

¹⁴ *Clayton v. Clark*, 74 Miss. 499, 60 Am. St. Rep. 521, 37 L. R. A. 771, 21 So. 565.

See § 601.

¹⁵ *Frye v. Hubbell*, 74 N. H. 358, 17 L. R. A. (N.S.) 1197, 68 Atl. 325.

¹ *Harper v. Graham*, 20 Ohio 105.

² *England. Pinnel's Case*, 5 Coke, 117a.

United States. Fire Insurance Association v. Wickham, 141 U. S. 564, 35 L. ed. 860.

from that at which it was payable originally,³ or if new security of any sort is given,⁴ including a mortgage given by the debtor upon his own property to secure such lesser sum,⁵ sufficient consideration is said to exist.

Forbearance on the part of the debtor to take advantage of proceedings in bankruptcy has been held to be a sufficient consideration if the claim is one which would be discharged by bankruptcy.⁶ Unless the effect of such promise would be to prevent the debtor from taking advantage of bankruptcy proceedings, if he should decide to break his promise, it is difficult to see what value such promise would be to the creditor. If the claim is one which would not be affected by proceedings in bankruptcy,⁷ such as a claim of a wife against her husband for support,⁸ the contract to refrain from proceedings in voluntary bankruptcy is not a consideration.

Payment by a third person out of his own funds is a sufficient consideration,⁹ even if such third person may compel the original

Iowa. *Marshall v. Bullard*, 114 Ia. 462, 54 L. R. A. 802, 87 N. W. 427.

Maryland. *Chicora Fertilizer Co. v. Dunan*, 91 Md. 144, 50 L. R. A. 401, 46 Atl. 347.

New York. *Bandman v. Finn*, 185 N. Y. 508, 12 L. R. A. (N.S.) 1134, 78 N. E. 175.

Wisconsin. *Palmer v. Yager*, 20 Wis. 91.

See §§ 597 et seq.

³ *Pinnel's Case*. 5 Coke 117a; *Harper v. Graham*, 20 Ohio 105.

Contra, after maturity. *Foster County State Bank v. Lammers*, 117 Minn. 94, 134 N. W. 500.

Contra, unless debtor is put to trouble or expense by reason of change of place, *Saunders v. Whitcomb*, 177 Mass. 457, 59 N. E. 192.

See § 598.

⁴ *Sibree v. Tripp*, 15 M. & W. 23; *In re Black Diamond Copper Mining Co.*, 11 Ariz. 415, 95 Pac. 117; *Jaffray v. Davis*, 124 N. Y. 164, 11 L. R. A. 710, 26 N. E. 351.

See § 599.

⁵ *Jaffray v. Davis*, 124 N. Y. 164, 11 L. R. A. 710, 26 N. E. 351.

⁶ *Melroy v. Kemmerer*, 218 Pa. St. 381, 11 L. R. A. (N.S.) 1018, 67 Atl. 999.

See § 592.

⁷ *Schlessinger v. Schlessinger*, 30 Colo. 44, 8 L. R. A. (N.S.) 863, 88 Pac. 970.

⁸ *Schlessinger v. Schlessinger*, 39 Colo. 44, 8 L. R. A. (N.S.) 863, 88 Pac. 970.

⁹ **England.** *Hirachand Punamchand v. Temple* [1911], 2 K. B. 330.

Iowa. *Marshall v. Bullard*, 114 Ia. 462, 54 L. R. A. 802, 87 N. W. 427.

Kansas. *Sigler v. Sigler*, 98 Kan. 524, L. R. A. 1917A, 725, 158 Pac. 864.

New Jersey. *Jackson v. Pennsylvania Ry. Co.*, 66 N. J. L. 319, 55 L. R. A. 87, 49 Atl. 730.

Ohio. *Leavitt v. Morrow*, 6 O. S. 71, 67 Am. Dec. 334.

South Carolina. *Ex parte Zeigler*, 83 S. Car. 78, 21 L. R. A. (N.S.) 1005, 64 S. E. 513, 216.

debtor to reimburse him thereafter for such advance.¹⁰ If, however, such third person is the agent of the debtor, and such payment is made out of the debtor's funds, it is generally held that the fact that such payment is made by the third person does not of itself amount to a consideration.¹¹

§ 2509. Satisfaction of nature different from original claim. If the thing which is given in satisfaction of the debt is of a different nature from the original liability, questions of adequacy of consideration do not exist.¹ Accordingly, if the original claim is for money, and the thing which is given in satisfaction is property,² either real,³ or personal,⁴ sufficient consideration exists.

§ 2510. Unliquidated or disputed claim. If the original claim is unliquidated or in dispute, a different principle applies. Under the ordinary rules as to compromise of disputed claims,¹ the courts have been obliged to choose between the rule, on the one hand, that if claims or defenses are asserted in good faith, or if the amount of the debt is unliquidated, the liquidation of the unliquidated amount or the adjustment of the dispute is of itself sufficient consideration without regard to the original merits of the case; and the rule, on the other hand, that it is impossible to liquidate unliquidated claims by mutual agreement, or to adjust disputes except by litigation. As between two rules, the courts have held that liquidation of unliquidated claims or the adjustment of genuine disputes is of itself a consideration.² A dispute as to a

¹⁰ Sigler v. Sigler, 98 Kan. 524, L. R. A. 1917A, 725, 158 Pac. 864.

¹¹ See § 599.

¹ See § 635.

² United States. Musgrove v. Gibbs, 1 U. S. (1 Dall.) 216, 1 L. ed. 107.

Massachusetts. Brooks v. White, 43 Mass. (2 Met.) 283, 37 Am. Dec. 95.

Michigan. Loud v. Winchester, 52 Mich. 174, 17 N. W. 784.

Oklahoma. First National Bank v. Latham, 37 Okla. 286, 132 Pac. 891.

Pennsylvania. Savage v. Everman, 70 Pa. St. 315, 10 Am. Rep. 676.

Wisconsin. Palmer v. Yager, 20 Wis. 91.

³ Loud v. Winchester, 52 Mich. 174, 17 N. W. 784; Savage v. Everman, 70 Pa. St. 315, 10 Am. Rep. 676.

⁴ Musgrove v. Gibbs, 1 U. S. (1 Dall.) 216, 1 L. ed. 107; Brooks v. White, 43 Mass. (2 Met.) 283, 37 Am. Dec. 95; First National Bank v. Latham, 370 Okla. 286, 132 Pac. 891; Palmer v. Yager, 20 Wis. 91.

¹ See § 612.

² United States. San Juan v. St. John's Gas Co., 195 U. S. 510, 49 L. ed. 299.

Colorado. Stanley-Thompson Liquor Co. v. Southern Colorado Mercantile Co., — Colo. —, 4 A. L. R. 471, 178 Pac. 577.

Illinois. Canton Union Coal Co. v. Parlin & Orendorff Co., 215 Ill. 244, 106 Am. St. Rep. 162, 74 N. E. 143.

set-off or counterclaim is held to render the entire claim unliquidated.³

Whether the payment of the exact amount claimed by the one party or conceded by the other without mutual concession is sufficient as a compromise without any new and additional consideration, is a question upon which there has been a conflict of authority. In some jurisdictions it has been held that no consideration exists under such circumstances,⁴ but in other jurisdictions it has been held that such payment amounts to consideration.⁵

§ 2511. Accord and satisfaction by stranger to original liability. As in the case of contracts generally,¹ an accord and satisfaction has no legal effect if it is made by one who has no authority to bind the party to such accord and satisfaction, whom he attempts to bind, and if such party does not ratify such accord.² A bank which has agreed to finance a contract has no authority to bind the contractor by a contract of accord and satisfaction between such contractor and the adversary party.³

As in the case of executory contracts generally,⁴ the courts have had some difficulty in cases in which the satisfaction was made by a third party and not by the party who was originally liable to the party to whom such satisfaction is made.⁵

In early English authority,⁶ it is said that a satisfaction by a stranger for the trespass of another is a bar to the creditor, for if

Massachusetts. Tuttle v. Tuttle, 53 Mass. (12 Met.) 551, 46 Am. Dec. 701.

Missouri. Zinke v. Knights of the Maccabees, 275 Mo. 660, 205 S. W. 1.

New Jersey. Rose v. American Paper Co., 83 N. J. L. 707, 85 Atl. 354.

North Dakota. Paulson v. Ward County, 23 N. D. 601, 42 L. R. A. (N.S.) 111, 137 N. W. 486.

Ohio. Seeds Grain & Hay Co. v. ger, 83 Ohio St. 169, 32 L. R. A. (N.S.) 360, 93 N. E. 892.

Wisconsin. Harris v. Kennedy, 48 Wis. 500, 4 N. W. 651.

See §§ 612 et seq.

¹ Stanley-Thompson Liquor Co. v. Southern Colorado Mercantile Co., — Colo. —, 4 A. L. R. 471, 178 Pac. 577.

See §§ 612 et seq.

⁴ Demeules v. Jewel Tea Co., 103

Minn. 150, 14 L. R. A. (N.S.) 954, 114 N. W. 733.

See § 619.

² Stanley-Thompson Liquor Co. v. Southern Colorado Mercantile Co., — Colo. —, 4 A. L. R. 471, 178 Pac. 577; Janci v. Cerny, 287 Ill. 359, 122 N. E. 507.

See § 619.

¹ See § 1762.

² Matheney v. Eldorado, 82 Kan. 720, 28 L. R. A. (N.S.) 980, 109 Pac. 166.

³ Matheney v. Eldorado, 82 Kan. 720, 28 L. R. A. (N.S.) 980, 109 Pac. 166.

⁴ See §§ 527 et seq.

⁵ Similar problems have arisen in case of payments by a third person. See Ch. LXXXI.

⁶ Fitzherbert's Abridgment, Title Barre, pl. 166.

he has been satisfied once, it is not reason that he be satisfied again. It was said, nevertheless, in a subsequent case, that a satisfaction by a stranger was not a bar, and this statement, while probably not necessary to the decision of the case, was followed subsequently in England,⁷ and in the United States.⁸

The absurdity of the result was apparent from the outset. Under such circumstances the creditor, after receiving a satisfaction from a stranger, could, under this rule, enforce his original liability against his original debtor. It was once said that such a result would operate as a "fraud" upon the third person by whom such payment was made,⁹ and accordingly the original authorities were carefully examined,¹⁰ and it was eventually held in England that a satisfaction accepted from a stranger operated as a discharge of the original liability.¹¹ The same result has been reached

⁷ *Grymes v. Blofield*, Cro. Eliz. 541 [see full discussion in *Jones v. Broadhurst*, 9 C. B. 173, 195 et seq.]; *Edgcombe v. Rodd*, 5 East 294.

⁸ *Stark v. Thompson*, 19 Ky. (3 T. B. Mon.) 296.

⁹ *Welby v. Drake*, 1 Car. & P. 557.

¹⁰ *Jones v. Broadhurst*, 9 C. B. 173.

¹¹ *Jones v. Broadhurst*, 9 C. B. 173.

"Upon the argument of this case, we were much pressed with the objection to the plea upon the ground that it was, in effect, a plea of satisfaction by a stranger; which, it was said, was bad in law. The opinion of the court upon the other objections to the plea, being in favor of the plaintiffs, it has become unnecessary to decide upon the validity of this particular objection. But, as the court has been called upon to consider the law in relation to this subject, it may be a convenience to the profession to mention the authorities which are to be found upon the subject.

"It may appear that the law is not perfectly settled. The authorities of the textbooks are generally to be found under the title of 'Accord and Satisfaction'; and most, if not all, of such textbooks, refer to accord and satisfaction by and between the par-

ties to the cause of action, and but very few authorities are to be found upon the subject of satisfaction made by a stranger. Notwithstanding the passages referred to in the textbooks, there is very early authority to the effect that satisfaction made by a stranger to a party having a cause of action and adopted by the party liable to the action, may be used as a good bar to an action for such cause. It is stated in *Fitzherbert's Abridgment* (Title Barre, pl. 166 [Hilary, 36 H. 6]), that 'if a stranger does trespass to me, and one of his relations, or any other, gives anything to me for the same trespass, to which I agree, the stranger shall have advantage of that to bar me; for, if I be satisfied, it is not reason that I be again satisfied. Quod tota curia concessit.' A very diligent search has not found any old authority inconsistent with the case in *Fitzherbert*. In several cases obligations given by strangers to parties having a cause of action, have been held to be no bar to an action between the parties to such a cause; but it will be found that all those cases were decided upon the ground that the obligation, so given, was collateral, and not by way of satisfaction, or in ex-

in the United States, and it is now generally held that if

tinguishment or merger. In connection with the branch of the law, this consideration will always be found material.

"In Fitzherbert's Abridgment, title Dette, pl. 83, it is said: 'In debt on contract, it is no plea to say that the plaintiff has a bond of a stranger, for the same duty; but, to say, that he has a bond of the defendant himself for the same duty, is a good plea.' (per Shard. [Shardelow, J.], 29 H. 8, Bro. Contract, pl. 29). So, in F. N. B. 121 M., it is said: 'If a man contract to pay money for a thing which he hath bought, if he make a bond for the money, the contract is discharged, and an action of debt will not lie upon the contract.' 'But (Lord Hale's note, citing Fitz. Abr., H. 35, E. 3, Dette, pl. 83; and referring to 11 H. 4, fo. 79 [Raufe Baker's case, T. 11 H. 4, fo. 79, pl. 21]; 13 H. 4, fo. 1 [M. 13 H. 4, fo. 1, pl. 3]; 10 H. 7, fo. 21 [P. 10 H. 7, fo. 21, pl. 16]), it is otherwise if a stranger makes an obligation for the same debt.' 5 Viner's Abridgment, 515, is to the same effect; also Brooke's Abridgment, title Contract, pl. 29. In Pudsey's case, cited in Hooper's case (2 Leonard, 110), it was held that 'a bond given by a stranger, pursuant to a stipulation in the original contract, will be a bar; but, otherwise, upon a subsequent contract.' The same point was decided in the principal case of Hooper.

"Some doubt has arisen upon the point of satisfaction by a stranger, from the case of Grymes v. Blofield. (Reported in Cro. Eliz. 541, and in Rolle's Abridgment, 471, translated, 5 Vin. Abr. 206. Condition [F. d.], pl. 1, and in Comyn's Digest, Accord [A. 2] 5. And see M. 28 H. 6, fo. 4, pl. 21.) The report in Cro. Eliz. states it to have been an action on an obligation for 20 £. The

defendant pleaded that J. S. had surrendered a copyhold tenement, in satisfaction, which the plaintiff accepted. The plaintiff demurred to the plea; and it is said that Popham and Gawdy, J. J., held it to be no plea. for J. S. was a mere stranger, and not privy to the condition, and therefore satisfaction by him was not good: and that afterwards, in Easter term, 31 Eliz., Popham and Clench adjudged for the plaintiff, in the absence of the rest of the justices. In Comyn's Digest, the case is stated to the same effect. But, from the report of the same case in Rolle's Abridgment, it is to be inferred that judgment was given for the defendant.

"In the case of Edgecombe v. Rodd (5 East, 294), which was an action for trespass and false imprisonment, to which satisfaction by another party was pleaded (upon the authority of Grymes v. Blofield) accrediting the report in Cro. Eliz., because cited in Comyn's without disapprobation, the court seems to have thought the plea bad, as setting up satisfaction by a stranger. In Edgecombe v. Rodd, however, the plea was held to be bad upon another substantial ground, upon which the judgment rather seems to have been founded.

"The rolls of the court have been searched, to ascertain the real state of the case of Grymes v. Blofield, but without much satisfaction being obtained. There are three rolls, importing three distinct actions upon three obligations for 20 £; and, in each case, a plea of satisfaction by J. S. by the surrender of a copyhold. The rolls are of Trinity term, 36 Eliz., B. R. No. 844, No. 845, No. 846. On the roll 844, the plea was demurred to, and a joinder in demurrer, with a dies datus to Michaelmas term; and there is no

the original creditor accepts satisfaction from a stranger, he

further entry upon that roll. Upon the roll 845, the pleadings are to the same effect, with a form of a *dies datus* in blank, and no further entry upon that roll. Upon the roll 846, there is a declaration and plea to the same effect as in the other rolls, with a replication traversing the surrender of the copyhold in satisfaction, and the acceptance. Issue was joined, and the cause tried, and a verdict found for the plaintiff, which was entered upon the *postea*. There is then an entry that a new trial was granted, upon the ground that the *venire* had issued to a wrong county; and a new *venire* awarded; and there the entry upon that roll ceases.

"Upon further inquiry being made, there has been found a report of the case in the MSS. reports in the British Museum, in the Hargrave MSS. No. 7, Vol. 2, p. 251, reports by Humphrey Were. The case is reported, in substance, as in *Cro. Eliz.*, referring to the roll in B. R. (Trinity term, 36 *Eliz.*) 844; and it states that Fenner, J., doubted of the opinion of Popham and Gawdy, by reason of the acceptance of the plaintiff, and cites the 36 H. 6, title Barre (36 H. 6, *Fitz. Abr. Barre*, pl. 166), which is the case referred to in *Fitzherbert's Abridgment*; and it afterwards states, that, upon the case being moved again, Clench and Fenner agreed that the plea was a good bar; and that Gawdy said the case of *Trespass*, 36 H. 6 (*Fitz. Abr. tit. Barre*, pl. 166) was good law: and the report then states, that, in Easter term, 39 *Eliz.*, the plaintiff had judgment to recover, Popham and Clench only being in court.

"There is another report of the same case in the Hargrave MSS., No. 50, in a book said to have been given, in

1618, by Arthur Turnour to Sergeant Calthorpe, in exchange for other books: but that report does not state any judgment to have been given.

"In the Lansdowne MSS. in the British Museum, No. 1104, fo. 152 b—being a report of cases from the 6th to the 41st year of Elizabeth, the same case is reported stating a judgment for the plaintiff; and the report being precisely to the same effect as in the Hargrave MSS.

"It appears that Humphry Were was, at a somewhat later period, a reader to the Inner Temple, and afterwards a sergeant.

"It seems probable that the report in Croke, stating the judgment to have been given for the plaintiff, is correct; although no answer is suggested to the authority of the 36 H. 6, which seems contrary to the decision, and to have been referred to.

"In *Thurman v. Wild* (11 Ad. & E. 453, 3 P. & D. 289) the question as to the effect of satisfaction by a stranger, also arose; and the court seemed to recognize the decision of *Grymes v. Blofield* as correct; but held that the satisfaction pleaded in that case was a good bar, because made by one who was not a stranger, but a joint trespasser; and it therefore became unnecessary to decide how far satisfaction by a stranger would have been a good bar.

"Such seems to be the state of authority upon that question: and the court does not feel called upon to express any opinion upon the point, although it must be obvious that the decision in the 36 H. 6, reported in *Fitzherbert*, is consistent with reason and justice." *Jones v. Broadhurst*, 9 C. B. 173.

can not thereafter enforce the original liability against the original debtor.¹²

§ 2512. Fraud, conditions, etc. As in the case of contracts generally,¹ a contract of accord and satisfaction may be avoided for fraud.² Whether it is necessary that the party who seeks to avoid such contract should restore the consideration, is a question upon which, as in other cases, there is a conflict of authority. Restitution is generally held to be necessary if it is not conceded that the amount paid over is due in any event.³ It is said that if such party is entitled to retain the amount received by him under such accord and satisfaction in any event, it is not necessary that he should restore such amount as a condition precedent to an accord and satisfaction and recovering the amount which he claims to be due.⁴ As in the case of other contracts,⁵ a contract of accord and satisfaction, which is to take effect upon the happening of some specified event, is inoperative unless such event takes place.⁶ A contract of accord and satisfaction, which is to take effect if a third person gives a specified certificate, is inoperative if such certificate is refused.⁷

§ 2513. Accord and satisfaction as discharge of contract of record. From an early period the English law regarded the formal contract as of an entirely different class and rank from the simple contract.¹ This distinction was regarded as essential and vital, and it was said that it was in accordance with natural justice that an obligation could be dissolved only by the same form as that by which it was entered into. As a result of a rigid and uncompro-

¹² *Minnesota*. *Clark v. Abbott*, 53 Minn. 88, 39 Am. St. Rep. 577, 55 N. W. 542.

New Jersey. *Jackson v. Pennsylvania Ry. Co.*, 66 N. J. L. 319, 55 L. R. A. 87, 49 Atl. 730.

Ohio. *Leavitt v. Morrow*, 6 Ohio St. 71, 67 Am. Dec. 334.

South Carolina. *Ex parte Zeigler*, 83 S. Car. 78, 21 L. R. A. (N.S.) 1005, 64 S. E. 613, 916.

West Virginia. *Crumlish v. Central Improvement Co.*, 38 W. Va. 390, 45 Am. St. Rep. 872, 23 L. R. A. 120, 18 S. E. 456.

Wisconsin. *Gray v. Herman*, 75 Wis. 453, 6 L. R. A. 601, 44 N. W. 248.

¹ See §§ 341 et seq.

² *Savage v. Edgar*, 86 N. J. Eq. 205,

³ *A. L. R.* 1021, 98 Atl. 407; *Conrad*

v. Interstate Life & Accident Ins. Co., — Tenn. —, 206 S. W. 34.

It may be avoided for mistake by the creditor as to the amount paid in, of which mistake the debtor seeks to take advantage. *Ledwidge v. Arkansas National Bank*, 135 Ark. 420, 205 S. W. 808.

³ *Allison v. Abendroth*, 108 N. Y. 470, 15 N. E. 606.

⁴ *Conrad v. Interstate Life & Accident Ins. Co.*, — Tenn. —, 206 S. W. 34.

⁵ See ch. LXXVII.

⁶ *St. Louis S. F. Ry. Co. v. Winslow*, — Ark. —, 210 S. W. 782.

⁷ *St. Louis S. F. Ry. Co. v. Winslow*, — Ark. —, 210 S. W. 782.

¹ See §§ 35 and 1131 et seq.

missing application of this maxim, we have the same problems in accord and satisfaction of formal contracts that we have in the case of modification by a new contract,² and in payment.³

Since payment was not a defense as against a judgment,⁴ accord and satisfaction was no better defense at law.⁵ Equity, however, would enjoin a judgment creditor from making an unconscientious use of his legal right in collecting judgment after payment thereof; and it was finally provided by statute that payment could be pleaded as a defense to an action upon a record.⁶ As a result of these views of equity, and of this English statute, it is now generally held that an accord and satisfaction is a good defense to a liability which is based upon a record.⁷

§ 2514. Accord and satisfaction as discharge of contract under seal. Similar problems arose in connection with the obligation under seal. In England the original rule at common law was that before breach a sealed obligation could not be discharged by parol accord and satisfaction,¹ and this rule has been repeated in a number of American jurisdictions.² Equity, however, would give no relief to the creditor, under such circumstances, unless he was ready and willing to perform,³ and relief would be given in equity to the debtor after satisfaction in case the creditor attempted to

² See §§ 1172 and 2473.

³ See ch. LXXXI.

⁴ See ch. LXXXI.

⁵ *Lutterford v. LeMayre* Cro. Jac. 579; *Weber v. Couch*, 134 Mass. 26, 45 Am. Rep. 274; *Mitchell v. Hawley*, 4 Denio (N. Y.) 414, 47 Am. Dec. 260.

⁶ 4 Anne, c. 16, § 12.

⁷ *Farmers' Bank v. Groves*, 53 U. S. (12 How.) 51, 13 L. ed. 889; *Boffinger v. Tuyes*, 120 U. S. 198, 30 L. ed. 649; *Marshall v. Bullard*, 114 Ia. 462, 54 L. R. A. 862, 87 N. W. 427; *Ex parte Zeigler*, 83 S. Car. 78, 21 L. R. A. (N.S.) 1005, 64 S. E. 513, 916; *Reid v. Hibbard*, 6 Wis. 175.

¹ *Alden v. Blague*, Cro. Jac. 99; *Oliver v. Lease*, Cro. Car. 86.

² *Levy v. Very*, 12 Ark. 148; *Cabe v. Jameson*, 32 N. Car. 193, 51 Am. Dec. 386; *Rorer Iron Co. v. Trout*, 83 Va. 397, 5 Am. St. Rep. 285, 2 S. E. 713.

³ *Very v. Levy*, 54 U. S. (13 How.) 345, 14 L. ed. 173.

"An agreement by a creditor to receive specific articles in satisfaction of a money debt, is binding on his conscience; and if he ask the aid of a court of equity to enforce the payment, he can receive that aid only to compel satisfaction in the mode in which he has agreed to accept it. A court of equity will even go further, and in a proper case will enforce the execution of such an agreement. At law, a mere accord is not a defense; and before breach of a sealed instrument, there is a technical rule, which prevents such an instrument from being discharged, except by matter of as high a nature as the deed itself. *Alden v. Blague*, Cro. Jac. 99; *Kaye v. Waghorne*, 1 Taunt. 428; *Bayley v. Homan*, 3 Bing. N. C. 915. But no such

assert the original obligation.⁴ After breach of a covenant of a sealed instrument for something other than the payment of money, the party not in default could recover unliquidated damages, and an accord and satisfaction was regarded as a sufficient bar to an action for unliquidated damages, even though based upon a sealed instrument.⁵ The result of these different limitations upon the original common-law right, is that for practical purposes accord and satisfaction is now a sufficient bar to an action upon a contract under seal.⁶

§ 2515. Satisfaction. Accord and satisfaction was recognized as a bar to an action in tort at a period when the simple executory contract was unenforceable in the king's courts.¹ At this time, therefore, an executory accord could have no legal effect. Even if the creditor had been willing to take the executory promise in satisfaction of his original claim, he would have acquired no right at law by reason of such executory contract, and accordingly there would have been no consideration for his promise to discharge his claim. Furthermore, in most cases, the parties to an accord intend that the original cause of action shall be discharged by performance of the accord unless they agree expressly that the promise contained in the accord shall be taken in full satisfaction of the original liability.

At the early common law, the second reason had practically no weight and the first reason was controlling. It was held by the English courts from an early period that an accord executory without a satisfaction was no bar,² and this rule was applied in a variety of cases in the American courts.³

difficulties exist in equity. On the broad principle that what has been agreed to be done, shall be considered as done, the court will treat the creditor as if he had acted conscientiously, and accepted in satisfaction what he had agreed to accept, and what it was his own fault only that he had not received. Indeed, even a court of law, in a case free from the technical difficulties above noticed, will do the same thing. *Bradly v. Gregory*, 2 Camp. 383." *Very v. Levy*, 54 U. S. (13 How.) 345, 14 L. ed. 173.

⁴ *Steeds v. Steeds*, 22 Q. B. D. 537.

⁵ *Blake's Case*, 6 Coke, 43b.

⁶ *Boffinger v. Tuyen*, 120 U. S. 198, 30 L. ed. 649; *Alden v. Thurber*, 149 Mass. 271, 21 N. E. 312; *Mitchell v. Hawley*, 4 Denio (N. Y.) 414, 47 Am. Dec. 280; *McCreery v. Day*, 119 N. Y. 1, 16 Am. St. Rep. 793, 6 L. R. A. 503, 23 N. E. 198.

¹ See §§ 23 et seq.

² *Richard v. Bartlet*, 1 Leon. 19; *Cumber v. Wane*, 1 Strange 426; *Peytoe's Case*, 9 Coke 77 b; and see also the cases cited in Rolle's Digest under the title "Accord."

³ *United States v. Brown*, 87 U. S. (20 Wall.) 289, 22 L. ed. 264.

The satisfaction which was necessary was a complete performance of the accord. A partial performance was not a satisfaction,⁴ even if the creditor could have received satisfaction if he had wished.⁵ The fact that the accord was performed in part and that performance of the remainder was tendered to the creditor,⁶ or the fact that the creditor refused performance,⁷ did not give any legal effect to the executory accord.

After the simple executory contract became recognized at the king's courts, the first reason for the rule that satisfaction was necessary to operate as a discharge of the original liability disappeared. After a simple executory contract became enforceable, a creditor who wished to accept such a contract and in consideration thereof to discharge his original claim, acquired an enforceable right by reason of such contract. The second reason, however, persisted. The result at modern law is that if the parties so agree, the promise of the debtor may be accepted by the creditor in satisfaction of the original liability.⁸ In such a case, the fact that the

Alabama. *Brown v. Lowndes County*, — Ala. —, 78 So. 815.

Illinois. *Jacobs v. Marks*, 183 Ill. 533, 56 N. E. 154.

Michigan. *Henderson v. McRae*, 148 Mich. 324, 111 N. W. 1057.

New York. *Russell v. Lytle*, 6 Wend. (N. Y.) 390, 22 Am. Dec. 537; *Bandman v. Finn*, 185 N. Y. 508, 12 L. R. A. (N.S.) 1134, 78 N. E. 175.

North Carolina. *King v. Atlantic C. L. R. Co.*, 157 N. Car. 44, 48 L. R. A. (N.S.) 450, 72 S. E. 801.

Ohio. *Ellis v. Bitzer*, 2 Ohio 89, 15 Am. Dec. 534; *Frost v. Johnson*, 8 Ohio 393.

⁴ **England.** *Peytoe's Case*, 9 Coke, 77b.

United States. *Memphis v. Brown*, 87 U. S. (20 Wall.) 289, 22 L. ed. 264.

Alabama. *Stephenson v. Allison*, 165 Ala. 238, 138 Am. St. Rep. 26, 51 So. 622.

Ohio. *Frost v. Johnson*, 8 Ohio 393.

Pennsylvania. *Schwartzfager v. Pittsburgh H. B. & C. Ry. Co.*, 238 Pa. St. 158, 85 Atl. 1115.

⁵ **King v. Atlantic C. L. R. Co.**, 157

N. Car. 44, 48 L. R. A. (N.S.) 450, 72 S. E. 801.

⁶ **England.** *Peytoe's Case*, 9 Coke, 77b.

Massachusetts. *Prest v. Cole*, 183 Mass. 283, 67 N. E. 246.

New York. *Day v. Roth*, 18 N. Y. 448.

Ohio. *Frost v. Johnson*, 8 Ohio 293.

Oklahoma. *Houston v. Wagner*, 28 Okla. 367, 114 Pac. 1106.

⁷ *Eichholtz v. Taylor*, 88 Ind. 38.

⁸ **England.** *Crowther v. Farrer*, 15 Q. B. 677.

United States. *Very v. Levy*, 54 U. S. (13 How.) 345, 14 L. ed. 173.

Alabama. *Brown v. Lowndes County*, — Ala. —, 78 So. 815.

Massachusetts. *Tuttle v. Metz Co.*, 229 Mass. 272, 118 N. E. 291.

Michigan. *Henderson v. McRae*, 148 Mich. 324, 111 N. W. 1057.

New York. *Bandman v. Finn*, 185 N. Y. 508, 12 L. R. A. (N.S.) 1134, 78 N. E. 175; *Reilly v. Barrett*, 220 N. Y. 170, 115 N. E. 453.

Oklahoma. *Gunn v. Fryberger*, — Okla. —, 176 Pac. 248.

PART VII

DISCHARGE

promise of the debtor is broken subsequently does not ordinarily prevent the effect of accord and satisfaction as a discharge of the original liability.⁹

At the same time, it will not be presumed that the creditor intended to substitute one cause of action for another, unless it appears to have been the intention of the parties to accept the promise of the debtor as satisfaction. The original cause is not discharged by an executory accord,¹⁰ and in such case the debtor can not make it operate as a discharge by tendering performance of the accord after action has been brought on the original cause of action.¹¹

The position which is intermediate between the original rule that an executory accord had no legal effect, and the modern rule that the promise of the debtor may be a satisfaction of the original liability if the parties so agree, is found in some jurisdictions in which it is said that the accord is to be regarded as executed when the debtor has performed as far as he has agreed to perform,¹² or when he has performed the accord to the point at which it is to operate as a satisfaction of the original liability.¹³ Accordingly, a composition deed is held to operate as a discharge to the original liability where the debtor has performed the terms of such composition deed on his part.¹⁴

§ 2516. Effect of accord and satisfaction. After a valid accord and satisfaction the original liability is discharged.¹ This is some-

Pennsylvania. Laughead v. Frick Coke Co., 209 Pa. St. 368, 103 Am. St. Rep. 1014, 58 Atl. 685.

Vermont. Babcock v. Hawkins, 23 Vt. 561.

West Virginia. Bennett v. Federal Coal & Coke Co., 70 W. Va. 456, 40 L. R. A. (N.S.) 588, 74 S. E. 418.

Wisconsin. Palmer v. Yager, 20 Wis. 91.

⁹ Tuttle v. Metz Co., 229 Mass. 272, 118 N. E. 291.

¹⁰ Frankfurt-Barnett Co. v. William Prym Co., 237 Fed. 21, L. R. A. 1918A. 602; Ledwidge v. Arkansas Nat. Bank, — Ark. —, 205 S. W. 808; Luther v. Ullritch, — Ia. —, 166 N. W. 85.

¹¹ Ledwidge v. Arkansas Nat. Bank, — Ark. —, 205 S. W. 808.

¹² Bradly v. Gregory, 2 Camp. 383.

¹³ Laughead v. Frick Coke Co., 209 Pa. St. 368, 103 Am. St. Rep. 1014, 58 Atl. 685.

¹⁴ Bradly v. Gregory, 2 Camp. 383.

¹ **Alabama.** Smith v. Elrod, 122 Ala. 269, 24 So. 994; Brown v. Lowndes County, — Ala. —, 78 So. 815.

Illinois. Janci v. Cerny, 297 Ill. 359, 122 N. E. 507.

Michigan. Detroit v. Detroit Ry. Co., 134 Mich. 11, 104 Am. St. Rep. 600, 95 N. W. 992.

New York. Reilly v. Barrett, 220 N. Y. 170, 115 N. E. 453.

New Jersey. Savage v. Edgar, 86 N. J. Eq. 205, 3 A. L. R. 1021, 98 Atl. 407.

North Dakota. Swan v. Great Northern Railway Co., — N. D. —, L. R. A. 1918F, 1063, 168 N. W. 657.

times spoken of as "merger,"² but this can not mean merger in the technical sense,³ since accord and satisfaction operates as a discharge of the original liability only if such is the intention of the parties, while merger operates as a discharge without regard to their intention.

After accord and satisfaction, no action can be brought upon the original cause of action, and if the promise of the debtor is taken as satisfaction of his original liability, his failure to perform his promise does not operate as a discharge of the accord and satisfaction,⁴ but the right of action of the creditor is solely upon the promise which he has taken as satisfaction of his original cause of action.⁵ In this respect the effect of total failure of consideration differs from its effect in ordinary contracts.⁶

Whether an accord is to be recognized as a valid contract like any other simple executory contract, for the purpose of bringing an action thereon, when it has no effect as a bar to an action upon the former liability,⁷ is a question upon which there is comparatively little authority, but which has caused some trouble. It has been said that no action can be brought upon an accord, since it has no legal effect while it is executory, and after it is executed the promisor is discharged from all legal liability by reason of such performance.⁸ Other cases have seemed to hold that an action might lie.⁹

If we assume that the accord has no effect as a bar to the original liability, and that the new promise either can not be taken in satisfaction of the original liability, or that the parties do not intend that it shall be taken in satisfaction of the original liability, it is difficult to see the presence both of consideration and of performance in such cases. The consideration is either the promise to forbear the legal liability in question, or the actual forbearance

Oklahoma. *Gunn v. Fryberger*, — Okla. —, 176 Pac. 248.

Pennsylvania. *Laughead v. Frick Coke Co.*, 209 Pa. St. 368, 103 Am. St. Rep. 1014. 58 Atl. 685.

If accord and satisfaction are not made until after an action is brought, such defense must be made in such action. Equity will not enjoin the further prosecution of such action. *Savage v. Edgar*, 86 N. J. Eq. 205, 3 A. L. R. 1021, 98 Atl. 407.

² *Swan v. Great Northern Railway Co.*, — N. D. —, L. R. A. 1918F, 1063, 168 N. W. 657.

³ See ch. LXXVI.

⁴ See § 2515.

⁵ Contra, on this question, *Palmer v. Yager*, 20 Wis. 91.

⁶ See ch. LXXXIV.

⁷ See § 2515.

⁸ *Lynn v. Bruce*, 2 H. Bl. 317; *Reeves v. Hearne*, 1 M. & W. 323.

See also, *Allen v. Harris*, 1 Ld. Raym. 122.

⁹ *Crowther v. Farrer*, 15 Q. B. 677; *Nash v. Armstrong*, 10 C. B. (N.S.) 259.

thereof. If the accord has no legal effect while it is executory, we have a case in which there is a promise on the one side which is of no legal effect as an alleged consideration for a promise on the other side. A promise which has no legal effect is ordinarily held not to be a sufficient consideration.¹⁰ The only theory upon which it can be held to be a consideration is that the adversary party accepts the making of the promise in itself apart from any legal liability attaching thereto as a consideration for his promise. This is almost invariably exactly the opposite of what the party to such a contract really intended. As long as the original liability persists, there can be no consideration for the promise of the party who is subject to such liability to do something in place thereof; and if there is no consideration for a promise it can be no consideration for the inoperative promise of the adversary party to give up such legal liability. The question is now solved in most jurisdictions by giving effect to the intention of the parties whenever they intend to accept a new promise as satisfaction of the original liability.¹¹

VI

ACCOUNT STATED

§ 2517. Definition and nature. An account stated is frequently defined as an agreement between parties who have had previous transactions of a monetary character creating the relation of debtor and creditor, by which agreement they fix and determine the amount which is due from one to the other upon the account between them.¹ In some of the definitions and discussions of the

¹⁰ See §§ 567 et seq.

¹¹ See § 2515.

¹ For definitions which are in substance the same as that which is given in the text, or which emphasize certain phases of such definition, see:

England. Knowles v. Michel, 13 East 249.

United States. Toland v. Sprague, 37 U. S. (12 Pet.) 300, 9 L. ed. 1093.

Alabama. Jasper Trust Co. v. Lampkin, 162 Ala. 388, 24 L. R. A. (N.S.) 1237 [sub nomine, Jasper Trust Co. v. Lampkin, 136 Am. St. Rep. 33, 50 So. 337].

Kansas. Dolman v. Kaw Const. Co., 103 Kan. 635, 2 A. L. R. 67, 176 Pac. 145.

Massachusetts. Tucker v. Columbian National Life Ins. Co., — Mass. —, 122 N. E. 285.

Michigan. Thomasma v. Carpenter, 175 Mich. 428, 45 L. R. A. (N.S.) 543, 141 N. W. 559.

Montana. Johnson v. Gallatin Valley Milling Co., 38 Mont. 83, 98 Pac. 883.

"An account stated is an agreement, express or implied, between parties, * * * fixing and determining the

subject, the courts emphasize the fact that the striking of such an account is an admission of a balance due and owing from one to the other;² while in others the element of the agreement is emphasized,³ and the agreement thus made is distinguished from a mere admission.⁴ As will be seen later,⁵ each of these apparently inconsistent theories as to the nature of the account stated contains an element of the truth. An admission of the amount which is due and owing is necessary to an account stated;⁶ but such admission must be made in such a manner as to indicate the assent of the parties to the account and to amount to an implied promise by the party who is found to be the debtor upon such account to pay to the creditor the amount which is thus conceded to be due.

Whether a transaction amounts to an account stated or not is a question which is presented in a number of different ways. By

amount due from one to the other on account, and, when such agreement is made, such account stated becomes a new obligation. *Syl. 1, Harrison v. Henderson*, 67 Kan. 202, 62 L. R. A. 760, 100 Am. St. Rep. 386, 72 Pac. 878." *Dolman v. Kaw Construction Co.*, 103 Kan. 635, 2 A. L. R. 67, 176 Pac. 145. "An account stated must be founded on previous transactions of a monetary character creating the relation of debtor and creditor. *Lubbock v. Tribe*, 3 M. & W. 607; *Chase v. Chase*, 191 Mass. 556, 562, 78 N. E. 115." *Tucker v. Columbian National Life Ins. Co.*, — Mass. —, 122 N. E. 285. "An account stated is defined as 'an agreed balance of accounts; an account which has been examined and accepted by the parties.' It is not necessary that there should be cross-demands between the parties, or that the defendant's acknowledgment that a certain sum is due from him to the plaintiff should relate to more than a single debt or transaction." *Merchants' National Bank v. Carmichael*, — Cal. —, 173 Pac. 999 [citing *Baird v. Crank*, 98 Cal. 297, 33 Pac. 63]. "The conversion of an open account into an account stated is an

operation by which the parties assent to a sum as the correct balance due from one to the other." *White v. Campbell*, 25 Mich. 463.

"An account stated is a document—a writing—which exhibits the state of the account between parties and the balance owing from one to the other, and when assented to, either expressly or impliedly, it becomes a new contract, *Coffee v. Williams*, 103 Cal. 556, 37 Pac. 504; *Gardner v. Watson*, 170 Cal. 574, 150 Pac. 994." *Merchants' National Bank v. Carmichael*, — Cal. —, 173 Pac. 999.

² *Lyell v. Walbach*, 111 Md. 610, 76 Atl. 339.

An account stated is said to be a "mere admission that the account is correct." *Lockwood v. Thorne*, 18 N. Y. 285.

³ *Trueman v. Hurst*, 1 T. R. 40; *Merchants' National Bank v. Carmichael*, — Cal. —, 173 Pac. 999; *Dolman v. Kaw Construction Co.*, 103 Kan. 635, 2 A. L. R. 67, 176 Pac. 145.

⁴ *McKinster v. Hitchcock*, 19 Neb. 100, 26 N. W. 705.

⁵ See §§ 2518 et seq.

⁶ See §§ 2521 et seq.

the original Statute of Limitations,⁷ "such accounts as concern the trade of merchandise between merchant and merchant," were made an exception to the ordinary period of limitations. However, a transaction which amounted to an account stated as distinguished from an open or current account, fell within the provisions of the Statute of Limitations.⁸ It was, accordingly, important in cases of this sort to distinguish between the open or current account on the one hand and the account stated on the other.

If an action were brought upon an open account, or if an accounting were sought, the defendant could set up as a defense the fact that he and the plaintiff had examined their accounts, and had struck a balance thereon. A defense of this sort, which set up an account stated as between the parties, was a good defense to the original action, unless the plaintiff could show fraud, mistake, and the like.⁹

The party to whom a balance was due as a result of the statement of the account, could maintain an action upon the transaction by which the parties had settled the balance due without recurring to the items which made up the original account.¹⁰ This remedy was given by one of the common counts in the action of assumpsit known as *insimul computassent*.¹¹

§ 2518. Elements of account stated—Nature of account. It is said that a statement of an account consists in the mutual examination of the claims of each other as between the parties and a mutual agreement between them as to the correctness or the disallowance of the items of their respective claims, and the striking of a balance between them.¹

In order that an account may be stated, it is necessary in the first instance that there should be a presentation of what the law

⁷ 21 Jac., I. C. 16, § III.

⁸ Toland v. Sprague, 37 U. S. (12 Pet.) 300, 9 L. ed. 1093; White v. Campbell, 25 Mich. 463.

⁹ See § 2524.

¹⁰ See § 2524.

¹¹ III Blackstone's Com., 162. For a discussion of the history and nature of the account stated, see White v. Campbell, 25 Mich. 463.

¹ "In stating an account, two things are necessary: first, that there be a mutual examination of the claims of each other by the parties; and second, that there be a mutual agreement be-

tween them, as to the correctness of the allowance and disallowance of the respective claims, and of the balance, as it is struck upon the final adjustment of the whole account and demands on both sides. The minds of the parties must meet upon the allowance of each item or claim allowed, and upon the disallowance of each item or claim rejected. They must mutually concur upon the final adjustment, and nothing short of this in substance will fix and adjust their respective demands as an account stated." Lockwood v. Thorne, 18 N. Y. 235.

recognizes as an account.² The mere statement by one party to the other of the amount of an unliquidated claim,³ such as an unliquidated claim in tort,⁴ can not be the basis of an account stated even if assented to. A mere memorandum of a debt can not be the basis of an account stated.⁵ A statement of an amount which is merely a matter of computation from the conceded facts,⁶ such as a statement of the amount of principal and interest which are due upon a negotiable instrument, together with the statement of payment of an additional sum so that the total will equal the amount of a judgment which is transferred in consideration of the amount thus stated,⁷ can not be the basis of an account stated.

As in other cases of offer and acceptance,⁸ the statement must be so definite and certain that the acceptance thereof concludes a

² *Pudas v. Mattola*, 173 Mich. 189, 45 L. R. A. (N.S.) 534, 138 N. W. 1052; *Johnson v. Stilwell*, — Or. —, 176 Pac. 123; *Brauns v. Green Bay*, 78 Wis. 81, 46 N. W. 889.

A monthly statement rendered by a factor to his principal is not such an account as can be the basis of an account stated. *Newburger-Morris Co. v. Talcott*, 219 N. Y. 505, 3 A. L. R. 287, 114 N. E. 846.

³ *Pudas v. Mattola*, 173 Mich. 189, 45 L. R. A. (N.S.) 534, 138 N. W. 1052; *Johnson v. Stilwell*, — Or. —, 176 Pac. 123; *In re O'Bold*, 221 Pa. St. 145, 70 Atl. 555; *Brauns v. Green Bay*, 78 Wis. 81, 46 N. W. 889.

⁴ *Pudas v. Mattola*, 173 Mich. 189, 45 L. R. A. (N.S.) 534, 138 N. W. 1052.

⁵ *Sturm v. Boker*, 150 U. S. 312, 37 L. ed. 1093.

"The account, in order to constitute a contract, should appear to be something more than a mere memorandum. It should show upon its face that it was intended to be a final settlement up to date. And this should be expressed with clearness and certainty." *Coffee v. Williams*, 103 Cal. 550, 37 Pac. 504.

⁶ *Jasper Trust Co. v. Lamkin*, 162 Ala. 388, 24 L. R. A. (N.S.) 1237 [sub nomine. *Jasper Trust Co. v. Lampkin*, 136 Am. St. Rep. 33, 50 So. 337].

⁷ *Jasper Trust Co. v. Lamkin*, 162 Ala. 388, 24 L. R. A. (N.S.) 1237 [sub nomine. *Jasper Trust Co. v. Lampkin*, 136 Am. St. Rep. 33, 50 So. 337].

"We think the principles are applicable to show that a mere calculation of the amount due on promissory notes can not merge the note into an account stated. An account stated must still be an account, and the origin of the action shows that it was not intended to be applied to a case like the one now under consideration. The original action was called *insimul computassent*, which means 'they accounted together,' and it was averred 'that the parties had settled their accounts together, and defendant engaged to pay plaintiff the balance.' . . . Evidently, when there is no indebtedness except one or more promissory notes, the promisor is as firmly bound to pay the amount, which is definitely fixed by the note, as he could be by any implied promise; also there is no account for them to settle together. Each one with his pencil can ascertain at any moment just what is due, and the mere affirmation of what they both know and are already bound to can not form a new contract." *Jasper Trust Co. v. Lamkin*, 162 Ala. 388, 136 Am. St. Rep. 33, 24 L. R. A. (N.S.) 1237, 50 So. 337.

⁸ See §§ 95 et seq.

definite agreement between the parties.⁹ An offer by a principal to pay certain commissions when certain old machinery was sold by the principal and when he obtained therefrom the net amount due him on the transaction, is not sufficiently definite to be the basis of an account stated.¹⁰

§ 2519. Antecedent debt. The liability which is the basis of an account stated must be a debt.¹ A liability in tort,² such as liability for negligence,³ can not be the basis of an account stated. A promise by a prospective buyer to pay the commission which the prospective seller had agreed to pay to a broker, is not an account stated, since no antecedent debt between the parties existed prior to the alleged agreement.⁴ If the original contract provides for making a deposit, and an I. O. U. is given as security for such deposit instead of money, the transaction does not amount to an account stated.⁵ If there is no dispute as to the items involved in the transaction, and the only question is one of legal liability,⁶ as where the only question is that of the liability of the public official for funds which were lost because of the failure of the bank or trust company with which such funds were deposited,⁷ an agreed statement as to the amount of such deposits can not be regarded as an account stated.

It is not necessary, on the other hand, that the debt which is the basis of the account stated should be incurred under a number of different contracts.⁸ An account stated may be based on a number of items furnished under a single contract.⁹ A claim for a specific sum of money under a special contract may be the basis of an account stated.¹⁰

⁹ Bjorneby v. Minneapolis Threshing Mach. Co., 65 Mont. 287, 176 Pac. 617; Newburger-Morris Co. v. Talcott, 219 N. Y. 505, 3 A. L. R. 287, 114 N. E. 846.

¹⁰ Bjorneby v. Minneapolis Threshing Mach. Co., 55 Mont. 287, 176 Pac. 617.

¹ Whitehead v. Howard, 2 Brod. & B. 372; Lemere v. Elliott, 6 Hurl. & N. 656; Tucker v. Barrow, 7 Barn. & C. 623; Stevens v. Tuller, 4 Mich. 387; Thomasma v. Carpenter, 175 Mich. 428, 45 L. R. A. (N.S.) 543, 141 N. W. 559.

² Whitehead v. Howard, 2 Brod. & B. 372; Pudas v. Mattola, 173 Mich. 189, 45 L. R. A. (N.S.) 534, 138 N. W. 1052.

³ Whitehead v. Howard, 2 Brod. & B. 372.

⁴ Thomasma v. Carpenter, 175 Mich. 428, 45 L. R. A. (N.S.) 543, 141 N. W. 559.

⁵ Lemere v. Elliott, 6 Hurl. & N. 656.

⁶ University City v. Schall, — Mo. —, 205 S. W. 631.

⁷ University City v. Schall, — Mo. —, 205 S. W. 631.

⁸ Knowles v. Michel, 13 East 249; Dolman v. Kaw Construction Co., 103 Kan. 635, 2 A. L. R. 67, 176 Pac. 145.

⁹ Dolman v. Kaw Const. Co., 103 Kan. 635, 2 A. L. R. 67, 176 Pac. 145.

¹⁰ Knowles v. Michel, 13 East 249.

§ 2520. Rendition of account. In analogy to the ordinary principles of offer and acceptance, which require the communication of an offer,¹ an account stated can not exist unless the account in question has been rendered by one party to the other.² If the evidence shows that no account was rendered by the creditor to the debtor before action was begun, and there is no other evidence to show that the debtor was aware of the items of the account, the transaction can not amount to an account stated.³ The fact that the creditor was in the custom of sending out bills each month, is not sufficient to show that the account in question was rendered.⁴

It is generally held that an account may be stated orally,⁵ although it has been said that it is "a document—a writing—which exhibits the statement of account between parties and the balance owing from one to the other."⁶

§ 2521. Assent to account as rendered. In analogy to the ordinary principles of offer and acceptance, which require the acceptance of the offer to convert the offer into a contract,¹ an account is not stated unless the party to whom the account is rendered assents thereto.² If we take the theory that an account stated is a contract, acceptance is of course necessary.³ If we regard an account stated as an admission, there must be at least such words or acts on the part of the party to whom the account is rendered as show an admission of the debt which is due.⁴

The assent of the debtor to the account ordinarily implies a promise to pay the account.⁵ On the other hand, in order to con-

¹ See §§ 110 et seq.

² *United Hardware-Furniture Co. v. Blue*, 59 Fla. 419, 35 L. R. A. (N.S.) 1038, 52 So. 364 [citing, *Daytona Bridge Co. v. Bond*, 47 Fla. 136, 36 So. 445; *Clark v. Marbourg*, 33 Kan. 471, 6 Pac. 548, and *Lockwood v. Thorne*, 18 N. Y. 285].

³ *United Hardware-Furniture Co. v. Blue*, 59 Fla. 419, 35 L. R. A. (N.S.) 1038, 52 So. 364.

⁴ *United Hardware-Furniture Co. v. Blue*, 59 Fla. 419, 35 L. R. A. (N.S.) 1038, 52 So. 364.

⁵ *Pinchon v. Chilcott*, 3 Car. & P. 236; *Gibson v. Sumner*, 6 Vt. 163 (obiter, neither party attacking the account as stated).

⁶ *Coffee v. Williams*, 103 Cal. 550, 37 Pac. 504.

¹ See § 150.

² *Tucker v. Barrow*, 7 B. & C. 623; *Toland v. Sprague*, 37 U. S. (12 Pet.) 300, 9 L. ed. 1093; *Lane & Bodley Co. v. Taylor*, 80 Ark. 469, 7 L. R. A. (N.S.) 924, 97 S. W. 441; *O'Bold's Estate*, 221 Pa. St. 145, 70 Atl. 555; *Shaw v. Lobe*, 58 Wash. 219, 29 L. R. A. (N.S.) 333, 108 Pac. 450.

³ *Dolman v. Kaw Const. Co.*, 103 Kan. 635, 2 A. L. R. 67, 176 Pac. 145; *Wilbur v. Win*, 89 N. J. Eq. 278, 103 Atl. 985.

See § 150.

⁴ *Lemere v. Elliott*, 6 Hurl. & N. 656; *Porter v. Cooper*, 1 C. M. & R. 387.

⁵ *Dolman v. Kaw Const. Co.*, 103 Kan. 635, 2 A. L. R. 67, 176 Pac. 145.

vert the account into an account stated, the assent of the debtor must be of such a character as to be equivalent to a promise to pay.⁶ An admission that money has been received without an admission that it is a valid and subsisting debt, is not enough to constitute an account stated.⁷

The effect of an objection to one item is a question upon which there seems to be some conflict of authority. It has been said that if the debtor objects to one or more specific items, such objection converts the remaining items into an account stated.⁸ On the other hand, it has been said that if there is objection to certain items and an assent to the rest, the account does not become an account stated unless the disputed item is withdrawn.⁹

A conditional assent is inoperative unless the condition is performed.¹⁰ If the debtor claims to have an account against the creditor, which will serve as a set-off,¹¹ such assent does not convert the open account into an account stated, unless the creditor acquiesces in the demands of the debtor. If, however, one of the parties is willing to rely upon the promise of the other,¹² as where certain items are charged by the one or credited to the other in reliance upon a promise by one of the parties to do something in the future with reference thereto,¹³ such assent may convert the account into an account stated.

§ 2522. Communication of assent. The express approval of an account on the part of the debtor amounts to an account stated.¹ It is not necessary that the assent of the debtor should be shown by express words however. Any circumstances which show that he assents to the correctness of such account as a valid and subsisting obligation, are sufficient.² The fact that the debtor gives his notes to the creditor for the balance shown by the account, is sufficient to convert the original account into an account stated.³

⁶ *Tucker v. Barrow*, 7 Barn. & C. 623.

⁷ *Tucker v. Barrow*, 7 Barn. & C. 623.

⁸ *Chisman v. Count*, 2 Man. & G. 307; *Wiggins v. Burkham*, 77 U. S. (10 Wall.) 129, 19 L. ed. 884.

⁹ *Sergeant v. Ewing*, 36 Pa. St. 156.

¹⁰ *Kennedy v. Withers*, 3 Barn. & Ad. 767; *Weigel v. Hartman Steel Co.* 51 N. J. L. 446, 20 Atl. 67.

¹¹ *Kennedy v. Withers*, 3 Barn. & Ad. 767.

¹² *Kimmerle v. Lowitz*, — Mich. —, 169 N. W. 857.

¹³ *Kimmerle v. Lowitz*, — Mich. —, 169 N. W. 857.

¹ *Roy v. King's Estate*, 55 Mont. 567, 179 Pac. 821.

² *Wilbur v. Win*, 89 N. J. Eq. 278, 103 Atl. 985.

³ *Fryer v. Roe*, 12 C. B. 437; *Everingham v. Halsey*, 108 Ia. 709, 78 N. W. 220; *Hallowell Granite Works v. Orleans*, — Ia. —, 80 So. 610; *Seabury v. Bolles*, 51 N. J. L. 103, 11 L. R. A. 136, 16 Atl. 54.

§ 2523. Silence as assent. A debtor to whom an account is presented has at least a reasonable time for investigation and examination,¹ and if he objects to the account within a reasonable time, and at the first available opportunity,² his failure to object to the account at the first moment that it was presented, does not convert the account into an account stated.

Whether silence on the part of the debtor for more than a reasonable time is to be regarded as an assent to the correctness of the account as a valid and subsisting legal obligation, is a question upon which there is a divergence of authority, although the divergence is probably rather apparent than real.³ In some jurisdictions language is used which seems to indicate that the courts feel that silence for more than a reasonable time is acquiescence in the account which converts the open account into an account stated.⁴ If the creditor has sent to the debtor his account for a number of times, upon which there is notice that after the lapse of a certain period the creditor would charge interest, the account of the debtor in making payments after receiving such notice without objection to a charge of interest is equivalent to an assent to such charge,⁵ even if the original account did not bear interest.⁶ Failure to object for two years,⁷ or even for two or three posts,⁸ has been said to turn an open account into an account stated.

In other jurisdictions language is used which seems to indicate that the court believes that silence on the part of the debtor is not of itself assent to the correctness of the account.⁹ In some cases

¹ *Wilbur v. Win*, 89 N. J. Eq. 278, 103 Atl. 985.

² *Wilbur v. Win*, 89 N. J. Eq. 278, 103 Atl. 985.

³ See § 162.

⁴ *England*. *Tickel v. Short*, 2 Ves. Sr. 239; *Sherman v. Sherman*, 2 Vern. 276; *In re Anglesey* (1901), 2 Ch. 548.

United States. *Perkins v. Hart*, 24 U. S. (11 Wheat.) 237, 6 L. ed. 463; *Wiggins v. Burkham*, 77 U. S. (10 Wall.) 129, 19 L. ed. 884; *Standard Oil Co. v. Van Etten*, 107 U. S. 325, 27 L. ed. 319.

Arkansas. *Memphis, Dallas & Gulf Ry. v. Atlas Powder Co.*, 123 Ark. 620 (no opinion), 185 S. W. 786.

Iowa. *Sullivan v. Herrick*, 161 Ia. 148, 140 N. W. 359.

Minnesota. *Western Newspaper Union v. Segerstrom*, 118 Minn. 230, 136 N. W. 752.

New Jersey. *Wilbur v. Win*, 89 N. J. Eq. 278, 103 Atl. 985.

New York. *Spellman v. Muehlfeld*, 166 N. Y. 245, 59 N. E. 817.

Virginia. *Buchanan v. Higginbotham*, 89 Va. 278, 97 S. E. 340.

Wisconsin. *Jones v. DeMuth*, 137 Wis. 120, 118 N. W. 542; *Miller v. Ryder*, 145 Wis. 526, 130 N. W. 518.

⁵ *In re Anglesey* (1901), 2 Ch. 548.

⁶ *Miller v. Ryder*, 145 Wis. 526, 130 N. W. 518.

⁷ *Tickel v. Short*, 2 Ves. Sr. 239.

⁸ *Sherman v. Sherman*, 2 Vern. Ch. 276.

⁹ *Shaw v. Lobe*, 58 Wash. 219, 29 L. R. A. (N.S.) 333, 108 Pac. 450; *Merritt v. Meisenheimer*, 84 Wash. 174, 146 Pac. 370; *United Iron Works v. Rathskeller Co.*, 94 Wash. 67, L. R. A. 1917C, 445, 161 Pac. 1197.

it is said that silence for an unreasonable period of time casts the burden of proof upon the debtor if he wishes to show that he did not acquiesce in such account.¹⁰

There is probably, however, little, if any, real conflict between these jurisdictions on matters of pure law, the conflict, if any, being as to the weight and sufficiency of the evidence in each particular case. Silence on the part of the debtor for more than a reasonable time is at least evidence from which his acquiescence may be inferred as a fact.¹¹ In accordance with the usage of many courts, the term "presumption of fact" is frequently applied wherever a fact may be inferred from the existence of other facts, but where such inference is not required by law to be drawn. The courts which use language to the effect that silence amounts to acquiescence probably have in mind the particular case which they are deciding, and they mean either that a finding of acquiescence is supported by sufficient evidence, or that upon the evidence of acquiescence thus offered the issue of acquiescence should have been submitted to the jury or to the court if the facts in that case are found by the court. On the other hand, the courts which use language to the effect that silence is not acquiescence, usually mean that in the particular case the surrounding circumstances justify a finding that the debtor did not by his silence intend to acquiesce in the correctness of the account.¹²

Language has been used which tends to restrict the doctrine of silence as acquiescence in an account to mercantile transactions,¹³

¹⁰ *Freeland v. Heron*, 11 U. S. (7 Cranch.) 147, 3 L. ed. 297; *Fayette Liquor Co. v. Jones*, 75 W. Va. 119, 83 S. E. 726.

¹¹ *United States*. *Freeland v. Heron*, 11 U. S. (7 Cranch.) 147, 3 L. ed. 297; *Wiggins v. Burkham*, 77 U. S. (10 Wall.) 129, 19 L. ed. 884.

Arkansas. *Memphis, Dallas & Gulf Ry. v. Atlas Powder Co.*, 123 Ark. 620 (no opinion), 185 S. W. 786.

California. *Crane v. Stansbury*, 173 Cal. 631, 161 Pac. 7.

Illinois. *State v. Illinois Central Ry. Co.*, 246 Ill. 188, 92 N. E. 814.

Minnesota. *Western Newspaper Union v. Segerstrom Piano Mfg. Co.*, 118 Minn. 230, 136 N. W. 752.

New York. *Murray v. Toland*, 3 Johns. Ch. (N. Y.) 569.

Virginia. *Townes v. Birchett*, 39 Va. (12 Leigh) 173.

Wisconsin. *Jones v. DeMuth*, 137 Wis. 120, 118 N. W. 542.

¹² "As the omission to object to the account rendered, raises merely an inference that the party is satisfied with it, and that he means to have his silence understood as an expression of his concurrence therewith, any circumstances calculated to rebut such inferences, or to raise counter-inferences, are clearly competent evidence to be submitted to the jury, in order that, with a knowledge of all the circumstances of the case, they may form their conclusion of the actual intention of the parties." *Lockwood v. Thorne*, 18 N. Y. 235.

¹³ *Tickel v. Short*, 2 Ves. Sr. 239; *Sherman v. Sherman*, 2 Vern. Ch. 276; *Freeland v. Heron*, 11 U. S. (7 Cranch.) 147, 3 L. ed. 297.

and to courts of equity.¹⁴ Even in recent cases language is found occasionally which seems to imply that this rule has especial application in mercantile transactions.¹⁵ The rule that silence on the part of the debtor implies acquiescence in the account is said to be "peculiarly applicable as between merchants,"¹⁶ or between a merchant and a customer.¹⁷ In most jurisdictions, however, this rule is applied to all business transactions, in the course of which one party renders an account to another.¹⁸

It is in cases in which silence is regarded as an acquiescence in the account that the necessity of showing that the account was in fact rendered to the debtor, is clearest.¹⁹ "Considering the origin and nature of the rule, I think a person who has chosen to hold an equivocal position in such a case, is not at liberty to assert the rights which pertain to a definite and decided one. He ought not to be allowed, at his election, to turn his own considerate inaction and reticence into a positive admission in his own favor, to serve as the very basis of his defense under the statute. When he claims the benefit of the statute on the ground that the account sued on has been converted into a stated one, through his assent to it as rendered to him, it is not enough to substantiate the defense, that there is no evidence as to whether he objected or not, nor is it sufficient to sustain such a defense, to prove, that upon and after the exhibition of the account, he remained perfectly passive. He must go further. He must show some word, or act, marking or implying that he assented to the account. There is no hardship in this. If the party receiving the account is willing to consider it as correct, and means that it shall be so regarded on his side, so that he may be enabled to assert the fact as against the other party, it will be easy for him to manifest his assent in some positive and unequivocal manner. Any other rule would lead to much duplicity and injustice."²⁰

What amounts to a reasonable time depends upon all of the facts and circumstances of the case.²¹ At one extreme it has been said

¹⁴ *Pratt v. Weyman*, 1 McCord Eq. (S. Car.) 156.

¹⁵ *Dodge v. Brown*, 74 W. Va. 466, 82 S. E. 262; *Fayette Liquor Co. v. Jones*, 75 W. Va. 119, 83 S. E. 726.

¹⁶ *Fayette Liquor Co. v. Jones*, 75 W. Va. 119, 83 S. E. 726.

¹⁷ *Buchanan v. Higginbotham*, — Va. —, 97 S. E. 340.

¹⁸ *Crane v. Stansbury*, 173 Cal. 631, 161 Pac. 7; *Spellman v. Muehlfeld*, 166 N. Y. 245, 59 N. E. 817.

¹⁹ *United Hardware-Furniture Co. v. Blue*, 59 Fla. 419, 35 L. R. A. (N.S.) 1038, 52 So. 364.

²⁰ *White v. Campbell*, 25 Mich. 463.

²¹ See on this question, *Sherman v. Sherman*, 2 Vern. 276; *Tickel v. Short*, 2 Ves. Sr. 239; *Freeland v. Heron*, 11 U. S. (7 Cranch.) 147, 3 L. ed. 297; *Wiggins v. Burkham*, 77 U. S. (10 Wall.) 129, 19 L. ed. 834.

that if the merchants are in correspondence, a failure to object to an account for more than the second or third post, is to be regarded as an allowance of the account.²² At the other extreme it has been said that if the merchants are in different countries, a delay of two years converts the current account into a stated account.²³

Even in jurisdictions in which an unexplained delay in objecting to an account is said to amount to an acquiescence therein, the debtor may avoid such effect of his acquiescence by showing reasonable and proper explanation for his delay.²⁴ He may show that circumstances made it impracticable for him to interpose objections to the account until after the lapse of a reasonable time.²⁵

§ 2524. Effect of account stated. An account stated becomes a new contract,¹ or an admission of an existing liability,² according to the emphasis placed on one or the other of these characteristics. Unless some recognized ground for attacking its validity can be shown, the parties are bound thereby.³

It is not necessary, on the one hand, for the creditor to prove the original items which were carried into the account stated.⁴ On the other hand, neither the debtor nor the creditor can avoid the effect of the account stated, either by refusing to pay the balance agreed to be due, or by refusing to accept the balance agreed to be due in full satisfaction of liability.⁵

In some of the earlier cases, language was used which seemed to indicate that the courts believed that an account stated was conclusive as between the parties.⁶ Probably this language, however, meant that in the particular case no sufficient ground for avoiding the effect of the account stated had been shown. At

²² *Sherman v. Sherman*, 2 Vern. 276.

²³ *Tickel v. Short*, 2 Ves. Sr. 239; *Freeland v. Heron*, 11 U. S. (7 Cranch.) 147, 3 L. ed. 297.

²⁴ *Wiggins v. Burkham*, 77 U. S. (10 Wall.) 129, 19 L. ed. 884; *Hollenbeck v. Ristine*, 105 Ia. 488, 67 Am. St. Rep. 306, 75 N. W. 355; *Jones v. DeMuth*, 137 Wis. 120, 118 N. W. 542.

²⁵ *Wiggins v. Burkham*, 77 U. S. (10 Wall.) 129, 19 L. ed. 884.

¹ *Merchants' National Bank v. Carmichael*, — Cal. —, 173 Pac. 999.

² See § 2517.

³ *Dolman v. Kaw Construction Co.*, 103 Kan. 635, 2 A. L. R. 67, 176 Pac. 145; *Hallowell Granite Works v. Orleans*, — La. —, 80 So. 610; *Fayette Liquor Co. v. Jones*, 75 W. Va. 119, 83 S. E. 726.

⁴ *Roy v. King's Estate*, 55 Mont. 567, 179 Pac. 821; *Fayette Liquor Co. v. Jones*, 75 W. Va. 119, 83 S. E. 726.

⁵ *Dolman v. Kaw Const. Co.*, 103 Kan. 635, 2 A. L. R. 67, 176 Pac. 145.

⁶ *Trueman v. Hurst*, 1 T. R. 40; *Holmes v. D'Camp*, 1 Johns (N. Y.) 34, 3 Am. Dec. 293.

modern law it is very generally agreed that an account stated is not absolutely conclusive for all purposes,⁷ and that it does not present any of the elements of estoppel.⁸ An account stated may be attacked for fraud or mistake.⁹

Since the existence of a valid obligation is necessary as the basis of an account stated,¹⁰ the debtor may attack an account stated on the ground that certain illegal items were included in such account stated.¹¹ He may show that certain of the items were debts growing out of a gambling transaction,¹² or that they were items growing out of the illegal sale of intoxicating liquor without a license,¹³ or that they were items of usurious interest.¹⁴ The effect of including in an account stated items growing out of contracts which are invalid as in violation of the Sunday statutes, depends upon the effect of such statute in such jurisdictions. In jurisdictions in which a Sunday contract is capable of ratification,¹⁵ the act of the parties in including an item growing out of a Sunday contract in an account stated, amounts to a ratification thereof.¹⁶ If a contract which is unenforceable by reason of the Statute of Frauds, has been

⁷ **England.** *Hardwicke v. Vernon*, 4 Ves. Jr. 411.

United States. *Standard Oil Co. v. Van Etten*, 107 U. S. 325, 27 L. ed. 538.

Colorado. *Gutshall v. Cooper*, 37 Colo. 212, 6 L. R. A. (N.S.) 820, 86 Pac. 125.

Illinois. *State v. Illinois Central Ry.*, 246 Ill. 188, 92 N. E. 814.

Kentucky. *Louisville Banking Co. v. Asher*, 112 Ky. 138, 99 Am. St. Rep. 283, 65 S. W. 133.

New Jersey. *Wilbur v. Win*, 89 N. J. Eq. 278, 103 Atl. 985.

Oregon. *Haines v. First National Bank*, 89 Or. 42, 172 Pac. 505.

Wisconsin. *Segelke & Kohlhaus Mfg. Co. v. Vincent*, 135 Wis. 237, 113 N. W. 806.

⁸ *Lockwood v. Thorne*, 18 N. Y. 285.

⁹ **England.** *Hardwicke v. Vernon*, 4 Ves. Jr. 411.

United States. *Wiggins v. Burkham*, 77 U. S. (10 Wall.) 129, 19 L. ed. 884.

Colorado. *Gutshall v. Cooper*, 37 Colo. 212, 6 L. R. A. (N.S.) 820, 86 Pac. 125.

Montana. *Johnson v. Gallatin Valley Milling Co.*, 38 Mont. 83, 98 Pac. 883.

New Jersey. *Wilbur v. Win*, 89 N. J. Eq. 278, 103 Atl. 985.

Oregon. *Haines v. First National Bank*, 89 Or. 42, 172 Pac. 505.

Wisconsin. *Segelke & Kohlhaus Mfg. Co. v. Vincent*, 135 Wis. 237, 113 N. W. 806.

¹⁰ See § 2519.

¹¹ *Rose v. Savory*, 2 Bing. N. C. 146; *Murphey v. Springs*, 200 Fed. 372, 45 L. R. A. (N.S.) 539; *Peeples v. Yates*, 88 Miss. 289, 40 So. 996.

¹² *Murphey v. Springs*, 200 Fed. 372, 45 L. R. A. (N.S.) 539.

¹³ *Melchior v. McCarty*, 31 Wis. 252, 11 Am. Rep. 605.

¹⁴ *Peeples v. Yates*, 88 Miss. 289, 40 So. 996.

¹⁵ See § 1038.

¹⁶ *Melchoir v. McCarty*, 31 Wis. 252, 11 Am. Rep. 605.

performed by one party, and the amount due thereunder has been included in an account stated, the debtor can not thereafter attack such account stated on the ground that such account stated was unenforceable because of the Statute of Frauds.¹⁷ If the original contract remains executory, the amount which will be due thereunder on performance, can not be made an item of an account stated,¹⁸ although it might be possible that the statement of the account might set forth the original transaction in writing, and might be so signed as to make a sufficient memorandum.¹⁹ It has also been held that if an action is brought upon an account stated for money earned under a special contract, the defendant may show breach of such contract as a defense to such action,²⁰ on the theory that this is in effect impeaching the account stated for mistakes and errors.²¹

VII

ARBITRATION

§ 2525. Definition and nature. An arbitration is another form of a discharge of liability by the voluntary agreement of the parties. It differs from discharge by new contract, by account stated, by accord and satisfaction and by release, in that the amount to be paid in satisfaction for the liability in question is not agreed upon by the parties themselves, but is determined by third parties selected by the parties to the original transaction for that purpose. A complete arbitration consists of three different steps: the agreement between the two parties to refer the matter in dispute to the judgment of the arbitrators, which is known as the submission;¹ the proceedings before the arbitrators by which they ascertain the

¹⁷ Knowles v. Michel, 13 East 249 (sale of standing trees).

¹⁸ Martyn v. Arnold, 36 Fla. 446, 18 So. 791. The same view seems to be entertained in, United Hardware-Furniture Co. v. Blue, 59 Fla. 419, 35 L. R. A. (N.S.) 1038, 52 So. 364; but in this case the evidence failed to prove an account stated.

¹⁹ See §§ 1316 et seq.

²⁰ Gutshall v. Cooper, 37 Colo. 212, 6 L. R. A. (N.S.) 820, 86 Pac. 125.

²¹ Gutshall v. Cooper, 37 Colo. 212, 6 L. R. A. (N.S.) 820, 86 Pac. 125.

¹ District of Columbia v. Bailey, 171 U. S. 161, 43 L. ed. 118; Whitcher v. Whitcher, 49 N. H. 176, 6 Am. Rep. 486.

On the subject of arbitration generally, see Arbitration, by John M. M'Candlish, 7 Juridical Review, 53; Interdiction of Arbitration Proceedings, by R. D. Melville, 15 Juridical Review, 379, and Alternative Awards in Arbitration, by R. D. Melville, 17 Juridical Review, 360.

See also § 723.

amount which one party is to pay to the other in satisfaction of the matter in dispute;² and the decision rendered by the arbitrators upon the matter in dispute, which is submitted to them for arbitration, which is known as the award.³

The third persons to whom the matter in dispute is thus submitted are known as arbitrators;⁴ although where the matter in dispute is submitted to one party, or where two arbitrators are selected with power to call in a third, if they can not agree, the single person to whose judgment the matter in controversy thus submitted is known as the umpire.⁵

§ 2526. History of arbitration. Like accord and satisfaction,¹ the method of settling controversies and disputes by means of arbitration seems to be one of immemorial antiquity in English law as indeed it is in practically every system of law. In early society, when the central authority is weak, it is, on the one hand, sometimes difficult to distinguish between the voluntary submission of the parties to their own arbitrators, and their submission to the judgments of the judicial powers, since in either case their obedience, if any, is purely voluntary.²

Arbitration was probably an established method of settling disputes before the king's courts were established in England. The fact that the jurisdiction of the king's courts was, at the outset, confined chiefly to criminal matters, to disputes concerning freeholds and to certain forms of tort, prevented these courts from dealing with arbitration, except in case of tort, or in cases in which the submission was under seal or seizin of realty was made as a result of the arbitration. As forms of action involving contract liability appeared in the king's courts, they were forced to deal

² See §§ 2536 et seq. and 2613 et seq.

³ *Richards v. Smith*, 33 Utah 8, 91 Pac. 683.

⁴ *Gordon v. United States*, 74 U. S. (7 Wall.) 188, 19 L. ed. 35; *Perry v. Cobb*, 88 Me. 435, 49 L. R. A. 389, 34 Atl. 278; *Millsaps v. Estes*, 137 N. Car. 535, 107 Am. St. Rep. 496, 70 L. R. A. 170, 50 S. E. 227.

⁵ *Hartford Fire Ins. Co. v. Bonner Mercantile Co.*, 44 Fed. 151, 11 L. R. A. 623; *Chandos v. American Fire Ins. Co.*, 84 Wis. 184, 19 L. R. A. 321, 54 N. W. 390.

¹ See § 2502.

² The method by which the blood feud was compromised, was more like arbitration than like a modern proceeding in court. Nothing could be done unless the parties submitted at the outset, and there was no available means for coercing them in case they refused to abide by the award. See *The Njals Saga*, *Sources of Ancient and Primitive Law*, Vol. I, *Evolution of Law Series*, pp. 122 et seq.

more and more with arbitration as a recognized method of discharging pre-existing liability. In the earliest reports of cases,³ arbitration seems to be assumed as a well-established method of settling disputes. The early digests show that arbitration was assumed as a sufficient discharge, and that the courts were already elaborating the details and discussing problems which were much the same as those which trouble our courts to-day, after making due allowance for the different economic and social conditions of the times.⁴ Evidently the rules determining the general nature and effect of arbitration and many of the leading principles were "known and uncontroverted law,"⁵ when the courts decided the cases which are reported in the year books.

In many states provision for arbitration is made by statute. Where no such provision is made, arbitration at common law is, nevertheless, a valid method of discharge.⁶ If the statutes provide for arbitration, such statutes are not exclusive unless they are so made by their express terms;⁷ and an arbitration which is good at common law, is good under such statutes, although it does not conform to the terms of the statutes on the subject.⁸

§ 2527. Validity of covenant for arbitration. A general provision in advance for arbitration is inoperative and it does not oust the jurisdiction of the courts.¹ Notwithstanding such provision, either party may bring an action upon the contract without submitting to arbitration, if the provision for arbitration is not made a condition precedent, or if it does not provide for determining the

³ Bracton's Notebook, 649 and 732.

"Compromiserunt se in arbitros," Bracton's Notebook, 649.

"Posuerunt se in arbitros," Bracton's Notebook, 732.

⁴ A great number of authorities are collected under the title "Arbitrement" in Statham's Abridgment; in Fitzherbert's Grande Abridgment, ff. 43 et seq.; and in Rolle's Abridgment, 242 et seq.

⁵ Kyd on Awards (second edition), p. 4.

⁶ Burke Grain Co. v. Stinchcomb, — Okla. —, 173 Pac. 204.

⁷ Meloy v. Imperial Land Co., 163 Cal. 99, 124 Pac. 712; Johnsen v. Wine-

man, 34 N. D. 116, 157 N. W. 679; Columbus, etc., Ry. v. Burke, 54 O. S. 98, 43 N. E. 282.

⁸ Burkland v. Johnson, 50 Neb. 858, 70 N. W. 388; Columbus, etc., Ry. v. Burke, 54 O. S. 98, 43 N. E. 282.

Contra, on the theory that if the parties intended statutory arbitration, they can not be held to common law arbitration. Deerfield v. Arms, 37 Mass. (20 Pick.) 480, 32 Am. Dec. 228.

¹ United States. Aktieselskabet Korn-og Foderstof Kompagniet v. Rederiaktiebolaget Atlanten, 250 Fed. 935.

Alabama. Headley v. Aetna Ins. Co., — Ala. —, 80 So. 466.

existence of some specific fact.² A general provision in advance for submission of disputes to arbitration, can not be modified by construction so as to provide for the assessment of damages by arbitration, and it can not thus be made a condition precedent.³

§ 2528. Elements of arbitration—Submission. From the nature of arbitration, a submission, which is the voluntary agreement of the parties to the original controversy to refer the matter in dispute to arbitrators, is necessary.¹ Under our constitutional guaranty of right of access to the courts, and right of trial by jury, the legislature can not compel the parties to submit to arbitration unless a means is given for appealing to the courts for trial in accordance with constitutional guaranties.² The submission by which the parties agree to refer certain questions to arbitration is a contract and is governed by the general principles which apply to ordinary contracts.³ Like other contracts, it must be sufficiently

California. *North American Dredging Co. v. Outer Harbor Dock & Wharf Co.*, — Cal. —, 173 Pac. 756.

Georgia. *Lawrence v. White*, 131 Ga. 840, 19 L. R. A. (N.S.) 966, 63 S. E. 631.

Missouri. *Mecartney v. Guardian Trust Co.*, 274 Mo. 224, 202 S. W. 1131.

West Virginia. *Flavell v. Red Jacket Consol. Coal & Coke Co.*, 82 W. Va. 295, 96 S. E. 600.

See § 721.

¹ *North American Dredging Co. v. Outer Harbor Dock & Wharf Co.*, — Cal. —, 173 Pac. 756; *Lawrence v. White*, 131 Ga. 840, 19 L. R. A. (N.S.) 966, 63 S. E. 631; *Mecartney v. Guardian Trust Co.*, 274 Mo. 224, 202 S. W. 1131; *Flavell v. Red Jacket Consol. Coal & Coke Co.*, 82 W. Va. 295, 96 S. E. 600.

² *Aktieselskabet Korn-og Foderstof Kompagniet v. Rederiaktiebolaget At lanten*, 250 Fed. 935.

³ *Burghardt v. Turner*, 29 Mass. (12 Pick.) 534; *Mecartney v. Guardian Trust Co.*, 274 Mo. 224, 202 S. W. 1131.

⁴ *Railway Company v. Garrett*, 50 O. S. 405, 34 N. E. 493.

The exercise of the police power is not compulsory arbitration. *State Board of Health v. Greenville*, 86 O. S. 1, 98 N. E. 1019.

⁵ *District of Columbia v. Bailey*, 171 U. S. 161, 43 L. ed. 118; *Mecartney v. Guardian Trust Co.*, 274 Mo. 224, 202 S. W. 1131.

"The general rule is, 'that every-one who is capable of making a disposition of his property, or a release of his right, may make a submission to an award; but no one can, who is either under a natural or civil incapacity of contracting.' Kyd, p. 35; Russell on Arbitrators, p. 14. And Morse, in the opening paragraph of his treatise on Arbitration and Award (p. 3), says: 'A submission is a contract.' And again, at p. 50: 'The submission is the agreement of the parties to refer. It is, therefore, a contract, and will in general be governed by the law concerning contracts.' In *Whitcher v. Whitcher*, 49 N. H. 176, the supreme court of New Hampshire said (p. 180): 'A submission is a contract between two or more parties, whereby they agree to refer the subject in dispute to others

definite in its terms,⁴ and a mere suggestion by one party that certain matters be settled by arbitration if not accepted by the adversary party,⁵ does not amount to a submission. It is not necessary that the submission should specify the time and place of the hearing,⁶ since the law will presume that the parties intended a reasonable time and place if none is specified.⁷ The time for hearing may be extended by subsequent mutual informal agreement, even if the original contract fixing the time for hearing were under seal.⁸

A submission has no legal effect, unless it is made by parties who have power to make contracts with reference to the right in question, by which such right may be discharged.⁹

From the nature of submission, questions of consideration rarely arise. Submission implies a mutual agreement on each side to submit the matters in question to the decision of the arbitrators, and accordingly the promise on either side is a sufficient consideration for the promise on the other side.

and to be bound by their award, and the submission itself implies an agreement to abide the result, even if no such agreement were expressed.¹ It was because a submission to arbitration had the force of a contract, that at common law a submission by a corporation aggregate was required to be the act of the corporate body. Russell on Arbitrators, fifth edition, p. 20; which act was of necessity required to be evidenced in a particular manner.

"It is true that an executor, at common law, had the power to submit to an award. But this power arose by reason of the full dominion which the law gave the executor or administrator over the assets, and the full discretion which it vested in him for the settlement and liquidation of all claims due to and from the estate. *Wheatley v. Martin*, 6 Leigh 62; *Wamsley v. Wamsley*, 26 W. Va. 45; *Wood v. Tunnicliff*, 74 N. Y. 38. Whilst, however, the agreement of the executor to a common-law submission was binding upon him, such a consent on his part did no

protect him from being called to an account by the beneficiaries of the estate, if the submission proved not to be to their advantage, because the submission was the voluntary act of the executor and was not the equivalent of a judicial finding. 3 Williams on Executors, p. 326, and authorities cited. So, also, the power of a municipal corporation to arbitrate arises from its authority to liquidate and settle claims." *District of Columbia v. Bailey*, 171 U. S. 161, 43 L. ed. 118.

⁴ *Rawlinson v. Shaw*, 124 Mich. 340, 82 N. W. 1054; *Mecartney v. Guardian Trust Co.*, 274 Mo. 224, 202 S. W. 1131; *Klock Produce Co. v. Robertson*, 90 Wash. 260, 155 Pac. 1044.

⁵ *Mecartney v. Guardian Trust Co.*, 274 Mo. 224, 202 S. W. 1131.

⁶ *Curtis v. Potts*, 3 M. & S. 145.

⁷ *Curtis v. Potts*, 3 M. & S. 145.

⁸ *Hill v. Taylor*, 15 Wis. 190.

⁹ *District of Columbia v. Bailey*, 171 U. S. 161, 43 L. ed. 118; *Millsaps v. Estes*, 137 N. Car. 535, 107 Am. St. Rep. 496, 70 L. R. A. 170, 50 S. E. 227.

§ 2529. Subject-matter of arbitration—Existing dispute. It has been said that there can be no submission unless it deals with some existing dispute between the parties.¹ This, however, has been denied and it has been said that a submission may exist, although it does not relate to matters in dispute, but to matters which may be in dispute but for such agreement of submission.² To a large extent this is, as has been said hereafter,³ merely a question of names. The parties may undoubtedly agree in advance for determining the existence of specific facts,⁴ and whether such agreement is to be called a submission or not depends upon whether such a method of settling future difficulties is to be regarded as arbitration or not.

§ 2530. Subject-matter of arbitration—Entire dispute. It has been said that arbitration can not exist in the true sense of the term unless the entire dispute is submitted,¹ and that a reference to appraisers or arbitrators for the purpose of determining a single

¹ *Bos v. Helsham*, L. R. 2 Exch. 72; *Omaha v. Omaha Water Co.*, 218 U. S. 180, 48 L. R. A. (N.S.) 1084, 54 L. ed. 991; *Irwin v. Hoyt*, 162 Ia. 679, 144 N. W. 584; *Green & Coates St. Passenger Ry. v. Moore*, 64 Pa. St. 79.

² *Chambers v. Goldthorpe* [1901], 1 Q. B. 624; *Brown v. Wheeler*, 17 Conn. 345, 44 Am. Dec. 550.

³ See § 2530.

⁴ See § 722.

¹ *Billmyer v. Hamburg-Bremen Fire Ins. Co.*, 57 W. Va. 42, 49 S. E. 901.

If a single fact, such as a question of valuation, is to be settled, the method of settling it is called an appraisalment. *Sebree v. Board of Education*, 254 Ill. 438, 98 N. E. 931; *Bangor Savings Bank v. Niagara Fire Ins. Co.*, 85 Me. 68, 35 Am. St. Rep. 341, 20 L. R. A. 650, 26 Atl. 991.

See also, *State v. Equitable Surety Co.*, 140 Minn. 48, 167 N. W. 292.

"But it is unnecessary to the decision of the question here raised to adopt in its full extent the doctrine apparently established by these authorities relating to the ordinary submission of an existing controversy to referees.

The question here does not arise in connection with a general submission to arbitration.

"It was a proceeding for the ascertainment of a single fact, or the settlement of a particular question in the chain of evidence, and not originally designed to terminate the whole controversy. In the absence of definite knowledge as to the extent of the loss, and in anticipation of a possible disagreement, it was mutually agreed that the damage should be 'ascertained and estimated' by competent and disinterested appraisers selected with special reference to their knowledge, skill, and experience in regard to the subject-matter. This duty is to be performed by the appraisers mainly by the aid of a personal examination of the premises, and an application of their personal knowledge. They are not expected to hold a formal session of court to determine an entire controversy after hearing pleadings, evidence, and argument. Their proceedings resemble more the process of taking expert testimony. Whether mere valuers or appraisers thus appointed

fact, is not arbitration in the proper sense of the term.² A reference of this sort for the purpose of determining the value of property,³ or the quantity of property,⁴ has accordingly been held not to be arbitration in the proper sense of the term.

The authorities are, however, not in accord upon questions of this sort, and such a reference has been said to be at least in the nature of an arbitration, if not an arbitration in the proper sense of the term.⁵ An architect who, by the terms of the building contract, is given power to determine questions of the performance of such contract, is treated as an arbitrator.⁶

for such a purpose can be deemed arbitrators in any proper sense or for any purpose, there is no occasion to decide. The authorities are not in harmony upon the subject. See *Morse, Arbitration and Award*, 38, 42, and cases cited. It is not necessary to follow the different courts in their ingenious efforts to trace, for all cases, a line of distinction between a mere appraisal and an ordinary submission to arbitration. The result may be that such appraisers are properly considered arbitrators for some purposes, but not in all respects. All are invested with quasi-judicial functions, which must be discharged with absolute impartiality, without the improper interference of either party, or undue influence from any source. But appraisers may be said to act in the twofold capacity of arbitrators and experts. In their character of experts they not only give effect to opinions based directly on their personal experience and knowledge, but also opinions founded in some measure upon information which may not be so direct and original as to be competent in itself as primary evidence. A witness called as an expert is expected before testifying to refresh his memory and confirm his judgment by an examination of authorities and conference with other experts. The umpire

did precisely this, and no more, in the case at bar." *Bangor Savings Bank v. Niagara Fire Ins. Co.*, 85 Me. 68, 35 Am. St. Rep. 341, 20 L. R. A. 650, 26 Atl. 991.

² *England. Scott v. Avery*, 5 H. L. Cas. 811.

Kansas. Guild v. Atchison, Topeka & Santa Fe Ry., 57 Kan. 70, 57 Am. St. Rep. 312, 33 L. R. A. 77, 45 Pac. 82.

Maine. Bangor Savings Bank v. Niagara Fire Ins. Co., 85 Me. 68, 35 Am. St. Rep. 341, 20 L. R. A. 650, 26 Atl. 991.

Minnesota. State v. Equitable Surety Co., 140 Minn. 48, 167 N. W. 292.

Wisconsin. State v. Maik, 113 Wis. 239, 89 N. W. 183.

³ *Leeds v. Burrows*, 12 East 1; *Currey v. Lackey*, 35 Mo. 389.

⁴ *State v. Equitable Surety Co.*, 140 Minn. 48, 167 N. W. 292.

⁵ *Chambers v. Goldthorpe* [1901], 1 K. B. 624; *Janney v. Goehring*, 52 Minn. 428, 54 N. W. 481 [citing, *Schreiber v. German-American Hail Ins. Co.*, 43 Minn. 367, 45 N. W. 708; *Smith v. Boston, Concord & Montreal R. R.*, 36 N. H. 458, and *Van Cortlandt v. Underhill*, 17 Johns. (N. Y.) 405]; *Stubbings v. McGregor*, 86 Wis. 248, 56 N. W. 641.

⁶ *Chambers v. Goldthorpe* [1901], 1 K. B. 624.

The name which is to be applied to the proceedings is of little practical importance. The confusion as to the name which is to be given in such cases generally grows out of one of three questions of vital importance. A covenant in advance for arbitration of the entire subject-matter is regarded as inoperative, since it ousts the courts of their jurisdiction and is accordingly contrary to the ideas of public policy entertained by most courts.⁷ A contract for arbitration as to a single fact or for arbitration as a condition precedent, is, on the other hand, valid and enforceable.⁸ For these reasons courts have sometimes attempted to distinguish between covenants for arbitration generally which are invalid, and covenants providing for means of ascertaining specific facts which are spoken of as covenants for appraisement. If the transaction is an arbitration in the proper sense of the term, the arbitrators must ordinarily give to the parties to the original dispute notice of the hearing and an opportunity to offer evidence.⁹ In case of an appraisement, on the other hand, notice and an opportunity to submit evidence are frequently unnecessary.¹⁰ For this reason the courts frequently attempt to distinguish between arbitration and appraisement or some other method of ascertaining a particular fact. If the party who is to ascertain the fact in question, is acting in a purely clerical or ministerial capacity, he may be liable to his employer for negligence; while if he is acting as an arbitrator, or if his position is in the nature of an arbitrator, he is not liable for negligence, but only for fraud, collusion, and the like.¹¹

§ 2531. Illegal subject-matter. Since an illegal covenant renders invalid the remaining covenants of an entire contract,¹ and since an illegal contract or transaction can not be a consideration for a new promise, based thereon, it is generally held that unless there is a genuine dispute between the parties as to the facts which render the transaction legal or illegal, a submission of rights growing out of an illegal contract or transaction, is itself illegal and inoperative.² While a different view is sometimes expressed,³ it is usually in cases in which it is possible that some rights might have

⁷ See § 721.

⁸ See § 722.

⁹ See § 2536.

¹⁰ See § 2537.

¹¹ See § —.

¹ See §§ 1029 et seq.

² *Aubert v. Maze*, 2 B. & P. 371;

Benton v. Singleton, 114 Ga. 548, 58 L. R. A. 181, 40 S. E. 811; *Hall v. Kimmer*, 61 Mich. 269, 1 Am. St. Rep. 575, 28 N. W. 96; *Lum v. Fauntleroy*, 80 Miss. 757, 92 Am. St. Rep. 620, 32 So. 290.

³ *Davis v. Wentworth*, 17 N. H. 567.

arisen under the contract, whether contractual or quasi-contractual in their nature, which the law would recognize and enforce, or in cases in which the legality of the contract is itself the question which is in dispute.

§ 2532. Form of submission. In the absence of statute no particular form of submission is necessary if no particular form would have been necessary to any other contract dealing with the subject-matter in question.¹ If an oral contract with reference to the subject-matter would have been enforceable, an oral submission is sufficient.² A submission under seal is not necessary,³ except in cases in which a sealed contract would be necessary because of the nature of the subject,⁴ or because of the fact that the original liability arose out of a sealed contract.⁵

An oral submission of a controversy, concerning the title of land, is unenforceable by reason of the Statute of Frauds.⁶

In the absence of statute, a submission to arbitration can not be made a rule of court;⁷ but under a number of statutes provision is made for making such submission a rule of court if the parties so agree.⁸

¹ **England.** Cooth v. Jackson, 6 Ves. Jr. 12.

Alabama. Waldon v. McKinnon, 157 Ala. 291, 22 L. R. A. (N.S.) 716, 47 So. 874.

Connecticut. White v. Fox, 29 Conn. 570.

Michigan. Cady v. Walker, 62 Mich. 157, 4 Am. St. Rep. 834, 28 N. W. 805.

New Mexico. Moore v. Collins, 24 N. M. 235, 173 Pac. 547.

West Virginia. Billmyer v. Hamburg-Bremen Fire Ins. Co., 57 W. Va. 42, 49 S. E. 901.

Wisconsin. Winnie v. Elderkin, 2 Pinn. (Wis.) 248, 52 Am. Dec. 159.

² **England.** Cooth v. Jackson, 6 Ves. Jr. 12.

Alabama. Waldon v. McKinnon, 157 Ala. 291, 22 L. R. A. (N.S.) 716, 47 So. 874.

Illinois. Smith v. Douglas, 16 Ill. 34.

Michigan. Cady v. Walker, 62 Mich. 157, 4 Am. St. Rep. 834, 28 N. W. 805.

New Mexico. Moore v. Collins, 24 N. M. 235, 173 Pac. 547.

West Virginia. Billmyer v. Hamburg-Bremen Fire Ins. Co., 57 W. Va. 42, 49 S. E. 901.

Wisconsin. Winnie v. Elderkin, 2 Pinn. (Wis.) 248, 52 Am. Dec. 159.

³ White v. Fox, 29 Conn. 570.

⁴ See §§ 1156 et seq.

⁵ See §§ 1172 and 2473 et seq.

⁶ Byrd v. Oldem, 9 Ala. 755; Brown v. Mize, 119 Ala. 10, 24 So. 453; Walden v. McKinnon, 157 Ala. 291, 22 L. R. A. (N.S.) 716, 47 So. 874; Fort v. Allen, 110 N. Car. 183, 14 S. E. 685.

If the parties act on the award and build fences in accordance therewith, they are estopped to deny the validity of the oral submission. Shaw v. State, 125 Ala. 80, 28 So. 390.

⁷ Nichols v. Chalie, 14 Ves. Jr. 265.

⁸ Ryan v. Daugherty, 30 Cal. 219; Minneapolis & St. Louis Ry. Co. v. Cooper, 59 Minn. 290, 61 N. W. 143.

A submission at common law need not be acknowledged.⁹ Under many statutes acknowledgment is necessary to a statutory submission,¹⁰ but if such acknowledgment is omitted, the submission will be good as a common-law submission.¹¹

§ 2533. Construction of submission. While the dislike for covenants for arbitration in advance at one time extended to all contracts for arbitration, and required strict construction of the submission,¹ a submission is now construed fairly and reasonably like any other contract, and the courts make it their primary object to ascertain the intent of the parties.² A provision for arbitration of damages caused by a default in performing a building contract, does not include defaults which are due to the failure of the architect to furnish proper plans or to designate the materials to be used.³ A provision for appraising merchandise "at the invoice purchase price," requires an appraisalment at the actual cost, and not at the cost which the buyer would have had to pay if he had bought them when the appraisalment was made.⁴

§ 2534. Appointment of arbitrators. In the absence of statute, the arbitrators must be appointed by the parties to the submission either in the submission itself or by their subsequent agreement.¹ No formal method of appointment is necessary, however, in the absence of statute,² and the conduct of the parties to the submission in acquiescing in the assumption of authority by an arbitrator.

⁹ *Burkland v. Johnson*, 50 Neb. 858, 70 N. W. 388.

¹⁰ *Franklin Mining Co. v. Pratt*, 101 Mass. 359; *Burkland v. Johnson*, 50 Neb. 858, 70 N. W. 388.

¹¹ *Burkland v. Johnson*, 50 Neb. 858, 70 N. W. 388.

¹ See discussion in *Shelton v. Alcox*, 11 Conn. 240.

² *United States v. Burchell v. Marsh*, 58 U. S. (17 How.) 344, 15 L. ed. 96.

Florida. *Florida Yacht Club v. Renfro*, 67 Fla. 154, 64 So. 742.

Kansas. *Swisher v. Dunn*, 89 Kan. 412, 787, 45 L. R. A. (N.S.) 810, 813, 131 Pac. 571, 132 Pac. 832.

Pennsylvania. *Hunn v. Pennsyl-*

vania Inst. for Blind, 221 Pa. St. 403, 18 L. R. A. (N.S.) 1248, 70 Atl. 812.

Wisconsin. *McCord v. Flynn*, 111 Wis. 78, 86 N. W. 668.

³ *Hunn v. Pennsylvania Inst. for Blind*, 221 Pa. St. 403, 18 L. R. A. (N.S.) 1248, 70 Atl. 812.

⁴ *Swisher v. Dunn*, 89 Kan. 412, 787, 45 L. R. A. (N.S.) 810, 813, 131 Pac. 571, 132 Pac. 832.

¹ An arbitration covenant can not be set up as a defense by one who has taken no steps thereunder to appoint arbitrators. *Smith v. Alker*, 102 N. Y. 87.

² *Greenville County v. Spartanburg County*, 62 S. Car. 105, 40 S. E. 147.

waives objections as to his original appointment.³ If two arbitrators are chosen by the parties who are to select a third in case of their failure to agree, the arbitrators must give notice to the parties to the submission of their appointment of such third arbitrator or umpire.⁴

§ 2535. Qualifications of arbitrators. Unless the parties have waived objection to an arbitrator on the ground of bias, prejudice, and the like, each party has a right to insist that the arbitrators, including the one appointed by the adversary party, shall be impartial and unbiased.¹ The fact that A acquiesces in B's appointment of B's agent as an arbitrator does not prevent B from objecting to A's appointment, as an arbitrator, of one who is biased in A's favor.²

If specific individuals are selected as arbitrators by mutual consent, and their qualifications are known to the parties to the submission, the law imposes no actual or further qualifications.³ Even if the parties agree upon one who is unfair and biased,⁴ or on an agent of one of the parties,⁵ or even, it has been said, if the parties agree upon one of the parties to the controversy as arbitrators,⁶ the award when made can not be attacked on the ground of such disqualification.

On the other hand, the parties may have agreed by contract that the arbitrator shall possess certain specific qualifications, and unless they possess such qualifications or unless such provision is waived by the parties, the award may be attacked for lack of such qualifications.⁷ If the lack of qualifications on the part of the arbitrators is not known to one of the parties to the submission,⁸ as in cases in which one of the arbitrators was biased and prejudiced, and incap-

³ Greenville County v. Spartanburg County, 62 S. Car. 105, 40 S. E. 147.

⁴ Bray v. Staples, 149 N. Car. 89, 19 L. R. A. (N.S.) 606, 62 S. E. 780.

¹ Western Assurance Co. v. Hall, 143 Ala. 168, 38 So. 853.

² Western Assurance Co. v. Hall, 143 Ala. 168, 38 So. 853.

³ Mathew v. Ollerton, Comb. 218. Rathven v. Elgin, L. R. 2 H. L. Scot. 535; Western Assurance Co. v. Hall, 143 Ala. 168, 38 So. 853; Robb v.

Brachman, 38 O. S. 423; Walworth County Bank v. Farmers' Loan & Trust Co., 22 Wis. 231.

⁴ Robb v. Brachman, 38 O. S. 423.

⁵ Western Assurance Co. v. Hall, 143 Ala. 168, 38 So. 853.

⁶ Mathew v. Ollerton, Comb. 218.

⁷ Jungheim, Hopkins & Co. v. Foukermann [1909], 2 K. B. 948.

⁸ Kimberley v. Dick, L. R. 13 Eq. 1; Pearson v. Barringer, 109 N. Car. 398, 13 S. E. 942.

able of rendering a fair award,⁹ the award when rendered may be attacked upon the ground of such disqualification unless the party who attacks the award had waived such disqualification. On learning of the disqualification, the parties must act with reasonable promptness, and if with knowledge of the disqualification, the party to the submission elects to proceed with the arbitration, he can not subsequently attack an award thus rendered on the ground of such original disqualification.¹⁰

§ 2536. Notice of hearing. Unless the time and place of the hearing are fixed by the submission, or the parties are otherwise informed thereof, the arbitrators must give notice to both parties of the time and place of their hearings at which evidence will be received by them upon which to base the award.¹ If the two arbitrators who are originally appointed disagree and they appoint a third arbitrator or umpire, notice must be given to the parties to the submission of the time and place of the rehearing before the original arbitrators and such third arbitrator.² If notice of a hearing or of a rehearing is not given, a party who is actually present at such hearing or rehearing can not take advantage of such failure to give notice.³ The parties are not entitled to notice of meetings of the arbitrators at which they consider the evidence which has been adduced by the parties and at which they deliberate upon the award which they are to make.⁴

⁹ *Kimberley v. Dick*, L. R. 13 Eq. 1; *Pearson v. Barringer*, 109 N. Car. 398, 13 S. E. 942.

¹⁰ *United States v. Chicago, R. I. & P. Ry. Co. v. Union Pac. R. Co.*, 254 Fed. 235.

Alabama. *Western Assurance Co. v. Hall*, 143 Ala. 168, 38 So. 853.

Massachusetts. *Doherty v. New Hampshire Fire Ins. Co.*, 224 Mass. 310, 112 N. E. 940.

North Carolina. *Pearson v. Barringer*, 109 N. Car. 398, 13 S. E. 942.

Ohio. *Robb v. Brachman*, 38 O. S. 423.

Wisconsin. *Frankfurth v. Steinmeyer*, 113 Wis. 195, 89 N. W. 148.

¹ *Walker v. Frobisher*, 6 Ves. Jr. 70; *Lutz v. Linthicum*, 33 U. S. (8 Pet.) 165, 8 L. ed. 904; *Jones v. Northern Assurance Co.*, 182 Ky. 701, 207 S. W.

459; *Day v. Hammond*, 57 N. Y. 479, 15 Am. Rep. 522.

² *Connecticut*. *Gaffy v. Hartford Bridge Co.*, 42 Conn. 143.

Illinois. *Alexander v. Cunningham*, 111 Ill. 511.

New Jersey. *Thomas v. West Jersey R. Co.*, 24 N. J. Eq. 567.

New York. *Elmendorf v. Harris*, 23 Wend. (N. Y.) 628, 35 Am. Dec. 587; *Day v. Hammond*, 57 N. Y. 479, 15 Am. Rep. 522.

North Carolina. *Bray v. Staples*, 149 N. Car. 89, 19 L. R. A. (N.S.) 696, 62 S. E. 780.

Virginia. *Coons v. Coons*, 95 Va. 434, 64 Am. St. Rep. 804, 28 S. E. 885.

³ *Rounds v. Aiken Manufacturing Co.*, 58 S. Car. 299, 36 S. E. 714.

⁴ *Ormsby v. Blakewell*, 7 Ohio 98.

§ 2537. Hearing. The parties to the submission have a right to be present at the hearings of the arbitrators at which evidence is offered which may affect the award.¹ At the same time an award otherwise valid can not be attacked on the ground that immaterial evidence was submitted by one party to the arbitrators in the absence of the other, and without notice to him.² The fact that an award was rendered before one party was given an opportunity to submit his evidence, is a defense to an action at law on such award.³

The submission, when taken in connection with the surrounding facts and circumstances, may show, however, that the arbitrators are to render their award upon facts known to them or to be discovered by them. In such cases it is not necessary that the arbitrator should grant hearings at which the parties are to offer evidence, and the award can not be attacked for failure to hold such hearings.⁴ This intention may be indicated by the express language of the submission,⁵ or it may be indicated by the fact that the matter in dispute involves expert knowledge and that the arbitrators are selected for such expert knowledge.⁶ The fact that arbitrators or appraisers who are to determine the value of a public utility, examined the books of such public utility without the consent of the adversary party and in the absence of its representatives, does not render the award invalid.⁷ If the parties began the introduction of their evidence under a mistake as to which contract controlled, and subsequently they sent the true contract to the arbi-

¹ **England.** *Lonsdale v. Littledale*, 2 Ves. Jr. 451.

United States. *Lutz v. Linthicum*, 33 U. S. (8 Pet.) 165, 8 L. ed. 904.

Kentucky. *Jones v. Northern Assurance Co.*, 182 Ky. 701, 207 S. W. 459.

Maine. *Small v. Trickey*, 41 Me. 507, 66 Am. Dec. 255.

North Carolina. *Bray v. Staples*, 149 N. Car. 89, 19 L. R. A. (N.S.) 696, 62 S. E. 780.

² *Whitney Co. v. Church*, 91 Conn. 684, 101 Atl. 329.

³ *Meloy v. Imperial Land Co.*, 163 Cal. 99, 124 Pac. 712.

⁴ *Bangor Savings Bank v. Niagara Fire Ins. Co.*, 85 Me. 68, 35 Am. St. Rep. 341, 20 L. R. A. 650, 26 Atl. 991; *Ham-*

ilton v. Phoenix Ins. Co., 106 Mass. 395; *Ormsby v. Bakewell*, 7 Ohio, 98; *Canfield v. Watertown Fire Ins. Co.*, 55 Wis. 419, 13 N. W. 252; *Eau Claire v. Eau Claire Water Co.*, 137 Wis. 517, 119 N. W. 555.

⁵ *Hamilton v. Phoenix Ins. Co.*, 106 Mass. 395; *Canfield v. Watertown Fire Ins. Co.*, 55 Wis. 419, 13 N. W. 252.

⁶ *Bangor Savings Bank v. Niagara Fire Ins. Co.*, 85 Me. 68, 35 Am. St. Rep. 341, 20 L. R. A. 650, 26 Atl. 991; *Ormsby v. Bakewell*, 7 Ohio, 98; *Eau Claire v. Eau Claire Water Co.*, 137 Wis. 517, 119 N. W. 555.

⁷ *Omaha v. Omaha Water Co.*, 218 U. S. 180, 54 L. ed. 991, 48 L. R. A. (N.S.) 1084.

trators, together with other evidence, the fact that the arbitrators refused to give another hearing does not render the award invalid.⁶

If the parties fail to offer evidence upon a question submitted to the arbitrators, they can not subsequently complain because the arbitrators failed to determine such question.⁶

§ 2538. Evidence. As a general rule, the admission by the arbitrators, at the hearing of evidence which would have been inadmissible in an action at law or a suit in equity as immaterial or incompetent, does not of itself render the award invalid if it appears from the entire proceedings that the arbitrators decided the issue which was submitted to them by the parties.¹ As a general rule, on the other hand, the exclusion of admissible, material, and non-cumulative evidence, while it apparently did not affect the award at law, justifies a court of equity in setting the award aside and in preventing its enforcement.² This rule applies, however, only when the evidence which is excluded is material.³

§ 2539. Method of action of arbitrators. Unless the agreement of the parties shows a contrary intent or the statute which controls provides otherwise, the arbitrators must all act in person.¹ They can not delegate their authority either to a third person or to one of their own number.²

All of the arbitrators must be given an opportunity to join in the deliberations;³ and they all must join unless the circumstances are such that an award may be rendered by a majority of the arbitrators and one of the arbitrators refuses absolutely to take part in the deliberations,⁴ or abandons his position of arbitrator because of his disagreement with the remaining arbitrators.⁵

⁶ *Chicago, R. I. & P. Ry. Co. v. Union Pac. R. Co.*, 254 Fed. 235.

⁶ *Hannevig v. Sutherland*, 256 Fed. 445.

¹ *Johnson v. Noble*, 13 N. H. 286, 38 Am. Dec. 485.

² *Nickalls v. Warren*, 6 Q. B. 615; *Halstead v. Seaman*, 82 N. Y. 27, 37 Am. Rep. 530; *Canfield v. Watertown Fire Ins. Co.*, 55 Wis. 419, 13 N. W. 252.

³ *Chicago, R. I. & P. Ry. Co. v. Union Pac. R. Co.*, 254 Fed. 235.

¹ *Proctor v. Williams*, 8 C. B. (N.S.) 386; *David Harley Co. v. Barnefield*, 22 R. I. 267, 47 Atl. 544.

² *Proctor v. Williams*, 8 C. B. (N.S.) 386; *David Harley Co. v. Barnefield*, 22 R. I. 267, 47 Atl. 544.

³ *Beck v. Jackson*, 1 C. B. (N.S.) 695; *Doherty v. Doherty*, 148 Mass. 367, 19 N. E. 352.

⁴ *Doherty v. Doherty*, 148 Mass. 367, 19 N. E. 352.

⁵ *Maynard v. Frederick*, 61 Mass. (7 Cush.) 247; *State v. Tucker*, — N. D. —, 166 N. W. 820.

§ 2540. Unanimity of action. In the absence of a provision in the submission or in the controlling statute to the contrary, the action of the arbitrators must be unanimous if the arbitration involves a matter of private interest.¹ In matters of public interest, however,² the decision of a majority of the arbitrators is sufficient. If a city exercises its option to buy waterworks at a valuation to be determined by three appraisers, one selected by each of the parties, and the third selected by the two thus selected, the transaction is a matter of public rather than of private interest, and the action of a majority of the appraisers is therefore sufficient.³

The submission may, however, provide for a decision by a majority of the arbitrators.⁴ The original rights of parties who have entered into an arbitration agreement are not affected by a judgment setting aside an award because the arbitrators acted without giving the necessary notice to the parties.⁵ When the court, in setting aside an award, directs the case to be referred back to the arbitrators for another award, neither party can afterward withdraw from the arbitration without consent of the court.⁶ On setting aside an award made under a submission in pais, the court can not properly recommit the controversy to the same or any other arbitrators.⁷ Such a provision may be made by the

¹ **England.** *United Kingdom Mutual Steamship Assurance Association v. Houston* [1896], 1 Q. B. 567.

United States. *Hobson v. McArthur*, 41 U. S. (16 Pet.) 182, 10 L. ed. 930.

Massachusetts. *Washburn v. White*, 197 Mass. 540, 84 N. E. 106.

New York. *Green v. Miller*, 6 Johns. (N. Y.) 39, 5 Am. Dec. 184.

Ohio. *Rhoades v. Baird*, 16 O. S. 573.

Contra, in South Carolina, *Lockart v. Kidd*, 2 Mills Const. Rep. (S. Car.) 216; *Greenville County v. Spartanburg County*, 62 S. Car. 105, 40 S. E. 147 (obiter, as the matter in this case was one of public interest).

² *Grindley v. Barker*, 1 Bos. & P. 229; *Columbia v. Cauca Co.*, 190 U. S. 524, 47 L. ed. 1159; *Omaha v. Omaha Water Co.*, 218 U. S. 180, 54 L. ed. 991, 48 L. R. A. (N.S.) 1084; *People v. Nichols*, 52 N. Y. 478, 11 Am. Rep. 734; *Wheeling Gas Co. v. Wheeling*, 8 W. Va. 320.

³ *Omaha v. Omaha Water Co.*, 218 U. S. 180, 54 L. ed. 991, 48 L. R. A. (N.S.) 1084.

⁴ **England.** *Moseley v. Simpson*, L. R. 16 Eq. 226.

United States. *Hobson v. McArthur*, 41 U. S. (16 Pet.) 182, 10 L. ed. 930.

Kansas. *Fish v. Vermillion*, 76 Kan. 348, 78 Pac. 811.

Massachusetts. *Washburn v. White*, 197 Mass. 540, 84 N. E. 106.

Pennsylvania. *Ralston v. Ihmsen*, 204 Pa. St. 588, 54 Atl. 365.

Wisconsin. *Darge v. Horicon Iron Mfg. Co.*, 22 Wis. 691.

⁵ *Bray v. Staples*, 149 N. Car. 89, 19 L. R. A. (N.S.) 696, 62 S. E. 780.

⁶ *McCann v. Alaska Lumber Co.*, 71 Wash. 331, 43 L. R. A. (N.S.) 711, 128 Pac. 663.

⁷ *Raleigh Coal & Coke Co. v. Mankin*, — W. Va. —, 97 S. E. 299.

See also, *State v. Tucker*, — N. D. —, 166 N. W. 820.

express language of the submission⁸ or it may be implied, as from a provision for the choice of a third arbitrator or an umpire in case of disagreement between the two originally selected.⁹

§ 2541. Award—General nature. The award has been spoken of as if it were a contract between the parties, entered into by their authorized agents, the arbitrators.¹ It is true that the parties enter into arbitration through the contract of submission, and that they select arbitrators to decide the questions in dispute, but the arbitrators are not the agents of either party,² nor are they in a proper sense the agents of both of the parties. Their position is quasi-judicial in its nature, and the award is more like a judgment than like a contract.³

§ 2542. Award—Conformity to submission. The submission is the charter of authority for the arbitrators,¹ and the award must conform to the submission.²

⁸ *Moseley v. Simpson*, L. R. 16 Eq. 226; *Washburn v. White*, 197 Mass. 540, 84 N. E. 106; *Ralston v. Ihmsen*, 204 Pa. St. 588, 54 Atl. 365.

⁹ *Hobson v. McArthur*, 41 U. S. (16 Pet.) 182, 10 L. ed. 930; *Fish v. Vermillion*, 70 Kan. 348, 78 Pac. 811; *Darge v. Horicon Iron Mfg. Co.*, 22 Wis. 691.

¹ *Blood v. Bates*, 31 Vt. 147.

² *Lantry Contracting Co. v. Atchison, T. & S. F. Ry. Co.*, 102 Kan. 799, 172 Pac. 527.

See §§ 2530, 2550.

³ *Olston v. Oregon Water Power Co.*, 52 Or. 343, 20 L. R. A. (N.S.) 915, 96 Pac. 1005 (obiter).

See also to the same effect:

England. *Cummings v. Heard*, L. R. A. Q. B. 669.

Florida. *Ogden v. Baile*, — Fla. —, 75 So. 794.

North Carolina. *Williams v. Branning Mfg. Co.*, 153 N. Car. 7, 138 Am. St. Rep. 637, 31 L. R. A. (N.S.) 679, 68 S. E. 902.

Ohio. *Corrigan v. Rockefeller*, 67 O. S. 354, 66 N. E. 95.

Pennsylvania. *Starr v. McNeal*, 253 Pa. St. 98, 97 Atl. 943.

Wisconsin. *Eau Claire v. Eau Claire Water Co.*, 137 Wis. 517, 119 N. W. 555.

See also, § 2550.

¹ *Bailey v. Triplett*, — W. Va. —, 98 S. E. 166.

² **England.** *Taylor v. Shuttleworth*, 6 Bing. N. C. 277; *Quebec Improvement Co. v. Quebec Bridge Co.* [1908], A. C. 217.

United States. *Colombia v. Cauca Co.*, 190 U. S. 524, 47 L. ed. 1159.

Illinois. *Snead v. Merchants' Loan & Trust Co.*, 225 Ill. 442, 9 L. R. A. (N.S.) 1007, 80 N. E. 237.

Kansas. *Swisher v. Dunn*, 89 Kan. 412, 787, 45 L. R. A. (N.S.) 810, 813, 131 Pac. 571, 132 Pac. 832.

Massachusetts. *Estes v. Mansfield*, 88 Mass. (6 All.) 69.

West Virginia. *Raleigh Coal & Coke Co. v. Mankin*, — W. Va. —, 97 S. E. 299; *Bailey v. Triplett*, — W. Va. —, 98 S. E. 166.

Wisconsin. *Donaldson v. Buhlman*, 134 Wis. 117, 113 N. W. 638, 114 N. W. 431.

"The agreement of submission entered into by the parties is the author-

If the parties to the submission agree upon the method which is to be used for the purpose of ascertaining the fact in dispute, the arbitrators can not ignore such provision, and resort to a different method for ascertaining such fact.³ If the submission of a con-

ity for the arbitrators and the umpire to act. Without that, anything that they do is entirely without authority. It is their charter of authority, and can it be said that, where matters in dispute are submitted to them for determination, they have authority to decide that dispute in any manner which they see fit, in utter disregard of the provisions of the agreement of submission? Where the parties themselves agree upon the manner of the submission of the dispute, and upon what shall be considered by the arbitrators, and what shall be done by them in order to a settlement of the dispute, it is part of the agreement, and is as binding upon the arbitrators as any other part, and they have no authority to make an award in violation of, or not in accordance with, such stipulations. Such an award can not be binding upon the parties, and would be entirely beyond the authority given to the arbitrators." *Bailey v. Triplett*, — W. Va. —, 98 S. E. 166.

³ *Bailey v. Triplett*, — W. Va. —, 98 S. E. 166.

"In *Goff v. Goff*, 78 W. Va. 423, 89 S. E. 9, which was a cause submitted to arbitration for the purpose of determining a disputed line, it was held that, where the agreement of submission provided that the arbitrators should determine the line by the deeds and other evidence deemed necessary to enable them to arrive at a just and fair settlement, they were not authorized to determine such dispute in such manner as they may deem just and fair, but that they must determine it in accordance with the title papers of the parties and the evidence submitted to them, as provided in the order of

submission. Similar holdings are found in the cases of *Mathews v. Miller*, 25 W. Va. 817; *Austin v. Clark*, 8 W. Va. 236; *Dunlap v. Campbell*, 5 W. Va. 195, and *Swan v. Deem*, 4 W. Va. 368. We are clearly of the opinion that the agreement of the parties as to the methods to be pursued by the arbitrators and the umpire in locating the disputed line is as binding upon them in doing the work as any other part of the agreement, and that the parties could not be bound by any award not made in accordance therewith. There is no real dispute in this case but that the conclusion adopted by the judgment of the court is the only one which can be reached by following the directions given in the agreement of submission; but one of the arbitrators does not agree that that is the proper way to locate the disputed line, and declined to agree to it for that reason. This necessitated the appointment of the umpire. The umpire was likewise of the opinion that the agreement made by the parties as to how the line should be fixed and determined was not the proper way for deciding it, but he, as before stated, in addition to finding this, also found as an alternative award that, if the agreement in this particular was binding upon the arbitrators, then the line finally established by the circuit court of Mineral county is the true division line. Much evidence was taken tending to show that the other line is the correct one. This evidence was all improper and immaterial. There is no showing that any fraud was practiced upon either of the parties in entering into the agreement to submit the question to arbitrators. They were anxious to get the

troversy over the value of timber requires the arbitrator to give an equal value to standing and lying timber, and to estimate the quantity thereof, the failure of the arbitrators to comply with the submission in those respects renders the award invalid.⁴ If the submission provides for the determination of the true meanings of plans and specifications, it does not authorize the arbitrator or appraiser to ignore the terms of the building contract, and to render his decision by including provisions not in the contract, and excluding provisions which are contained therein.⁵ If the submission of the partition of land provides that neither owner shall have an easement or right of way across the land allotted to the other if it is possible to avoid it, an award which grants a right of way which is not necessary, is invalid.⁶

The failure of the arbitrators to comply with the terms of the submission, renders the whole award invalid, if it is an entire award, and not merely that particular part thereof which is at variance with the submission.⁷ If the award is so made that the

line in dispute between them settled, and without knowing just where the same would run on the ground they, from the title papers and the information they possessed, freely and fairly entered into the agreement. The policy of the law is to settle disputes by arbitration, and when contending parties submit a matter of this character, or of any other character, to arbitrators for the purpose of determining their differences, and agree upon the method to be pursued by such arbitrators, and there is no fraud or mistake in the making of such agreement, an award made thereunder will be final and binding upon the parties. On the other hand, an award made in disregard of the agreement entered into, even though it may be the opinion of the arbitrators that such is the correct solution of the matters submitted to them, will be set aside as having no authority for its basis." *Bailey v. Triplett*, — W. Va. —, 98 S. E. 166.

⁴ *Raleigh Coal & Coke Co. v. Mankin*, — W. Va. —, 97 S. E. 299.

⁵ *Snead v. Merchants' Loan & Trust Co.*, 225 Ill. 442, 9 L. R. A. (N.S.) 1007, 80 N. E. 237.

⁶ *Frankfurth v. Steinmeyer*, 113 Wis. 195, 89 N. W. 148.

⁷ *England. Skipworth v. Skipworth*, 9 Beav. 135; *Quebec Improvement Co. v. Quebec Bridge & Ry. Co.* [1908], A. C. 217.

United States. DeGroot v. United States, 72 U. S. (5 Wall.) 419, 18 L. ed. 700.

Illinois. Sherfy v. Graham, 72 Ill. 158; *Alfred v. Kankakee & S. W. R. Co.*, 92 Ill. 609; *Snead v. Merchants' Loan & Trust Co.*, 225 Ill. 442, 9 L. R. A. (N.S.) 1007, 80 N. E. 237.

Kansas. Swisher v. Dunn, 89 Kan. 412, 787, 45 L. R. A. (N.S.) 810, 813, 131 Pac. 571, 132 Pac. 832.

Massachusetts. Estes v. Mansfield, 88 Mass. (6 All.) 69.

New Hampshire. Thrasher v. Haynes, 2 N. H. 429.

West Virginia. Raleigh Coal & Coke Co. v. Mankin, — W. Va. —, 97 S. E. 299; *Bailey v. Triplett*, — W. Va. —, 98 S. E. 166.

various items are severable, the valid items may be enforced, although the excessive items are rejected;⁸ and an award for a gross sum may be severed if it shows on its face the items of which it is made up.⁹

If, however, the parties to the submission have not offered evidence on one or more of the questions, included in the submission, the fact that the arbitrators do not determine such questions does not render the award invalid.¹⁰

A party to a submission, who has waived the failure of the arbitrators to conform to the terms of the submission,¹¹ as by an admission of record,¹² can not thereafter attack the award because of such variance between the award and the submission.

§ 2543. Completeness and finality of award. The purpose of the parties in submitting their controversy to arbitration, is to terminate such controversy; and an award which leaves any material part of the controversy for future arbitration or for litigation, fails to perform the terms of the submission substantially. The award must be complete and it must not omit any material questions which are included in the submission.¹ If provision is made for determining the value of property by arbitration, an award which omits a material portion of such property is insufficient.² The same reasons that require an award to be definite and to be complete, require it to be final as between the parties.³

§ 2544. Certainty of award. The intention of the parties in submitting to an award, is to end the controversy between them

⁸ *Colombia v. Cauca Co.*, 190 U. S. 524, 47 L. ed. 1159; *Chase v. Strain*, 15 N. H. 535; *Donaldson v. Buhlman*, 134 Wis. 117, 113 N. W. 638, 114 N. W. 431.

⁹ *Colombia v. Cauca Co.*; 190 U. S. 524, 47 L. ed. 1159.

¹⁰ *Hannevig v. Sutherland*, 256 Fed. 445.

¹¹ *Williams v. Branning Mfg. Co.*, 153 N. Car. 7, 31 L. R. A. (N.S.) 679, 68 S. E. 902.

¹² *Williams v. Branning Mfg. Co.*, 153 N. Car. 7, 31 L. R. A. (N.S.) 679, 68 S. E. 902.

¹ *Stone v. Phillips*, 4 Bing. N. C. 37; *Carnochan v. Christie*, 24 U. S. (11

Wheat.) 446, 6 L. ed. 516; *Kabatchnick v. Hoffman*, 226 Mass. 221, 115 N. E. 309; *Stubbings v. McGregor*, 86 Wis. 248, 56 N. W. 641.

² *Stubbings v. McGregor*, 86 Wis. 248, 56 N. W. 641.

³ *England*. *Hewitt v. Hewitt*, 1 Q. B. 110.

United States. *Carnochan v. Christie*, 24 U. S. (11 *Wheat.*) 446, 6 L. ed. 516.

Minnesota. *Hoit v. Berger-Critenden Co.*, 81 Minn. 356, 84 N. W. 48.

North Carolina. *Clark Millinery Co. v. National Union Fire Ins. Co.*, 160 N. Car. 130, 75 S. E. 944.

Wisconsin. *Frankfurth v. Steinmeyer*, 113 Wis. 195, 89 N. W. 148.

which they thus agree to submit. The award, accordingly, must be so definite and certain that it will conclude such controversy and that it will not substitute for the original controversy a new controversy as to the scope and meaning of the award.¹ If the controversy concerns money owed by one in part in a representative capacity and in part upon his personal liability, an award which does not distinguish between the amounts owed in these different capacities is insufficient.² If the controversy in part involves the question whether deeds which are absolute on their face are intended by way of security or not, an award which leaves such question open for future arbitration or litigation, is insufficient.³ If the dispute involves the amount due for work and labor, an award which provides for payment of the money due for work by the piece, as well as work by the day, without any finding as to the amount of work thus done, or the amount due thereon, is invalid.⁴ An award which provides that one party shall deliver to the other all the books, papers, and accounts, together with a small chest and wearing apparel not otherwise disposed of on another debt, which he has on hand, belonging to the adversary party, is not sufficient.⁵

At the same time an award is to be construed fairly and reasonably, and not with technical strictness for the purpose of defeating it, if possible. An award, accordingly, is valid if it is reasonably certain, even though every detail may not be stated with literal minuteness.⁶ It is said that the test for the certainty of an award is the same as that for certainty of a contract.⁷ An award is suf-

¹ England. *Price v. Popkin*, 10 Ad. & El. 139.

United States. *Lyle v. Rodgers*, 18 U. S. (5 Wheat.) 394, 5 L. ed. 117; *Carnochan v. Christie*, 24 U. S. (11 Wheat.) 446, 6 L. ed. 516.

Illinois. *Tucker v. Page*, 69 Ill. 179.

New York. *Perkins v. Giles*, 50 N. Y. 228.

North Carolina. *Ball-Thrash Co. v. McCormack*, 172 N. Car. 677, 90 S. E. 916.

Ohio. *Thomas v. Molier*, 3 Ohio. 266.

² *Lyle v. Rodgers*, 18 U. S. (5 Wheat.) 394, 5 L. ed. 117.

³ *Lyle v. Rodgers*, 18 U. S. (5 Wheat.) 394, 5 L. ed. 117.

⁴ *Pope v. Brett*, 2 Saunders, 292.

⁵ *Thomas v. Molier*, 3 Ohio, 266.

⁶ England. *Mays v. Cannell*, 15 C. B. 107.

United States. *Hannevig v. Sutherland*, 256 Fed. 445.

Kentucky. *Burnett v. Miller*, 174 Ky. 91, 191 S. W. 659.

Michigan. *Pigott-Healy Const. Co. v. H. A. Jones Real Estate Co.*, 201 Mich. 102, 166 N. W. 852.

Wisconsin. *Bancroft v. Grover*, 23 Wis. 463, 99 Am. Dec. 195.

⁷ *Hannevig v. Sutherland*, 256 Fed. 445; *Bancroft v. Grover*, 23 Wis. 463, 99 Am. Dec. 195.

ficient which furnishes the means of determining what is to be done thereunder, although it may not provide specifically what is to be done as performance of such award except by such reference.⁸ If the award provides for the payment of a certain amount subject to the discharge of all liens upon certain property, such award is sufficient, although the liens are not described, since the place at which such liens are to be filed is fixed by law and since in the particular case the time for filing liens had expired and the amounts of the liens could thus be ascertained of record.⁹ A finding "that the note of M belongs to both parties," is sufficiently certain if such note can be certified by extrinsic evidence.¹⁰ An award of a certain sum of money to one party is sufficient, although it does not provide in express terms that the adversary party is to pay such sum of money.¹¹

§ 2545. Form and signature of award. An award need not be made in any specific form; and it may even be made orally,¹ unless the terms of submission require a written award,² or the statute which controls specifically requires a written award,³ or the arbitration deals with a subject-matter,⁴ such as land,⁵ which, under the Statute of Frauds, must be proved by written evidence.

If the award is in writing, and signed by the arbitrators, and the validity of the award is conceded, oral evidence can not be received to show what was included by the arbitration proceedings, and by the award,⁶ especially if the subject-matter involves realty or some interest therein.⁷

If no specific form of the award is required, it is, of course, not necessary that the award should be signed. If the submission pro-

⁸ Lutz v. Linthicum, 33 U. S. (8 Pet.) 165, 8 L. ed. 904; Pigott-Healy Const. Co. v. H. A. Jones Real Estate Co., 201 Mich. 102, 166 N. W. 852; Eureka Pipe Line Co. v. Simms, 62 W. Va. 628, 59 S. E. 618; Bancroft v. Grover, 23 Wis. 463, 99 Am. Dec. 195.

⁹ Pigott-Healy Const. Co. v. H. A. Jones Real Estate Co., 201 Mich. 102, 166 N. W. 852.

¹⁰ Bancroft v. Grover, 23 Wis. 463, 99 Am. Dec. 195.

¹¹ Lutz v. Linthicum, 33 U. S. (8 Pet.) 165, 8 L. ed. 904.

¹ Cocks v. Macclefield, Dyer, 218b; Lilley v. Tuttle, 52 Colo. 121, 117 Pac. 896; Moore v. Collins, 24 N. M. 235, 173 Pac. 547; Deal v. Thompson, 51 Okla. 256, 151 Pac. 856.

² Thompson v. Mitchell, 35 Me. 281.

³ Darling v. Darling, 16 Wis. 644.

⁴ Philbrick v. Preble, 18 Me. 255, 36 Am. Dec. 718.

⁵ Philbrick v. Preble, 18 Me. 255, 36 Am. Dec. 718.

⁶ Cox v. Heuseman. — Va. —, 97 S. E. 778.

⁷ Cox v. Heuseman, — Va. —, 97 S. E. 778.

vides that the award must be signed, such formality is, of course, necessary.⁸ It has even been held that the fact that the submission requires the award to be in writing, shows that the award must be signed.⁹ While it is quite likely that the submission taken as a whole may show in such cases that the parties intend to insist upon the signature of the arbitrators, it would seem dangerous to lay down an arbitrary rule to the effect that a provision in the submission for a written award, necessarily requires it to be signed.

If a majority of the appraisers can render the award, it is not necessary that all should sign the award.¹⁰ It is said that the award must show on its face that the arbitrators had been unable to agree in order to justify the court in upholding an award which is signed by less than all;¹¹ and that the fact that the arbitrators or appraisers were appointed with power to select a third arbitrator to settle differences between them, and the fact that the award was signed by such third arbitrator and by one of the two original arbitrators, does not show that a matter of difference had arisen between them.¹²

§ 2546. Effect of submission as bar to action. While the early authors seem to indicate that a submission was a bar to the original action even before award,¹ the opposite rule became so at a comparatively early period of the classic common law; and it became thoroughly established in spite of occasional protests,² that a submission of a matter between individuals was revocable at the will of either party with or without any reason, so that a submission without an award could not be pleaded as a defense to the original cause of action.³ Revocation of the submission has been

⁸ *Thaire v. Thaire*, 2 Rolle, 243.

⁹ *State v. Gurnee*, 14 Kan. 111.

¹⁰ *O'Neill v. Clark*, 57 Neb. 760, 78 N. W. 256.

¹¹ *Shepard v. Springfield Fire & Marine Ins. Co.*, 41 R. I. 403, 104 Atl. 18.

¹² *Shepard v. Springfield Fire & Marine Ins. Co.*, 41 R. I. 403, 104 Atl. 18.

¹ *Statham's Abridgment, Arbitrement*, 14; *Fitzherbert's Grand Abridgment, Arbitrement*, 26.

² *Mills v. Bayley*, 2 H. & C. 36.

³ *England. Mills v. Bayley*, 2 H. & C. 36.

United States. Aktieselskabet Korn- og Foderstof Kompagniet v. Rederiaktiebolaget Atlanten, 250 Fed. 935.

Delaware. Fooks v. Lawson, 1 Marv. (Del.) 115, 40 Atl. 661.

Iowa. Harrison v. Hartford Fire Ins. Co., 112 Ia. 77, 83 N. W. 820.

Minnesota. Minneapolis & St. Paul Ry. Co. v. Cooper, 59 Minn. 290, 61 N. W. 143.

Missouri. Mecartney v. Guardian Trust Co., 274 Mo. 224, 202 S. W. 1131.

permitted, though in bad faith and just before the award was about to be made.⁴

The fact that an agreement for submitting to arbitration provides expressly that such agreement is to be irrevocable,⁵ and that value is given for such provision,⁶ does not prevent either party from avoiding such submission at will, as far as concerns his right to bring an action on the original cause of action.

Whatever the rule may be in case of arbitration between individuals, it is said that a submission of a dispute to which a government is a party can not be revoked, at least after the discussions have been disclosed and after one party has received a large amount of property thereunder.⁷ The reason for the possible distinction between cases of this sort and cases of private arbitration is that in cases of private arbitration resort may be had to litigation, while in a case of this sort the alternative is a resort to diplomatic demand.⁸

An agreement for an appraisalment, as distinguished from arbitration, is irrevocable.⁹

A submission under seal can not be revoked orally,¹⁰ and it has been said that the same rule applies to a submission in writing.¹¹

While arbitration may be made a condition precedent by a provision in the original contract,¹² such effect will not be given to such a provision unless arbitration is made a condition precedent, either by the express language of the contract or by necessary implication.¹³ Accordingly, an arbitration agreement which has

New York. *People v. Nash*, 111 N. Y. 310, 7 Am. St. Rep. 747, 2 L. R. A. 180, 18 N. E. 630.

Tennessee. *Key v. Norrod*, 124 Tenn. 146, 136 S. W. 991.

Vermont. *Sartwell v. Sowles*, 72 Vt. 270, 82 Am. St. Rep. 943, 48 Atl. 11.

Virginia. *Rison v. Moon*, 91 Va. 384, 22 S. E. 165.

⁴ *Green v. Pole*, 6 Bing. 443.

⁵ *Thomas W. Finucane Co. v. Rochester Board of Education*, 190 N. Y. 76, 82 N. E. 737.

⁶ *Thomas W. Finucane Co. v. Rochester Board of Education*, 190 N. Y. 76, 82 N. E. 737.

⁷ *Colombia v. Cauca Co.*, 190 U. S. 524, 47 L. ed. 1159.

⁸ *Colombia v. Cauca Co.*, 190 U. S. 524, 47 L. ed. 1159.

⁹ *Martin v. Vansant*, 99 Wash. 106, 168 Pac. 990.

¹⁰ *Wallis v. Carpenter*, 95 Mass. (13 All.) 19.

¹¹ *Mand v. Patterson*, 19 Ind. App. 619, 49 N. E. 974; *Brown v. Leavitt*, 26 Me. 251; *Mullins v. Arnold*, 36 Tenn. (4 Sneed) 262; *McFarlane v. Cushman*, 21 Wis. 401.

¹² See § 722.

¹³ *Mecartney v. Guardian Trust Co.*, 274 Mo. 224, 202 S. W. 1131; *Flavelle v. Red Jacket Consol. Coal & Coke Co.*, 82 W. Va. 295, 96 S. E. 600.

been abandoned by the parties has no legal effect as far as the original right of action is concerned.¹⁴ If one of the parties is at fault, and the provision for arbitration is not performed by reason thereof, the other party is not bound to enter into another submission.¹⁵ In Pennsylvania, however, it is held that if the agreement for arbitration is a part of the original contract,¹⁶ as in case of a building contract,¹⁷ such agreement is irrevocable.¹⁸

If the submission has been made a rule of court, it is generally irrevocable;¹⁹ and it is occasionally provided by statute that a submission is irrevocable,²⁰ as after final submission to the arbitrators.²¹

The death of either party before award operates as a revocation of a submission,²² except where the submission has been made a rule of court.²³

§ 2547. Effect of submission as basis for recovering damages.

If the covenant for arbitration is not invalid as being a covenant for ousting the jurisdiction of the courts in advance,¹ it is a valid contract between the parties if it possesses the sufficient elements, even though it is not a bar to an action upon the original cause of action. If one of the parties to the submission revokes it, such revocation leaves each party free to make use of the original cause of action or defense, as the case may be, but it also renders the person who breaks such contract of submission liable in damages

¹⁴ *Scott v. Scott*, 183 Ky. 604, 210 S. W. 175.

¹⁵ *Bradbury v. Insurance Co.*, — Me. —, 106 Atl. 862.

¹⁶ *Frederick v. Margwarth*, 221 Pa. St. 418, 18 L. R. A. (N.S.) 1246, 70 Atl. 797.

See also, *McCune v. Lytle*, 197 Pa. St. 404, 47 Atl. 190.

¹⁷ *Frederick v. Margwarth*, 221 Pa. St. 418, 18 L. R. A. (N.S.) 1246, 70 Atl. 797.

¹⁸ This is especially true if a pending action has been discontinued in reliance on the covenant for arbitration. *McCune v. Lytle*, 197 Pa. St. 404, 47 Atl. 190.

¹⁹ *Aitken v. Fernando* [1903], A. C. 200; *Zehner v. Lehigh, etc., Co.*, 187 Pa. St. 487, 67 Am. St. Rep. 586, 41 Atl.

464; *Riley v. Jarvis*, 43 W. Va. 43, 26 S. E. 366; *Turner v. Stewart*, 51 W. Va. 493, 41 S. E. 924.

²⁰ *Harrison v. Hartford Fire Ins. Co.*, 112 Ia. 77, 83 N. W. 820; *Thomas W. Finucane Co. v. Rochester Board of Education*, 190 N. Y. 76, 82 N. E. 737.

²¹ *Thomas W. Finucane Co. v. Rochester Board of Education*, 190 N. Y. 76, 82 N. E. 737.

²² *Gregory v. Boston Safe-Deposit & Trust Co.*, 36 Fed. 408; *Gregory v. Pike*, 94 Me. 27, 46 Atl. 793; *Farmer v. Frey*, 4 McCord (S. Car.), 160.

²³ *Freeborn v. Denman*, 8 N. J. L. 116; *Moore v. Webb*, 53 Tenn. (6 Heisk.) 301; *Wheatley v. Martin*, 33 Va. (6 Leigh.) 62.

¹ See § 721.

to the adversary party.² The difficulty in granting relief under this theory grows out of the fact that the judgment of the court in the litigation based on the original cause of action can not be attacked collaterally,³ and that it must be regarded as conclusive as between the parties.⁴ The injured party is therefore unable to show any damage arising out of the fact that the result reached by the court was erroneous and that a correct result would have been reached by arbitration. If the contract of submission has been performed in part and expenses have been incurred thereunder, the injured party may recover compensation for such expenses.⁵ If nothing has been done under the contract of submission, and no expenses have been incurred, only nominal damages can be recovered.⁶ In some jurisdictions, therefore, a demurrer to the declaration may be sustained, since only nominal damages are shown, though a cause of action is stated.⁷

§ 2548. Effect of award. After an award has been made, and announced, the submission and award cease to be revocable at the arbitrary will of either of the parties thereto;¹ and this rule has been extended to cases in which the award has been determined

² **England.** *Vynior's Case*, 8 Coke, 81b; *Mitchell v. Harris*, 2 Ves. Jr. 129; *Livingston v. RalH*, 5 El. & Bl. 132.

Iowa. *Read v. State Insurance Co.*, 103 Ia. 307, 64 Am. St. Rep. 180, 72 N. W. 665.

Massachusetts. *Nute v. Hamilton Mutual Ins. Co.*, 72 Mass. (6 Gray) 174.

New York. *Haggart v. Morgan*, 5 N. Y. 422, 55 Am. Dec. 350.

Vermont. *Mead v. Owen*, 83 Vt. 132, 74 Atl. 1058.

West Virginia. *Kinney v. Baltimore & Ohio Employes' Relief Association*, 35 W. Va. 385, 15 L. R. A. 142, 14 S. E. 8.

Contra, apparently, *Tattersall v. Groote*, 2 B. & P. 131.

³ See § 1145.

⁴ See §§ 1136 et seq.

⁵ *Smith v. Seitz*, 87 Conn. 678, 89 Atl. 257; *Pond v. Harris*, 113 Mass. 114; *Miller v. Junction Canal Co.*, 53 Barb. (N. Y.) 590; *Hawley v. Hodge*, 7 Vt. 237.

See also, *Union Insurance Co. v. Cen-*

tral Trust Co., 157 N. Y. 633, 44 L. R. A. 227, 52 N. E. 671.

⁶ *Street v. Rigby*, 6 Ves. 815; *Brunsdon v. Board*, 1 Cab. & E. 272; *Munson v. Straits of Dover S. S. Co.*, 99 Fed. 787 [affirmed, *Munson v. Straits of Dover S. S. Co.*, 102 Fed. 926]; *Aktieselskabet Korn-og Foderstof Kompagniet v. Rederiaktiebolaget Atlanten*, 250 Fed. 935.

⁷ *Munson v. Straits of Dover S. S. Co.*, 99 Fed. 787 [affirmed, *Munson v. Straits of Dover S. S. Co.*, 102 Fed. 926].

See on this question, *Tattersall v. Groote*, 2 B. & P. 131.

¹ **United States.** *N. P. Sloan Co. v. Standard Chemical & Oil Co.*, 256 Fed. 451.

Iowa. *Turner v. Hartford Fire Ins. Co.*, — Ia. —, 172 N. W. 166.

Nebraska. *Connecticut Fire Ins. Co. v. O'Fallon*, 49 Neb. 740, 69 N. W. 118; *Schlanbusch v. Schlanbusch*, 102 Neb. 462, 167 N. W. 557.

upon by the arbitrators, and the defeated party, on learning of the result of the arbitration, has sought to revoke his submission.² After the award has been made, the original claim is discharged and no action can be brought thereon,³ except for the specific ground of attack which will be discussed hereafter. While arbitration when complete is usually treated as a discharge of the original cause of action for the purpose of preventing an action thereon, the same principle applies to cases in which it is sought to use as a defense the facts which have already been submitted to arbitration and which have been decided adversely to the party who seeks to make such use of them. Such facts can not be used as a defense,⁴ since the arbitration when complete is conclusive as between the parties, unless it is attacked successfully for some specific ground. Since arbitration is informal in its nature, and since bad faith will not be imputed, it is said that reasonable presumption will be made in favor of the award.⁵ An award can not be attacked for mere difference of opinion on the part either of the defeated party or of the court,⁶ or for irregularities and informalities which do not prevent a fair hearing and award.⁷

§ 2549. Enforcement of award. At common law, award which was not made a rule of court could be enforced by an action at law on the award or by an action on the bond, if a bond to secure performance of the award had been given.¹ Even if a bond to

New Jersey. *Hewitt v. The Lehigh & Hudson River Ry. Co.*, 57 N. J. Eq. 511, 42 Atl. 325.

New York. *Merritt v. Thompson*, 27 N. Y. 225.

Utah. *Bivans v. Utah Lake Land, Water & Power Co.*, — Utah —, 174 Pac. 1126.

West Virginia. *Levy v. Scottish Union & National Ins. Co.*, 58 W. Va. 546, 52 S. E. 449.

² *Carey v. Montgomery County*, 19 Ohio, 246.

Contra, *Butler v. Greene*, 49 Neb. 280, 68 N. W. 496.

³ **England.** *Clegg v. Dearden*, 12 Q. B. 576.

Iowa. *Turner v. Hartford Fire Ins Co.*, — Ia. —, 172 N. W. 166.

Mississippi. *Yarbro v. Purser*, 114 Miss. 75, 74 So. 425.

North Dakota. *Johnsen v. Wineman*, 34 N. D. 116, 157 N. W. 679.

Pennsylvania. *March v. Lukens*, 214 Pa. St. 206, 63 Atl. 427.

West Virginia. *Billmyer v. Hamburg-Bremen Fire Ins. Co.*, 57 W. Va. 42, 49 S. E. 901.

⁴ *Cook v. Gardner*, 130 Mass. 313.

⁵ *Turner v. Hartford Fire Ins. Co.*, — Ia. —, 172 N. W. 166.

⁶ *N. P. Sloan Co. v. Standard Chemical & Oil Co.*, 256 Fed. 451; *Turner v. Hartford Fire Ins. Co.*, — Ia. —, 172 N. W. 166.

⁷ *Bivans v. Utah Lake Land, Water & Power Co.*, — Utah —, 174 Pac. 1126.

¹ *Hodaden v. Harridge*, 2 Saunders, 61; *Nay v. Boston & W. St. R. Co.*, 192

secure performance were given, the action upon such bond was not exclusive.² If the submission was made a rule of court, the remedy by enforcing it through the direct action of the court of which it was made a rule, was not exclusive, but an action might be brought on the award,³ unless the statute under which the award was conducted was so worded as to make such remedy exclusive.⁴ If the submission is made a rule of court, it is generally provided by statute that judgment may be entered upon the award without the necessity of a separate action thereon.⁵ Since the award was regarded as the performance of submission between the parties, equity would give specific performance of an award, if specific performance would have been given upon a contract between the parties containing the same terms and involving the same subject-matter.⁶ The most common example of specific performance of award is naturally found in awards which involve the title to realty or to some interest therein.⁷

§ 2550. Grounds for attacking award. The submission ordinarily provides either expressly or by fair implication that the proceedings before the arbitrators shall be such as to give to each party a fair opportunity for presenting his claims, and that the arbitrators will be fair and impartial.¹ "Also, the law reads into the agreement a covenant to the effect that the proceeding shall be honest and fair; that the statement of the items of damages claimed shall be reasonably specific; that the evidence heard shall possess legal competency and some probative value; that claims made shall be legally competent, and that each party shall have a fair and honest hearing."² An award may be set aside if it is shown that the arbitrators were biased or prejudiced.³ Such bias or prejudice

Mass. 517, 78 N. E. 547; *Dickie Mfg. Co. v. Sound Construction & Engineering Co.*, 92 Wash. 316, 159 Pac. 129.

² *Martin v. Williams*, 13 Johns. (N. Y.) 264.

³ *Hodsden v. Harridge*, 2 Saunders, 61.

⁴ *Booye v. Muth*, 69 N. J. L. 266, 55 Atl. 287.

⁵ *Wilkinson v. Prichard*, 145 Ia. 65, 123 N. W. 964; *In re Burke*, 191 N. Y. 437, 84 N. E. 405.

⁶ *Nickels v. Hancock*, 7 DeG. M. & G. 300; *Omaha v. Omaha Water Co.*,

218 U. S. 180, 54 L. ed. 991, 48 L. R. A. (N.S.) 1084.

⁷ *Hall v. Hardy*, 3 P. Wms. 187; *Omaha v. Omaha Water Co.*, 218 U. S. 180, 54 L. ed. 991, 48 L. R. A. (N.S.) 1084; *Davis v. Harvard*, 15 Serg. & R. 165, 16 Am. Dec. 537.

¹ *Bivans v. Utah Lake Land, Water & Power Co.*, — Utah —, 174 Pac. 1126

² *Bivans v. Utah Lake Land, Water & Power Co.*, — Utah —, 174 Pac. 1126.

³ *Morgan v. Mather*, 2 Ves. Jr. 15; *Insurance Co. v. Hegewald*, 161 Ind. 631,

may be shown affirmatively, or it may be inferred from the fact that the award is clearly shown to be grossly inadequate.⁴ It is not necessary to establish improper or corrupt motives in order to establish bias.⁵ The arbitrators must act in a quasi-judicial capacity, and must act fairly and impartially as between the parties. This is sometimes expressed by saying that they are agents of both parties, although it would be better to say that they are agents of neither, but the informal tribunal to decide between them. In any event, if one of the arbitrators misunderstands his true position, and assumes to act as the agent of one of the parties exclusively, such conduct shows bias or prejudice, even if he acts in this way because he believes that the duties of his position require such attitude on his part.⁶ Since the provision of arbitration is to substitute the judgment of the arbitrators for the judgment of the parties on the one hand, or for the judgment of the court or jury on the other, an award can not be attacked because the judgment of the arbitrators does not coincide with the judgment either of the parties or of the court or jury.⁷ As long as the proceedings of the arbitrators in rendering the award amount to a substantial performance of the terms of the submission, an honest error in judgment on their part does not render the award subject to attack.⁸ On the other hand, a mistake on the part of the arbitrators, which amounts

66 N. E. 902; *Turner v. Hartford Fire Ins. Co.*, — Ia. —, 172 N. W. 166; *Raleigh Coal & Coke Co. v. Mankin*, — W. Va. —, 97 S. E. 299.

⁴ *Turner v. Hartford Fire Ins. Co.*, — Ia. —, 172 N. W. 166; *Rand v. Redington*, 13 N. H. 72, 38 Am. Dec. 475; *Raleigh Coal & Coke Co. v. Mankin*, — W. Va. —, 97 S. E. 299.

⁵ *Lantry Contracting Co. v. Atchison, T. & S. F. Ry. Co.*, 102 Kan. 799, 172 Pac. 527; *Central Union Stock Yards Co. v. Uvalde Asphalt Paving Co.*, 82 N. J. Eq. 246, 87 Atl. 235.

⁶ *Hickman v. Roberts* [1913], A. C. 229; *Lantry Contracting Co. v. Atchison, T. & S. F. Ry. Co.*, 102 Kan. 799, 172 Pac. 527; *Central Union Stock Yards Co. v. Uvalde Asphalt Paving Co.*, 82 N. J. Eq. 246, 87 Atl. 235.

⁷ *England. Morgan v. Mather*, 2 Ves. Jr. 15.

United States. Burchell v. Marsh, 58 U. S. (17 How.) 344, 15 L. ed. 96.

California. Church v. Shanklin, 95 Cal. 626, 17 L. R. A. 207, 30 Pac. 789.

Florida. Johnson v. Wells, 72 Fla. 290, 73 So. 188.

Iowa. Turner v. Hartford Fire Ins. Co., — Ia. —, 172 N. W. 166.

New York. In re Burke, 191 N. Y. 437, 84 N. E. 405.

Utah. Bivans v. Utah Lake Land Water & Power Co., — Utah —, 174 Pac. 1126.

Virginia. Adams v. Tri-City Amusement Co., — Va. —, 98 S. E. 647.

Wisconsin. Donaldson v. Buhlman, 134 Wis. 117, 113 N. W. 638, 114 N. W. 431.

⁸ *Burchell v. Marsh*, 58 U. S. (17 How.) 344, 15 L. ed. 96; *Turner v. Hartford Fire Ins. Co.*, — Ia. —, 172 N. W. 166.

to a non-performance of the terms of the submission, renders the award subject to attack.⁹ If the arbitrators misunderstand the questions submitted to them,¹⁰ as where they misunderstand the time as of which the value of the property is to be ascertained,¹¹ the award is subject to attack. While some courts have advanced this theory that an attack upon an award for mistake can succeed only if the arbitrators admit such mistake,¹² this rule is not entertained by modern authority: and such attack may be made if the mistake is established either by the admission of the arbitrators or by other evidence which clearly establishes the existence of a mistake of this sort.¹³ Since a submission is an agreement to submit to the honest judgment of impartial arbitrators, an award may be attacked successfully because of the fraud of the arbitrators in making the award.¹⁴ Since an award can not be attacked for a mere difference in judgment between the arbitrators and the complaining party or the court,¹⁵ such difference in judgment can not be treated as fraud.¹⁶ Accordingly, the fact that the arbitrators did not give full and complete investigation to every feature of the dispute, is not of itself sufficient to establish fraud.¹⁷

⁹ **Iowa.** *Turner v. Hartford Fire Ins. Co.*, — Ia. —, 172 N. W. 166.

Kansas. *Swisher v. Dunn*, 89 Kan. 412, 787, 45 L. R. A. (N.S.) 810, 813, 131 Pac. 571, 132 Pac. 832.

New Jersey. *Collings Carriage Co. v. German-American Ins. Co.*, 86 N. J. Eq. 53, 97 Atl. 726.

Oregon. *Oregon-Washington R. & Nav. Co. v. Spokane P. & S. Ry. Co.*, 83 Or. 528, 163 Pac. 600, 989.

West Virginia. *Goff v. Goff*, 78 W. Va. 423, 89 S. E. 9.

¹⁰ *Swisher v. Dunn*, 89 Kan. 412, 787, 45 L. R. A. (N.S.) 810, 813, 131 Pac. 571, 132 Pac. 832.

¹¹ *Swisher v. Dunn*, 89 Kan. 412, 787, 45 L. R. A. (N.S.) 810, 813, 131 Pac. 571, 132 Pac. 832.

¹² *Knox v. Simmonds*, 1 Ves. Jr. 369; *Veghete v. Hoagland*, 10 N. J. Eq. 450.

¹³ **Iowa.** *Turner v. Hartford Fire Ins. Co.*, — Ia. —, 172 N. W. 166.

Kansas. *Swisher v. Dunn*, 89 Kan.

412, 787, 49 L. R. A. (N.S.) 810, 813, 131 Pac. 571, 132 Pac. 832.

New Jersey. *Collings Carriage Co. v. German-American Ins. Co.*, 86 N. J. Eq. 53, 97 Atl. 726.

Oregon. *Oregon-Washington R. & Nav. Co. v. Spokane P. & S. Ry. Co.*, 83 Or. 528, 163 Pac. 600, 989.

West Virginia. *Goff v. Goff*, 78 W. Va. 423, 89 S. E. 9.

¹⁴ **England.** *Morgan v. Mather*, 2 Ves. Jr. 15.

United States. *United States v. Farragut*, 89 U. S. (22 Wall.) 406, 22 L. ed. 879.

Michigan. *Hewitt v. Reed City*, 124 Mich. 6, 50 L. R. A. 128, 82 N. W. 616.

Wisconsin. *Donaldson v. Buhlman*, 134 Wis. 117, 113 N. W. 638, 114 N. W. 431.

¹⁵ See note 7 this section.

¹⁶ **Washington.** *National Bank v. Myers*, 104 Kan. 526, 180 Pac. 268.

¹⁷ **Washington.** *National Bank v. Myers*, 104 Kan. 526, 180 Pac. 268.

§ 2551. Methods of attacking award. The common law has always regarded the form rather than the substance; and, accordingly, in actions upon awards, the general rule was that if the proceedings were regular upon their face, the common law would enforce the award and would not recognize the existence of defenses,¹ unless such defense involved the validity of the submission itself,² or the performance of the submission.³ If the arbitrator exceeded the power conferred upon him by the submission,⁴ or, in some jurisdictions, if he acted without notice to the parties,⁵ such defenses could be set up at law in an action upon the award. Advantage could not be taken, at common law, of other defects in the proceedings.⁶

On the other hand, equity refuses to give specific performance of an award, if the circumstances are such that a contract containing the same terms and covering the same subject-matter would not be enforced specifically.⁷ If the defects in the proceedings are of a substantial character so that it is inequitable to permit the award to be enforced, equity will grant affirmative relief against the enforcement of the award.⁸ If the award was rendered through bias of the arbitrators,⁹ or fraud,¹⁰ or manifest mistake which prevented the performance of the award,¹¹ equity enjoins the parties who had reaped the benefit of such bias, fraud or mistake, from enforcing it.

In states in which the Code of Civil Procedure or some analogous statute thereto is in force, permitting equitable defenses to be made in actions at law, it is generally held that defenses may be

¹ *David Harley Co. v. Barnefield*, 22 R. I. 267, 47 Atl. 544; *Meloy v. Dougherty*, 16 Wis. 269.

² *Rice v. Loomis*, 28 Ind. 399.

³ *Hartford Fire Ins. Co. v. Bonner Mercantile Co.*, 44 Fed. 151, 11 L. R. A. 623; *McCord v. McSpaden*, 34 Wis. 541.

⁴ *Hartford Fire Ins. Co. v. Bonner Mercantile Co.*, 44 Fed. 151, 11 L. R. A. 623; *McCord v. McSpaden*, 34 Wis. 541.

⁵ *Elmendorf v. Harris*, 23 Wend (N. Y.) 628, 35 Am. Dec. 587; *North Braddock Borough v. Carey*, 205 Pa. St. 35, 54 Atl. 486.

Contra, *Thorburn v. Barnes*, L. R. 2 C. P. 384.

⁶ *Hartford Fire Ins. Co. v. Bonner Mercantile Co.*, 44 Fed. 151, 11 L. R. A. 623; *Michels v. Western Underwriters' Association*, 120 Mich. 417, 80 N. W. 56;

Billmyer v. Hamburg-Bremen Fire Ins. Co., 57 W. Va. 42, 49 S. E. 901; *Canfield v. Watertown Fire Ins. Co.*, 55 Wis. 419, 13 N. W. 252.

⁷ *Raleigh Coal & Coke Co. v. Mankin*, — W. Va. —, 97 S. E. 299.

⁸ *England*. *Anderson v. Darcy*, 18 Ves. Jr. 447.

Illinois. *White Star Mining Co. v. Hultberg*, 220 Ill. 578, 77 N. E. 327.

Ohio. *Conway v. Duncan*, 28 O. S. 102.

West Virginia. *Raleigh Coal & Coke Co. v. Mankin*, — W. Va. —, 97 S. E. 299.

Wisconsin. *Pettibone v. Perkins*, 6 Wis. 616.

⁹ See § 2535.

¹⁰ See § 2550.

¹¹ See § 2551.

made in actions at law upon awards, although in the absence of such a statute the parties who wished to invoke such defenses would have to seek relief in equity.¹² It was held that under such a statute an award may be attacked in an action at law by the plaintiff,¹³ as by bringing an action upon his original cause of action and setting up the facts on which he relies by way of reply to the answer which sets up the award.¹⁴

§ 2552. Waiver. While the refusal of the arbitrators to consider competent evidence,¹ or irregularities in procedure which prevent a fair and impartial hearing,² may be ground for attacking an award, such defects may be waived by the parties by acquiescing in the continuance of the arbitration proceedings or by taking advantage of the award with full knowledge of the facts.³ If the parties and the arbitrators begin the proceedings under a mistake as to the contract which controls the rights of the parties, the act of the parties in submitting the true contract to the arbitrators and acquiescing in further proceedings, operates as a waiver of such defect.⁴ The fact that the parties, with knowledge of the facts, accept the award, and that a part payment is made thereunder, operates as a waiver.⁵

§ 2553. Liability of arbitrators. An arbitrator acts in a quasi-judicial capacity, and accordingly he is not liable for lack of skill, lack of due care, and the like, although an agent would be liable under similar circumstances. In England and the United States, it is generally held that an arbitrator incurs no personal liability for a lack of due care or skill,¹ or for negligence in performing his functions as arbitrator.² In the United States it is generally said that the arbitrator's position is so much like that of a judge that he is not liable personally, even in case of fraud or willful misconduct on his part.³

¹² *Hartford Fire Ins. Co. v. Bonner Mercantile Co.*, 44 Fed. 151, 11 L. R. A. 623; *Brymer v. Clark*, 20 O. S. 231; *Canfield v. Watertown Fire Ins. Co.*, 55 Wis. 419, 13 N. W. 252; *Contra, Cohn v. Wemme*, 47 Or. 146, 81 Pac. 981.

¹³ *Turner v. Hartford Fire Ins. Co.*, — Ia. —, 172 N. W. 166.

¹⁴ *Turner v. Hartford Fire Ins. Co.*, — Ia. —, 172 N. W. 166.

¹ See § 2538.

² See §§ 2536 et seq.

³ *Chicago, R. I. & P. Ry. Co. v. Union*

Pac. R. Co., 254 Fed. 235; *Ramish v. Marsh*, — Cal. —, 172 Pac. 1100.

⁴ *Chicago, R. I. & P. Ry. Co. v. Union Pac. R. Co.*, 254 Fed. 235.

⁵ *Ramish v. Marsh*, — Cal. —, 172 Pac. 1100.

¹ *Chambers v. Goldthorpe* [1901], 1 K. B. 624; *Hutchins v. Merrill*, 109 Me. 313, 42 L. R. A. (N.S.) 277, 84 Atl. 412.

² *Hutchins v. Merrill*, 109 Me. 313, 42 L. R. A. (N.S.) 277, 84 Atl. 412.

³ *Hoosac Tunnel, Dock & Elevator Co. v. O'Brien*, 137 Mass. 424, 50 Am. Rep. 323.

CHAPTER LXXVI

MERGER

- § 2554. Nature of merger.
- § 2555. Merger in contract of record—In general.
- § 2556. Merger of contract of record in contract of record.
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- § 2570. Merger of fraudulent representations.
- § 2571. Merger by union of inconsistent rights in same party—Marriage of debtor and creditor.
- § 2572. Appointment of debtor as executor.
- § 2573. Sale or bequest of debt to debtor.

§ 2554. **Nature of merger.**.. In most systems of law which have advanced so far that they recognize different degrees in the formality of valid transactions, it is generally assumed that the more formal transaction will operate so as to extinguish all the rights of the parties to it arising out of a prior but less formal transaction which covers the same subject-matter. At Roman law the word which was used to indicate this result involved the simile of eating up.¹ At English law the same idea was expressed by words which involved the simile of drowning. The informal transaction or the contract right of lower rank was said to merge in the more formal

¹ The rule that a right of action was extinguished by bringing an action thereon and carrying it to a certain degree of legal proceedings, was expressed by saying "actio consumitur"; that is, that the right of action was eaten up. Salkowski, Roman Private Law, § 26.

transaction or the contract right of higher rank. By derivation the word "merge" implied a sinking in water so as to drown; and this idea is not infrequently expressed at an earlier period in English words as well as in Latin derivatives, and it is not infrequently said that the original right is drowned in the more formal right or in the contract right of higher rank.² Subject to some of the qualifications set forth later,³ it was well settled at common law that a contract between two parties was merged by a subsequent contract between the same parties which dealt with the same subject-matter, if the second contract was of a higher rank than the first, and if the creditor was not deprived of any pre-existing remedy by such merger.⁴

² "The original contract is drowned in the judgment." *Biddleston v. Whitel*, 1 W. Bl. 506, 3 Burr. 1545.

³ See § 2555 et seq.

⁴ **England.** *Biddleston v. Whitel*, 1 W. Bl. 506, 3 Burr. 1545; *Price v. Moulton*, 10 C. B. 561.

Arkansas. *Hemingway v. Grayling Lumber Co.*, 125 Ark. 400, 188 S. W. 1186.

Indiana. *Rhoades v. Jones*, 92 Ind. 328.

Kansas. *Remington Paper Co. v. Hudson*, 64 Kan. 43, 67 Pac. 636.

Kentucky. *Commonwealth v. Harkness' Administrator*, 181 Ky. 709, 205 S. W. 787.

Maryland. *Packham v. German Ins. Co.*, 91 Md. 515, 80 Am. St. Rep. 461, 50 L. R. A. 828, 46 Atl. 1066.

Minnesota. *Griawold v. Eastman*, 51 Minn. 189, 53 N. W. 542; *Gould v. Svendsgaard*, 141 Minn. 437, 170 N. W. 595.

Missouri. *Barger v. Healy*, 276 Mo. 145, 207 S. W. 499.

New Hampshire. *Labonté v. Lacasse* 78 N. H. (1 Hening) 489, 102 Atl. 540.

New Jersey. *Baker v. Baker*, 28 N. J. L. 13, 75 Am. Dec. 243; *Traflet v. Empire Ins. Co.*, 64 N. J. L. 387, 46 Atl. 204.

New York. *Howes v. Barker*, 3 Johns (N. Y.) 506, 3 Am. Dec. 526.

North Carolina. *Costner v. Fisher*, 104 N. Car. 392, 10 S. E. 526; *Case Mfg. Co. v. Moore*, 144 N. Car. 527, 119 Am. St. Rep. 983, 10 L. R. A. (N.S.) 734, 57 S. E. 213.

Ohio. *McNaughten v. Partridge*, 11 Ohio 223, 38 Am. Dec. 731; *James v. Allen Co.*, 44 O. S. 226, 58 Am. Rep. 821, 6 N. E. 246.

Pennsylvania. *Titus v. Poland Coal Co.*, 263 Pa. St. 24, 106 Atl. 90.

Rhode Island. *Garabedian v. Avedisian*, — R. I. —, 105 Atl. 516.

Tennessee. *Nichols v. Thompson*, 9 Tenn. (1 Yerg.) 151.

Virginia. *Shenandoah Valley Ry. v. Dunlop*, 86 Va. 346, 10 S. E. 239.

Washington. *Carmean v. North American Transportation and Trading Co.*, 45 Wash. 446, 122 Am. St. Rep. 930, 8 L. R. A. (N.S.) 595, 88 Pac. 834; *Denton v. Maple*, 92 Wash. 290, 158 Pac. 1001; *Petri v. Manny*, 99 Wash. 601, 170 Pac. 127.

West Virginia. *Williamson v. Cline*, 40 W. Va. 194, 20 S. E. 917; *French v. McMillion*, 79 W. Va. 639, L. R. A. 1917D, 228, 91 S. E. 538.

Wisconsin. *Borchert v. Skidmore Land Co.*, 168 Wis. 523 [sub nomine, *Borchert v. Coons*, 171 N. W. 70].

For merger of rights and defenses, including questions of res adjudicata, see also, *National Foundry & Pipe*

Merger, as distinguished from discharge by voluntary agreement and the like,⁵ did not depend in the least upon the intention of the parties that such result should be accomplished. In some cases the intention of the parties was ignored, and in others it was, no doubt, defied.

As has been said before,⁶ the so-called contracts at common law were divided in the first instance into the formal and the simple, and the formal contracts were in turn divided into the contracts of record and the contracts under seal. In applying the general principle, we find, as we may expect, that the simple contract is always merged in a subsequent formal contract between the same parties, covering the same subject-matter.⁷ We would naturally expect to find the sealed contract merge in the contract of record, but the peculiarities of the sealed contract cause some difficulties in reaching this result.⁸

§ 2555. Merger in contract of record—In general. In every system of law enormous importance is usually attached to legal proceedings, and the more primitive the system of law, the greater the importance which is usually attached to the form. Wherever any importance is attached to legal proceedings, it is almost universally held that at some stage of the proceedings the rights of the parties which were the basis of the action in question are extinguished; and the parties are remitted to the rights which they have acquired by reason of such legal proceeding. At Roman law, the stage of the proceedings at which rights were thus extinguished, was the stage which roughly corresponds to our joinder of issue.¹ In the English law, the stage of legal proceedings at which the prior right of action is merged in the right which is acquired by such legal proceeding, is the final judgment. The institution of an action or the prosecution of an action to any stage

Works v. Oconto Water Supply Co., 183 U. S. 216, 46 L. ed. 157 [affirming, 105 Wis. 48, 81 N. W. 125]; Barnett v. Western Assurance Co., 132 Ark. 434 201 S. W. 282; Aiken v. Robinson, 108 La. 267, 32 So. 415; American Trust Co. v. Crescent Ice Co., 143 La. 568, 78 So. 942; Thompson v. Ellsworth, 39 Mich. 719; Young v. Farwell, 165 N. Y. 341, 59 N. E. 143.

⁵ See §§ 2447 et seq.

⁶ See §§ 20 et seq. and § 35.

⁷ See §§ 2558 and 2567.

⁸ See § 2557.

¹ This was the "litis contestatio," and at this stage the original right of action was said to be extinguished "actio consumitur." Czychlarz, Manual of Institutes of Roman Law, § 160 (III); Salkowski, Roman Private Law, § 26.

short of final judgment, does not operate as a merger of the pre-existing right of action.²

§ 2556. Merger of contract of record in contract of record.

Whether a judgment or other contract of record is merged in a subsequent judgment or other contract of record upon the same cause of action, seems to depend, in most jurisdictions, on the question whether the cause of action which is set up in the second action is the original cause of action on which the first judgment was based, or is the judgment which was rendered in the first action. If the cause of action which is set up in the second action is the judgment which was rendered in the original action, the judgment rendered in the second action does not operate as a merger of the judgment rendered in the original action.¹ It has been held, however, that a judgment rendered in an action based on a prior judgment merges such judgment for most purposes² even if the judgment in the first action was rendered by an inferior court.³

If the cause of action which is set up in the second action is the original cause of action, and not the judgment rendered in the first action, the judgment rendered in the second action is held to merge the judgment rendered in the first action;⁴ and if the judgment in the second action is smaller in amount than the judgment rendered in the first action, the judgment creditor's rights are limited by the judgment rendered in the second action, and he can not thereafter enforce the judgment rendered in the first action.⁵

² See § 1137.

¹ In re Williams, 208 N. Y. 32, 46 L. R. A. (N.S.) 719, 101 N. E. 853; Springs v. Pharr, 131 N. Car. 191, 92 Am. St. Rep. 775, 42 S. E. 590.

See also, Jackson v. Shaffer, 11 Johns. (N. Y.) 513; Batten v. Lowther, 74 W. Va. 167, 81 S. E. 821.

² Gould v. Hayden, 63 Ind. 443; Bertram v. Waterman, 18 Ia. 529. A judgment refusing to revive a prior judgment is a finality as to the effect thereof. Perkins v. Peterson, — Colo. —, 185 Pac. 660.

³ Andrews v. Smith, 9 Wend. (N. Y.) 53 (each judgment rendered in justice's court).

⁴ Price v. First National Bank, 62 Kan. 735, 84 Am. St. Rep. 419, 64 Pac. 637; Cummins v. Mullins, 183 Ky. 666, 210 S. W. 170. (If inconsistent judgments are rendered on same contract and between same parties, the second controls.) Johnson v. Hesser, 61 Neb. 631, 85 N. W. 894; Barth v. Loeffelholz, 108 Wis. 562, 84 N. W. 846.

The first judgment will not sustain a plea of res adjudicata. Johnson v. Hesser, 61 Neb. 631, 85 N. W. 894.

⁵ Price v. Bank, 62 Kan. 735, 84 Am. St. Rep. 419, 64 Pac. 637; Barth v. Loeffelholz, 108 Wis. 562, 84 N. W. 846.

If a judgment has been rendered upon a cause of action in one state, and an action is brought thereafter in another state upon the judgment rendered in the first state, and a judgment is recovered in such action in the second state, it is generally held that such second judgment does not operate as a merger of the first judgment.⁶ The judgment creditor may bring an action thereafter upon the first judgment in the state in which it was rendered,⁷ or in a third state.⁸ The rendition of the judgment in the second state does not affect the right of an attorney to a lien upon such judgment as rendered in the first state.⁹

§ 2557. Merger of specialty in contract of record. At common law, an instrument under seal was not discharged, even by performance, unless the instrument itself was canceled; that is, unless the seal was torn off or the instrument was mutilated in some way so that it ceased to be the formal obligation which it was originally.¹ Conversely, at the early law, the accidental destruction of the seal operated as a discharge of the sealed contract without any regard to the intention of the parties.² Accordingly, it was held at the early law that a judgment upon a sealed contract did not operate as a merger thereof, but that if an action were brought subsequently upon the same instrument, a plea that judgment had once been rendered thereon was insufficient,³ especially if the judgment was that of an inferior court,⁴ unless the sealed instrument had been brought into court and had been canceled. This devotion to form as distinguished from substance, was too much even for the common-law judges, and it was finally held in England that a judgment operated as a merger of a sealed instrument, whether

⁶ *Lilly-Brackett Co. v. Sonnemann*, 163 Cal. 632, 42 L. R. A. (N.S.) 360, 126 Pac. 483; *Wells v. Schuster-Hax National Bank*, 23 Colo. 534, 48 Pac. 809; *Weeks v. Pearson*, 5 N. H. 324.

Contra, *Gould v. Hayden*, 63 Ind. 443.
⁷ *Wells v. Schuster-Hax National Bank*, 23 Colo. 534, 48 Pac. 809; *Weeks v. Pearson*, 5 N. H. 324.

⁸ *Lilly-Brackett Co. v. Sonnemann*, 163 Cal. 632, 42 L. R. A. (N.S.) 360, 126 Pac. 483.

⁹ *Van Winkle v. Owen*, 54 N. J. Eq. 253, 34 Atl. 400.

¹ See § 1164.

² See § 1164 and ch. LXXXV.

³ *Denom v. Scot*, Y. B., 17 Ed., III, 24 (Pasch.), pl. 11 (translation by L. Owen Pike, p. 296); *Statham's Abridgment*, Title Barre (105).

See discussion in *Higgen's Case*, 6 Coke, 44b and 45b.

⁴ *Denom v. Scot*, Y. B., 17 Ed., III, 24 (Pasch.), pl. 11 (translation by L. Owen Pike, p. 296).

execution had issued or not;⁵ and this principle has always been recognized in the United States.⁶

§ 2558. Merger of simple contract in contract of record. Apart from the difficulties which have arisen where the original right was founded upon a record, such as a judgment,¹ or where it was embodied in a sealed instrument,² it is an established rule of law that a judgment,³ or other contract of record,⁴ of a court of competent jurisdiction, merges the right of action upon which it is rendered, as between the parties to such judgment and those who claim under

⁵ *Higgen's Case*, 6 Coke 44b.

⁶ *United States v. Price*, 50 U. S. (9 How.) 83, 13 L. ed. 56; *Scott v. Sander's Heirs*, 29 Ky. (6 J. J. Mar.) 506; *Daniels v. Runyons*, 164 Ky. 309, 175 S. W. 338; *Smith v. Boothe*, 90 Or. 360, 375, 175 Pac. 709, 176 Pac. 793.

¹ See § 2556.

² See § 2557.

³ *England. Biddleston v. Whitel*, 1 W. Bl. 506, 3 Burr. 1545.

United States. National Foundry & Pipe Works v. Water Supply Co., 183 U. S. 216, 46 L. ed. 157 [affirming, 105 Wis. 48, 81 N. W. 125].

Arkansas. Hemingway v. Grayling Lumber Co., 125 Ark. 406, 188 S. W. 1186; *Barnett v. Western Assurance Co.*, 132 Ark. 434, 201 S. W. 282.

Illinois. Howell v. Goodrich, 69 Ill. 556.

Kansas. Remington Paper Co. v. Hudson, 64 Kan. 43, 67 Pac. 636.

Kentucky. Commonwealth v. Harkness' Administrator, 181 Ky. 709, 205 S. W. 787; *Cummins v. Mullins*, 183 Ky. 666, 210 S. W. 170.

Louisiana. Aiken v. Robinson, 108 La. 267, 32 So. 415; *American Trust Co. v. Crescent Ice Co.*, 143 La. 568, 78 So. 942.

Maryland. Packham v. Ins. Co., 91 Md. 515, 80 Am. St. Rep. 461, 50 L. R. A. 828, 46 Atl. 1066.

Massachusetts. Dalton v. American

Ammonia Co., 231 Mass. 430, 121 N. E. 407.

Michigan. Thompson v. Ellsworth, 39 Mich. 719; *Kimmerle v. Lowitz*, — Mich. —, 169 N. W. 857.

Minnesota. Gould v. Svendsgaard, 141 Minn. 437, 170 N. W. 595.

New Jersey. Traflet v. Ins. Co., 64 N. J. L. 387, 46 Atl. 204.

New York. Young v. Farwell, 165 N. Y. 341, 59 N. E. 143.

North Carolina. Case Mfg. Co. v. Moore, 144 N. Car. 527, 119 Am. St. Rep. 983, 10 L. R. A. (N.S.) 734, 57 S. E. 213.

Ohio. James v. Allen Co., 44 O. S. 226, 58 Am. Rep. 821, 6 N. E. 246.

Oklahoma. Uncle Sam Oil Co. v. Richards, — Okla. —, 175 Pac. 749.

Rhode Island. Garabedian v. Avedisian, — R. I. —, 105 Atl. 516.

Washington. Carmean v. North American Transportation & Trading Co., 45 Wash. 446, 122 Am. St. Rep. 930, 8 L. R. A. (N.S.) 595, 88 Pac. 834; *Denton v. Maple*, 92 Wash. 290, 158 Pac. 1001; *Petri v. Manny*, 99 Wash. 601, 170 Pac. 127. A judgment may be rendered as security for future advances. *First Mortgage Bond Homestead Association v. Mehlhorn*, — Md. —, 3 A. L. R. 844, 105 Atl. 526. This is a form of security much like the recognizance as originally used. See § 1152.

⁴ *Berry v. Somerset Ry.*, 89 Me. 552, 36 Atl. 904.

them. The relation of the parties to the action, the relation of the subject-matter to the judgment, and other questions of jurisdiction and procedure, will be discussed in the following sections.

§ 2559. Elements of merger in contract of record—Identity of parties. In order to operate as a merger, the judgment must be rendered in an action between the parties to the contract or their legal representatives; and it will operate as a merger only as against those who are parties to the action or the legal representatives of such parties or those who claim under them.¹ A judgment against one of two or more parties, who are severally liable, does not operate as a merger against the other parties, until such judgment is satisfied.² An unsatisfied judgment against one of two or more joint and several promisors, is not a bar to an action against the other.³ From the nature of a joint contract,⁴ a judgment against less than all of the parties who are jointly liable upon such contract, operates as a merger of the cause of action against the remaining parties in the absence of statute.⁵ This result does not

¹ **United States.** *Aspden v. Nixon*, 45 U. S. (4 How.) 467, 11 L. ed. 1059; *General Film Co. v. Sampliner*, 252 Fed. 443.

Georgia. *Booth v. Huff*, 116 Ga. 9, 94 Am. St. Rep. 98, 42 S. E. 381.

Indiana. *Giles v. Canary*, 99 Ind. 116; *Corneille v. Pfeiffer*, 26 Ind. App. 62, 59 N. E. 188.

Massachusetts. *Hawkes v. Phillips*, 73 Mass. (7 Gray) 284; *Frost v. Thompson*, 219 Mass. 360, 106 N. E. 1009.

North Carolina. *Hix v. Davis*, 68 N. Car. 231.

Ohio. *Clinton Bank v. Hart*, 5 O. S. 33.

Tennessee. *Lowry v. Hardwick*, 23 Tenn. (4 Humph.) 188.

Vermont. *Sawyer v. White*, 19 Vt. 40.

Washington. *Petri v. Manny*, 99 Wash. 601, 170 Pac. 127. A judgment against the debtor's administrator in one state does not merge the cause of action as against the debtor's administrator in another state. *Nash v.*

Benari, 117 Me. 491, 3 A. L. R. 61, 105 Atl. 107. This is true even if the two administrators are the same person. *Nash v. Benari*, 117 Me. 491, 3 A. L. R. 61, 105 Atl. 107.

² *Petri v. Manny*, 99 Wash. 601, 170 Pac. 127.

³ **Georgia.** *Booth v. Huff*, 116 Ga. 8, 94 Am. St. Rep. 98, 42 S. E. 381.

Indiana. *Giles v. Canary*, 99 Ind. 116; *Corneille v. Pfeiffer*, 26 Ind. App. 62, 59 N. E. 188.

Massachusetts. *Hawkes v. Phillips*, 73 Mass. (7 Gray) 284.

North Carolina. *Hix v. Davis*, 68 N. Car. 231.

Ohio. *Clinton Bank v. Hart*, 5 O. S. 33.

Tennessee. *Lowry v. Hardwick*, 23 Tenn. (4 Humph.) 188.

Vermont. *Sawyer v. White*, 19 Vt. 40.

⁴ See § 2073.

⁵ **England.** *King v. Hoare*, 13 M. & W. 494; *Hammond v. Schofield* [1891], 1 Q. B. 453; *Hoare v. Niblett* [1891],

depend upon the ordinary principles of merger alone, but also upon the theory that the right of a joint promisor to be held jointly with the remaining promisors can not be taken from him by his consent, either by releasing the remaining joint promisors,⁶ or by taking judgment against the remaining joint promisors. The practical result of this rule has operated so frequently to relieve the joint promisor from liability, that it has been changed by statute, in some jurisdictions, so as to make a contract which would have been a joint contract at common law, equivalent to a joint and several contract. Under such statutes, a judgment against one of two or more joint contractors does not merge the contract as to the others.⁷

A judgment operates as a merger as against those who claim under the parties, as well as against the parties themselves.⁸

If two public officers are each authorized to sue in the name of the state for the same cause of action, a judgment in an action brought by one is a bar to an action brought by the other.⁹ If full recovery can not be had against the manufacturer of an infringing article, a judgment against him does not merge a cause of action against those who have purchased such infringing article from such manufacturer and who have made use thereof.¹⁰

§ 2560. Identity of causes of action. In order to operate as a merger, the judgment which is rendered in the first action must be based upon the same cause of action as that which is set forth in the second action.¹ If the causes of action are separate and dis-

¹ Q. B. 781; *McLeod v. Power* [1898], Ch. 295.

United States. *Mason v. Eldred*, 73 U. S. (6 Wall.) 231, 18 L. ed. 783. [Obiter, as decided under a statute which prevented the effect of merger. Overruling, *Sheehy v. Mandeville*, 10 U. S. (6 Cranch.) 253, 3 L. ed. 215]; *Sessions v. Johnson*, 95 U. S. 347, 24 L. ed. 596 (obiter).

New Jersey. *Coles v. McKenna*, 80 N. J. L. 48, 76 Atl. 344.

Ohio. *Sloo v. Lea*, 18 Ohio 279.

Oregon. *Anderson v. Stayton Stat Bank*, 82 Or. 357, 159 Pac. 1033.

Wisconsin. *Lauer v. Bandow*, 48 Wis 638, 4 N. W. 774.

⁶ See §§ 2074 and 2456.

⁷ *Finch v. Galigher*, 181 Ill. 625, 54 N. E. 611; *Bute v. Brainerd*, 93 Tex. 137, 53 S. W. 1017.

⁸ *General Film Co. v. Sampliner*, 252 Fed. 443.

⁹ *Commonwealth v. Harkness' Administrator*, 181 Ky. 709, 205 S. W. 787.

¹⁰ *Kryptok Co. v. Stead Lens Co.*, 190 Fed. 767, 39 L. R. A. (N.S.) 1.

¹ **United States.** *Horner v. Hamner*, 249 Fed. 134, L. R. A. 1918E, 465.

Alabama. *Ebersole v. Daniel*, 146 Ala. 506, 119 Am. St. Rep. 52, 40 So. 614.

Arizona. *Brady v. Pinal County*, 8 Ariz. 114, 71 Pac. 910.

Arkansas. *Troxler v. Wilson*, 133 Ark. 216, 202 S. W. 819; *Rosselot v.*

inct, merger does not exist,² even although such causes of action might have been joined in the first action.³ If the two causes of action are based on distinct contracts, a judgment in the first action can not operate as a merger of the second cause of action, although the two contracts are connected in some way.⁴ A judgment which is rendered upon an official bond for one term, does not operate as a merger of an official bond given by the same official for another term, because the cause of action on the second bond is a distinct cause of action from that on the first bond.⁵ A judgment on an account stated does not merge an action by the creditor against the debtor, based upon his promise to pay certain notes, for the amount of which the creditor had given credit to the debtor in stating such account.⁶ If a promissory note has been given for a part of an account, the rendition of judgment upon such note does not operate as a merger of the entire account.⁷

Green & Lawrence Drainage District. — Ark. —, 207 S. W. 219.

Colorado. Gibbs v. Security Trust & Savings Bank, — Colo. —, 176 Pac. 827.

Connecticut. Viall v. Lionel Manufacturing Co., 90 Conn. 694, 98 Atl. 329.

Indiana. Chicago & S. E. Ry. v. Yawger, 24 Ind. App. 460, 56 N. E. 50.

Kansas. Garden City v. Merchants' and Farmers' National Bank, 65 Kan. 345, 93 Am. St. Rep. 284, 69 Pac. 325.

Michigan. Kimmerle v. Lowitz, — Mich. —, 169 N. W. 857.

Minnesota. Przyblyski v. Pellowski, 141 Minn. 193, 169 N. W. 707.

Missouri. Baumhoff v. St. Louis & Kirkwood Railroad Co., 205 Mo. 248, 120 Am. St. Rep. 745, 104 S. W. 5.

New York. Townsley v. Niagara Life Ins. Co., 218 N. Y. 228, 112 N. E. 924.

North Dakota. Kallberg v. Newberry — N. D. —, 170 N. W. 113.

Oklahoma. Akin v. Bonfils, — Okla. —, 169 Pac. 899.

Texas. Jones v. Gammel Statesman Publishing Co., 100 Tex. 320, 8 L. R. A. (N.S.) 1197, 99 S. W. 701. A judgment for damages caused by cattle trespassing merges the cause of action and bars the owner from enforcing such damages in a subsequent action by the

owner of the cattle to replevin them. **Brown v. Calvert**, 57 Okla. 364, 157 Pac. 284.

² **United States.** Horner v. Hamner, 249 Fed. 134, L. R. A. 1918E, 465.

Arkansas. Rosselot v. Green & Lawrence Drainage District, — Ark. —, 207 S. W. 219.

Michigan. Kimmerle v. Lowitz, — Mich. —, 169 N. W. 857. A decree of divorce which makes no provision for alimony does not merge a contract of separation which provides for the support of the wife as long as the separation should continue. **Hertz v. Hertz**, 136 Minn. 188, 161 N. W. 402.

North Dakota. Kallberg v. Newberry, — N. D. —, 170 N. W. 113.

Oregon. Stillwell v. Hill, 87 Or. 112, 169 Pac. 1174.

³ **Akin v. Bonfils**, — Okla. —, 169 Pac. 899.

⁴ **Brady v. Pinal County**, 8 Ariz. 114, 71 Pac. 910; **Kimmerle v. Lowitz**, — Mich. —, 169 N. W. 857.

⁵ **Brady v. Pinal County**, 8 Ariz. 114, 71 Pac. 910.

⁶ **Kimmerle v. Lowitz**, — Mich. —, 169 N. W. 857.

⁷ **Ebersole v. Daniel**, 146 Ala. 506, 119 Am. St. Rep. 52, 40 So. 614.

If the plaintiff may elect between tort and contract,⁸ he may sue on either theory, but he can not recover on both at once; and a judgment rendered in an action on either theory operates as a bar or merger as to such cause of action,⁹ and he can not thereafter maintain another action upon such cause of action by electing to treat it as of a different nature from the theory advanced in the original action.

§ 2561. Causes of action arising out of same contract. Even though the two causes of action may arise out of the same contract, a judgment in the first action does not operate as a merger of the second cause of action, if the two causes are in fact distinct.¹ If one who holds notes secured by a chattel mortgage brings an action in replevin to secure possession of the mortgaged property, as well as a separate action on the notes, and he seeks no relief in the action of replevin except possession, a judgment granting him possession of the mortgaged property does not merge the right of action on the notes.² A judgment rendered in an action for wages earned does not merge a subsequent claim for damages for discharge.³ On the other hand, a judgment for damages for breach of a contract of employment, is said not to merge a right of action for wages, commissions, and the like, which had already been earned.⁴ A judgment upon an interest coupon which is attached to a bond, establishes the validity of the bond, but it does not operate as a merger thereof.⁵

⁸ See §§ 1504 et seq.

⁹ *Home Insurance Co. v. Tate Mercantile Co.*, 117 Miss. 760, 78 So. 709.

¹ *Colorado. Gibbs v. Security Trust & Savings Bank.* — Colo. —, 176 Pac. 827.

Connecticut. Viall v. Lionel Manufacturing Co., 90 Conn. 694, 98 Atl. 329.

Indiana. Chicago & S. E. Ry. v. Yawger, 24 Ind. App. 460, 56 N. E. 50.

Kentucky. Chicago, M. & G. Ry. v. Dodds, 167 Ky. 624, 181 S. W. 666.

Massachusetts. Badger v. Titcomb, 32 Mass. (15 Pick.) 409, 26 Am. Dec. 611.

Minnesota. Przblyski v. Pellowski, 141 Minn. 193, 169 N. W. 707.

Missouri. Baumhoff v. St. Louis & Kirkwood Railroad Co., 205 Mo. 248, 120 Am. St. Rep. 745, 104 S. W. 5.

New York. Beach v. Crain, 2 N. Y. 86, 49 Am. Dec. 369; *Townsley v. Niagara Life Ins. Co.*, 218 N. Y. 228, 112 N. E. 924.

² *Gibbs v. Security Trust & Savings Bank.* — Colo. —, 176 Pac. 827.

³ *Chicago & S. E. Ry. v. Yawger*, 24 Ind. App. 460, 56 N. E. 50.

⁴ *Townsley v. Niagara Life Ins. Co.*, 218 N. Y. 228, 112 N. E. 924.

⁵ *Garden City v. Bank*, 65 Kan. 345, 93 Am. St. Rep. 284, 69 Pac. 325.

§ 2562. Splitting cause of action. Whether a judgment rendered upon a contract necessarily operates as a merger of all subsequent causes of action thereon, or whether separate judgments may be rendered upon the different causes of action, depends upon the nature of the contract and the nature of the breach. The test for determining whether a judgment for a breach of contract merges all rights of action growing out of such contract, is said to be whether the performance is entire or severable.¹ A judgment rendered upon a contract for paying money, stocks and bonds, by which the plaintiff is given judgment for a certain amount of money, and it is also decreed that he shall receive a certain amount of stock, but, since such stock has no money value, no money judgment is rendered therefor, does not merge a subsequent cause of action in favor of the original plaintiff to compel a trust company to deliver such certificates of stock to him and to compel the defendant to transfer such stock upon its books. If the breach is one which operates as a discharge of the contract, and, accordingly, the contract is not a continuing contract, a judgment for such breach is said to merge all rights of action upon all matters growing out of such breach, which might have been included in such action, whether they were actually included or not.² If there have been several breaches of the same contract, a judgment rendered in an action upon one breach, merges the right of action for the remaining pre-existing breaches.³

¹ *Baumhoff v. St. Louis & Kirkwood Railroad Co.*, 205 Mo. 248, 120 Am. St. Rep. 745, 104 S. W. 5; *Kallberg v. Newberry*, — N. D. —, 170 N. W. 113.

See also, *Hempstead County v. Hope Bridge Co.*, 132 Ark. 412, 200 S. W. 983.

² *United States. L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.*, 109 Fed. 411, 48 C. C. A. 455.

California. Van Horne v. Treadwell, 164 Cal. 620, 130 Pac. 5.

Maine. Willoughby v. Furnishing Co., 96 Me. 372, 52 Atl. 756; *Maine Cent. Ry. v. National Surety Co.*, 113 Me. 465, L. R. A. 1916A, 881, 94 Atl. 929.

Minnesota. Przblyski v. Pellowski, 141 Minn. 193, 169 N. W. 707.

Missouri. Leslie v. Carter, 268 Mo. 420, 187 S. W. 1196.

Nebraska. Waldo v. Lockard, 101 Neb. 797, 165 N. W. 154.

Ohio. Cockley v. Brucker, 54 O. S. 214, 44 N. E. 590.

Oklahoma. Akin v. Bonfile, — Okla. —, 169 Pac. 899 (obiter).

Pennsylvania. Thompson v. Graham, 246 Pa. St. 202, 92 Atl. 118.

Washington. Carmean v. North American Transportation Co., 45 Wash. 446, 122 Am. St. Rep. 930, 8 L. R. A. (N.S.) 395, 88 Pac. 834.

West Virginia. Jameson v. Board of Education, 78 W. Va. 612, L. R. A. 1916F, 926, 89 S. E. 255.

³ *United States. L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.*, 109 Fed. 411, 48 C. C. A. 455.

California. Van Horne v. Treadwell, 164 Cal. 620, 130 Pac. 5.

A judgment against an insurance company on a policy of insurance for a loss for which it is liable, merges a right of action for injury to the credit of the insured, due to delay on the part of the insurance company in settling its losses.⁴ Where equity can decree damages as relief incidental to specific performance, a decree of specific performance merges a right of action for breach of such contract, and the plaintiff can not split his claim into separate actions for the different elements of damages flowing from the same breach.⁵ If attorney's fees can be allowed as an item of damages, they must be recovered, if at all, in the original action; and if judgment is rendered in the original action, it merges such claim for attorney's fees, and a subsequent action can not be brought therefor.⁶ If the injured party seeks to recover full damages, when he institutes his action, he can not, without the consent of the adversary party, withdraw his claim for consequential damages, and maintain a separate action therefor after he has recovered judgment in the original action.⁷ If a receiver sues on stock liability for less than the full amount due, and recovers judgment for such amount, he can not thereafter recover the residue.⁸ A agreed to deliver lumber to B, and to perform such contract A purchased lumber from C. C made default and by reason thereof A made default in his contract. B recovered from A the difference between the contract price and the market price, and A recovered from C by a like measure of damages. Both judgments were paid. A then brought suit against C to recover the amount paid by A to B on such judgment. It was held that A could not recover.⁹

If, on the other hand, the contract is a continuing contract, and the breach does not operate as a total discharge thereof, a judgment rendered upon a prior breach does not merge the right of action for a subsequent breach.¹⁰ If a contract provides for publishing a number of books, a judgment in an action to recover

Ohio. Cockley v. Brucker, 54 O. S. 214, 44 N. E. 590.

Oklahoma. Akin v. Bonfils, — Okla. —, 169 Pac. 899.

Pennsylvania. Thompson v. Graham, 246 Pa. St. 202, 92 Atl. 118.

⁴ Home Insurance Co. v. Tate Mercantile Co., 117 Miss. 760, 78 So. 709.

⁵ Waldo v. Lockard, 101 Neb. 797, 165 N. W. 154.

⁶ Van Horne v. Treadwell, 164 Cal. 620, 130 Pac. 5; Leslie v. Carter, 268 Mo. 420, 187 S. W. 1196.

⁷ Maine Central Ry. v. National Surety Co., 113 Me. 465, L. R. A. 1916A, 881, 94 Atl. 929.

⁸ De Weese v. Smith, 97 Fed. 309.

⁹ Barr v. Henderson, 107 La. 323, 31 So. 762.

¹⁰ Connecticut. Viall v. Lionel Manufacturing Co., 90 Conn. 694, 98 Atl. 329.

profits which were lost by reason of refusing to furnish manuscript for some of such books, does not merge a cause of action to recover profits which were lost by reason of the failure to furnish manuscript for the remaining books.¹¹

Accordingly, the effect of recovering judgment for a breach often turns on the question whether the contract is a continuing one or whether the breach has discharged it. By the weight of authority, the discharge of an employe terminates the contract of employment and leaves only a right of action for the breach.¹² Where such theory obtains, the recovery of an installment of his salary prevents recovery of any further damages in a subsequent action.¹³ Where such contract is treated as a continuing contract, on the theory of constructive service, recovery of one installment of salary does not prevent subsequent recovery of installments thereafter due.¹⁴

While it is provided by statute in some jurisdictions that actions may be brought for each separate breach of an entire contract, if

Kentucky. *Chicago, M. & G. Ry. v. Dodds*, 167 Ky. 624, 181 S. W. 666.

Massachusetts. *Badger v. Titcomb*, 32 Mass. (15 Pick.) 409, 26 Am. Dec. 611.

Missouri. *Baumhoff v. St. Louis & Kirkwood Railroad Co.*, 205 Mo. 248, 120 Am. St. Rep. 745, 104 S. W. 5.

New York. *Beach v. Crain*, 2 N. Y. 86, 49 Am. Dec. 369.

Texas. *Jones v. Gammel Statesman Pub. Co.*, 100 Tex. 320, 8 L. R. A. (N. S.) 1197, 99 S. W. 701.

¹¹ *Jones v. Gammel Statesman Pub. Co.*, 100 Tex. 320, 8 L. R. A. (N.S.) 1197, 99 S. W. 701.

¹² See ch. LXXXVII.

¹³ **England.** *Beckham v. Drake*, 2 H. L. 579; *Archard v. Hornor*, 3 Car. & P. 349.

Maine. *Alie v. Nadeau*, 93 Me. 282, 74 Am. St. Rep. 346, 44 Atl. 891.

Maryland. *Olmstead v. Bach*, 78 Md 132, 44 Am. St. Rep. 273, 22 L. R. A. 74, 27 Atl. 501.

New York. *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285.

Ohio. *James v. Allen County*, 44 O. S. 226, 58 Am. Rep. 821, 6 N. E. 246.

Pennsylvania. *Allen v. Text Book Co.*, 201 Pa. St. 579, 88 Am. St. Rep. 834, 51 Atl. 323. (Same case, but with controlling facts in doubt upon the record. *Allen v. Engineers' Co.*, 196 Pa. St. 512, 46 Atl. 899.)

Tennessee. *Menihan Co. v. Hopkins*, 129 Tenn. 24, 164 S. W. 775.

Virginia. *Willoughby v. Thomas*, 65 Va. (24 Gratt.) 521.

Washington. *Carmean v. North American Transportation Co.*, 45 Wash. 446, 122 Am. St. Rep. 930, 8 L. R. A. (N.S.) 595, 88 Pac. 834.

West Virginia. *Jameson v. Board of Education*, 78 W. Va. 612, L. R. A. 1916F, 926, 89 S. E. 255.

Wisconsin. *Ornstein v. Yahr & Lange Drug Co.*, 119 Wis. 429, 96 N. W. 826.

¹⁴ *Strauss v. Meertief*, 64 Ala. 299, 38 Am. Rep. 8; *McMullen v. Dickinson Co.*, 60 Minn. 156, 51 Am. St. Rep. 511, 27 L. R. A. 409, 62 N. W. 120; *Williams v. Luckett*, 77 Miss. 394, 26 So. 967; *Frost v. International Rubber Co.*, 37 R. I. 406, 92 Atl. 1022.

such breach occurs,¹⁵ such statute does not permit the plaintiff to bring an action for part of the breaches which have occurred when he brings his action, to recover judgment therein and then to bring an action upon the remaining provisions which had taken place when the original cause of action was brought.¹⁶ Under such circumstances, even under such statute, a judgment rendered in the original action will operate as a merger of such other breaches.¹⁷

In case of mistake on the part of the plaintiff or fraud on the part of the defendant, as a result of which items are omitted from a cause of action, the courts frequently seem to be governed by principles analogous to election rather than those of merger in the proper sense of the term; and they, accordingly, hold that a judgment rendered upon such a cause of action does not merge items which are omitted because the plaintiff did not know of their existence when he brought the original action,¹⁸ or items omitted by mistake,¹⁹ or items omitted because of the fraud of the defendant.²⁰

A judgment for the principal debt merges interest if interest is merely incidental thereto.²¹ If, on the other hand, there is an independent covenant to pay interest, a judgment on the principal debt does not merge interest.²² A judgment for principal and interest to the date of the rendition of the judgment, which judgment bears interest at a rate lower than the interest on the obligation, does not merge the right of the mortgagee to retain the mortgage security until he is paid at the rate of interest fixed in the obligation down to the date of payment.²³

§ 2563. Merger of subsequent causes of action. In a number of jurisdictions, the condition of affairs at the time that the action is begun, and not the condition of affairs at the time that the judgment is rendered, is to be considered in determining whether the judgment operates as a merger or not.¹ Accordingly, if an action

¹⁵ Matheny v. Preston Hotel Co., 140 Tenn. 41, 203 S. W. 327.

¹⁶ Matheny v. Preston Hotel Co., 140 Tenn. 41, 203 S. W. 327.

¹⁷ Matheny v. Preston Hotel Co., 140 Tenn. 41, 203 S. W. 327.

¹⁸ Kane v. Morehouse, 46 Conn. 300; Jones v. Beaman, 119 N. Car. 300, 25 S. E. 970.

¹⁹ Seddon v. Tutop, 1 Esp. 401; Post v. Smilie, 48 Vt. 185.

²⁰ Johnson v. Provincial Ins. Co., 12 Mich. 216, 86 Am. Dec. 49.

²¹ Economic Life Assurance Society v. Usborne [1902], A. C. 147.

²² Economic Life Assurance Society v. Usborne [1902], A. C. 147.

²³ Economic Life Assurance Society v. Usborne [1902], A. C. 147.

¹ Illinois. Marshall v. John Grosse Clothing Co., 184 Ill. 421, 75 Am. St. Rep. 181, 56 N. E. 807.

is brought to recover damages for certain breaches of a contract, and subsequent breaches occur after such action has begun, but before a judgment is rendered therein, such judgment is said not to merge the causes of action for such subsequent breaches.² The fact that the plaintiff might have amended his petition in the original action so as to include the subsequent breaches, has been said not to alter the rule; and not to make a judgment rendered on the original cause of action operate as a merger of rights of action arising on subsequent breaches, in case the plaintiff does not exercise his right so to amend.³

If the contract is a continuing one, judgment does not merge a right of action for breach which did not arise until after judgment.⁴

§ 2564. Merger as affecting counterclaim and set-off. The defendant is ordinarily not obliged to plead a counterclaim or set-off, but he may elect whether he will make use of a right of action in his favor against the plaintiff as a counterclaim or set-off, upon the one hand, or whether he will bring a separate action thereon, on the other.¹ For these reasons a judgment in favor of the plaintiff in the first action does not operate as a merger or a bar of a counterclaim or set-off which the defendant has not yet put in such action.² If, however, a claim is set up as a set-off or counterclaim, an adjudication thereon operates as a merger or bar of such claim.³ If mutual accounts have been involved in an action, and judgment

Indiana. Franke v. Franke, 15 Ind. App. 529, 43 N. E. 468.

Maryland. Ahl v. Ahl, 60 Md. 207.

Minnesota. McEvoy v. Bock, 37 Minn. 402, 34 N. W. 740; Ramsey County Bldg. Soc. v. Lawton, 49 Minn. 362, 51 N. W. 1163.

Pennsylvania. Kane v. Fisher, 2 Watts (Pa.) 246.

Texas. Jones v. Gammel Statesman Pub. Co., 100 Tex. 320, 8 L. R. A. (N. S.) 1197, 99 S. W. 701.

² **Illinois.** Marshall v. John Grosse Clothing Co., 184 Ill. 421, 75 Am. St. Rep. 181, 56 N. E. 807.

Indiana. Franke v. Franke, 15 Ind. App. 529, 43 N. E. 468.

Minnesota. McEvoy v. Bock, 37 Minn. 402, 34 N. W. 740; Ramsey

County Bldg. Soc. v. Lawton, 49 Minn. 362, 51 N. W. 1163.

Pennsylvania. Kane v. Fisher, 2 Watts (Pa.) 246.

Texas. Jones v. Gammel Statesman Pub. Co., 100 Tex. 320, 8 L. R. A. (N. S.) 1197, 99 S. W. 701.

³ Jones v. Gammel Statesman Pub. Co., 100 Tex. 320, 8 L. R. A. (N. S.) 1197, 99 S. W. 701.

⁴ Ahl v. Ahl, 60 Md. 207. See also, as to future assessments, Koen v. Ft. Bent Ditch Co., — Colo. —, 185 Pac. 653.

¹ Stillwell v. Hill, 87 Or. 112, 169 Pac. 1174.

² Stillwell v. Hill, 87 Or. 112, 169 Pac. 1174.

³ Officer v. J. L. Owens Co., 252 Fed. 337; Case Mfg. Co. v. Moore, 144 N.

has been rendered therein, items of such account which have thus been adjudicated can not be the basis of a subsequent counterclaim.⁴

The reasons which forbid splitting a cause of action,⁵ apply to splitting a counterclaim.⁶ If one who has bought property and given notes therefor, sets up as a counterclaim the defective character of such property in an action upon one of such notes, he can not thereafter set up the same counterclaim in an action upon another of such notes.⁷ An exception to this rule exists in cases in which the original creditor has assigned his cause of action and in which the courts have to choose between denying to the debtor the right to interpose as a set-off or counterclaim, a part of his total claim against the original creditor, which exceeds the amount thus assigned, unless he is willing to have the entire amount of such claim merged in the judgment, on the one hand, and permitting him to split his claim so as to use a set-off or counterclaim against the amount thus assigned, a part of his original claim equal to the claim thus assigned. In such case, the courts permit the defendant to split his cause of action against the plaintiff and to set off against the assignee a part of his claim equal to the amount thus assigned,⁸ and to recover the balance of such claim against the assignor.⁹

§ 2565. Nature of judgment. In order that a judgment may operate as a merger, it must be rendered by a court which has jurisdiction of the subject-matter, and of the parties.¹ If a judgment is void for want of jurisdiction, it does not operate as a merger of the original cause of action, and the plaintiff in such action may bring another action upon his original cause of action.² This follows as a necessary consequence of the rule that the judgment in the original action is not conclusive as between the parties,

Car. 527, 119 Am. St. Rep. 983, 10 L. R. A. (N.S.) 734, 57 S. E. 213; Mann v. Mann, 176 N. Car. 353, 97 S. E. 175; Collard v. Fried, — N. D. —, 170 N. W. 525.

⁴ Collard v. Fried, — N. D. —, 170 N. W. 525.

⁵ See § 2562.

⁶ Case Mfg. Co. v. Moore, 114 N. Car. 527, 119 Am. St. Rep. 983, 10 L. R. A. (N.S.) 734, 57 S. E. 213.

⁷ Case Mfg. Co. v. Moore, 144 N. Car. 527, 119 Am. St. Rep. 983, 10 L. R. A. (N.S.) 734, 57 S. E. 213.

⁸ Nut House v. Pacific Oil Mills, 102 Wash. 114, 172 Pac. 841.

⁹ Nut House v. Pacific Oil Mills, 102 Wash. 114, 172 Pac. 841.

¹ Oil, etc., Co. v. Koen, 64 O. S. 422, 60 N. E. 603.

² Kansas, etc., Ry. Co. v. Moon, 66 Ark. 409, 50 S. W. 996; Oil, etc., Co. v. Koen, 64 O. S. 422, 60 N. E. 603.

and that it is subject to collateral attack for such lack of jurisdiction.³

In order to operate as a merger, the judgment rendered in the first action must have been rendered upon the merits of the case.⁴ A temporary restraining order does not operate as a merger or bar, since it does not purport to be a final adjudication.⁵

A consent decree operates as a merger of all rights under the original cause of action, and it is conclusive on both parties.⁶ A decree in equity operates as a merger of the rights of the parties in the cause of action which was the basis of such decree.⁷ A decree in foreclosure, finding the amount due on the note secured by the mortgage, merges the note.⁸ However, a foreclosure of a mortgage in which no attempt is sought to enforce the personal liability of the grantee who has assumed the mortgage debt, as a part of the purchase price of the property conveyed to him, does not merge the contract of such mortgagee.⁹

A judgment at law operates as a merger of the rights of the parties in the cause of action, upon which such judgment was rendered,¹⁰ and it prevents a subsequent suit for equitable relief upon the same cause of action.¹¹

An award of damages by arbitration for breach of a contract not to engage in business, is not a merger of such contract so as to prevent a subsequent action at law for a subsequent breach.¹²

³ See §§ 1144 and 1146.

⁴ *Slaker v. McCormick-Saeltzer Co.*, — Cal. —, 177 Pac. 155; *Payne v. Buena Vista Extract Co.*, — Va. —, 98 S. E. 34; *Toney v. Sandy Ridge Coal & Coke Co.*, — W. Va. —, 99 S. E. 178.

A different rule applies in error proceedings. *Barnett v. Western Assurance Co.*, 132 Ark. 434, 201 S. W. 282.

In order to operate as a merger, the judgment must also purport to be a finality. *Santowsky v. McKey*, 249 Fed. 51, 161 C. C. A. 111.

⁵ *Santowsky v. McKey*, 249 Fed. 51, 161 C. C. A. 111.

⁶ *Wagner v. Ruhl*, — Md. —, 106 Atl. 2.

⁷ *West New York Improvement Co. v. West New York*, — N. J. —, 104 Atl. 611; *Brigel v. Creed*, 65 O. S. 40,

60 N. E. 991; *Horr v. Herrington*, 22 Okla. 590, 20 L. R. A. (N.S.) 47, 98 Pac. 443.

A decree refusing specific performance does not fix the rights of the parties at law. *Carter v. Schrader*, — Ia. —, 175 N. W. 329.

⁸ *Brigel v. Creed*, 65 O. S. 40, 60 N. E. 991.

See also, *Horr v. Herrington*, 22 Okla. 590, 20 L. R. A. (N.S.) 47, 98 Pac. 443.

⁹ *Washington Life Ins. Co. v. Marshall*, 56 Minn. 250, 57 N. W. 658; *McRae v. Sullivan*, 56 Minn. 266, 57 N. W. 659.

¹⁰ *Sears, Roebuck & Co. v. Pearce*, 253 Fed. 960.

¹¹ *Sears, Roebuck & Co. v. Pearce*, 253 Fed. 960.

¹² *Nelson v. Hiatt*, 38 Neb. 478, 56 N. W. 1029.

§ 2566. Effect of judgment as merger. If the elements of merger which have already been described, are shown to exist,¹ a judgment merges the original cause of action so that no action can thereafter be brought on the original cause of action.² Accordingly, assigning a note "without recourse" after judgment has been taken thereon, does not make the assignor a guarantor.³ A judgment merges a cause of action so that the judgment may be barred by limitations, and hence neither the judgment nor the cause of action can be enforced, even under circumstances which would have prevented limitations from running against the original cause of action.⁴

A judgment which merges the original cause of action does not destroy liens or collateral securities by which the original cause of action was secured.⁵ A judgment rendered in an action brought upon a prior judgment, does not merge such prior judgment so as to destroy its priority over other liens upon the realty upon which it had become a lien upon its rendition.⁶ Merger does not operate to destroy the security of a decree as a lien.⁷

The merger of a note in a judgment rendered thereon, does not prevent the subsequent use of the note as evidence, as in an action in ejectment upon the trust deed securing it.⁸

Merger of a cause of action is not permitted to preclude inquiry into the nature of the original cause of action in cases where it would operate as an injustice to prevent such inquiry.⁹ A judgment in a cause of action based on a trust relation does not merge the cause of action so as to destroy the trust relation.¹⁰ If a judgment for alimony has been obtained in one state, and subsequently a judgment has been obtained in another state upon such judgment, and thereafter the husband obtains a discharge in bank-

¹ See §§ 2559 et seq.

² *Rossiter v. Merriman*, 80 Kan. 739, 24 L. R. A. (N.S.) 1095, 104 Pac. 858.

³ *Redden v. Bank*, 66 Kan. 747, 71 Pac. 578.

⁴ *Olson v. Dahl*, 99 Minn. 433, 116 Am. St. Rep. 435, 8 L. R. A. (N.S.) 444, 109 N. W. 1001; *Smith v. Brown*, 99 N. Y. 377, 52 Am. Rep. 34.

⁵ *Rossiter v. Merriman*, 80 Kan. 739, 24 L. R. A. (N.S.) 1095, 104 Pac. 858; *Springs v. Pharr*, 131 N. Car. 191, 92 Am. St. Rep. 775, 42 S. E. 590; *Erickson v. Russ*, 21 N. D. 208, 32 L. R. A.

(N.S.) 1072, 129 N. W. 1025; *Turner v. Stewart*, 51 W. Va. 493, 41 S. E. 924.

⁶ *Springs v. Pharr*, 131 N. Car. 191, 92 Am. St. Rep. 775, 42 S. E. 590.

⁷ *Turner v. Stewart*, 51 W. Va. 493, 41 S. E. 924.

⁸ *Brown v. Schintz*, 203 Ill. 136, 67 N. E. 767.

⁹ *New Orleans v. Warner*, 175 U. S. 120, 44 L. ed. 96; *Gould v. Svendsgaard*, 141 Minn. 437, 170 N. W. 595.

¹⁰ *New Orleans v. Warner*, 175 U. S. 120, 44 L. ed. 96.

ruptcy, the rendition of the second judgment does not prevent an inquiry into the nature of the cause of action upon which the original judgment was based.¹¹

§ 2567. Merger of simple contract in specialty. A simple contract is merged in a contract under seal.¹ Under the doctrine of merger, delivery of a specialty executed by the debtor,² extinguishes a simple contract debt. A simple contract for the sale of real property is merged in a subsequent deed, executed and delivered between the parties in full performance of such contract, and so accepted by the grantee; and such deed supersedes such provisions of such contract as are covered by the deed.³ A contract to convey realty, which implies a merchantable title thereto, merges in a deed which is delivered in full performance thereof.⁴ A provision

¹¹ *In re Williams*, 208 N. Y. 32, 46 L. R. A. (N.S.) 719, 101 N. E. 853.

¹ *England*. *Price v. Moulton*, 10 C. B. 561.

Indiana. *Rhoades v. Jones*, 92 Ind. 328.

Massachusetts. *Banorgie v. Hovey*, 5 Mass. 11, 4 Am. Dec. 17.

Minnesota. *Griswold v. Eastman*, 51 Minn. 189, 53 N. W. 542.

Missouri. *Barger v. Healy*, 276 Mo. 145, 207 S. W. 499.

New Jersey. *Baker v. Baker*, 28 N. J. L. 13, 75 Am. Dec. 243.

New York. *Howes v. Barker*, 3 Johns. (N. Y.) 506, 3 Am. Dec. 526.

North Carolina. *Costner v. Fisher*, 104 N. Car. 392, 10 S. E. 526.

Ohio. *McNaughten v. Partridge*, 11 Ohio 223, 38 Am. Dec. 731.

Pennsylvania. *Titus v. Poland Coal Co.*, 263 Pa. St. 24, 106 Atl. 90.

Tennessee. *Nichols v. Thompson*, 7 Tenn. (1 Yerg.) 151.

Virginia. *Shenandoah Valley R. R. Co. v. Dunlop*, 86 Va. 346, 10 S. E. 239.

West Virginia. *Williamson v. Cline* 40 W. Va. 194, 20 S. E. 914; *French v. McMillion*, 79 W. Va. 639, L. R. A. 1917D, 228, 91 S. E. 538.

Wisconsin. *Borchert v. Skidmore*

Land Co., 168 Wis. 523 [sub nomine, *Borchert v. Coons*, 171 N. W. 70].

² *Hall v. Hopkins*, 14 Mo. 450; *Costner v. Fisher*, 104 N. Car. 392, 10 S. E. 526.

³ *Canada*. *Carroll v. Fuel Co.*, 26 Can. S. C. 181.

Michigan. *Seager v. Cooley*, 44 Mich. 14, 5 N. W. 1058.

Missouri. *Barger v. Healy*, 276 Mo. 145, 207 S. W. 499.

New Hampshire. *Labonte v. Lacasse*, 78 N. H. 489, 102 Atl. 540.

New York. *Schoonmaker v. Hoyt*, 148 N. Y. 425, 42 N. E. 1059.

Ohio. *Brumbaugh v. Chapman*, 45 O. S. 368.

Pennsylvania. *Titus v. Poland Coal Co.*, 263 Pa. St. 24, 106 Atl. 90.

Rhode Island. *Abney v. Twombly*, 39 R. I. 304, 97 Atl. 806.

Utah. *Reese Howell Co. v. Brown*, 48 Utah 142, 158 Pac. 684.

West Virginia. *French v. McMillion*, 79 W. Va. 639, L. R. A. 1917D, 228, 91 S. E. 538.

Wisconsin. *Borchert v. Skidmore Land Co.*, 168 Wis. 523 [sub nomine, *Borchert v. Coons*, 171 N. W. 70].

⁴ *Tipton v. Ellsworth*, 18 Ida. 207, 109 Pac. 134; *Wheeler v. State*, 190 N.

with reference to a right of way, which is contained in a contract for sale of realty, is merged in the deed given in performance of such contract; and the rights of the parties to such right of way are limited by the provisions of the deed.⁵ A provision in a contract for the sale of land with reference to the area, is merged for most purposes in the provisions of the covenants of the deed which is given in performance of such contract.⁶ A contract for the sale of "merchantable coal" is merged by subsequent deed conveying "all the stone coal" in the specified realty.⁷ A simple contract to sell a lot for twelve hundred dollars in cash and eighty shares of stock, and providing that a dwelling-house costing not less than four thousand dollars shall be erected by vendee upon such lot before a specified date, and that within ten years no improvement should be erected nearer than thirty feet to the rear building line, is merged by a subsequent deed for such lot delivered between the parties, providing that the grantee should not erect upon the lot within ten years a dwelling not to cost less than three thousand dollars, and should not build any improvement nearer than thirty feet to the front building line.⁸ A contract for the sale of realty reserving timber is merged in a deed for such realty in which timber is not reserved.⁹

A contract to convey realty is merged in a subsequent deed executed by a third person if accepted in performance of such contract.¹⁰ A contract to convey realty is merged in a subsequent deed executed to the wife of the purchaser in accordance with his instructions.¹¹

A security of higher nature operates at law as a merger of a prior security of a lower nature.¹²

The rule of common law on the subject of merger of prior contracts or securities of a lower nature in subsequent contracts or securities of a higher nature, operated frequently so as to defeat

Y. 406, 123 Am. St. Rep. 555, 83 N. E. 54.

⁵ Abney v. Twombly, 39 R. I. 304, 97 Atl. 806; Reese Howell Co. v. Brown, 48 Utah 142, 158 Pac. 684.

⁶ Brumbaugh v. Chapman, 45 O. S. 368.

⁷ McGowan v. Bailey, 155 Pa. St. 256 25 Atl. 648.

⁸ West Boundary Real Estate Co. v. Bayless, 80 Md. 495, 31 Atl. 442.

⁹ Clifton v. Iron Co., 74 Mich. 183, 16 Am. St. Rep. 621, 41 N. W. 891.

¹⁰ Slocum v. Bracy, 55 Minn. 249, 43 Am. St. Rep. 499, 56 N. W. 826.

¹¹ French v. McMillion, 79 W. Va. 639, L. R. A. 1917D, 228, 91 S. E. 538.

¹² Price v. Moulton, 10 C. B. 561; Banorgie v. Hovey, 5 Mass. 11, 4 Am. Dec. 17.

the intention of the parties and so as to work serious injustice. While equity could not grant relief where the higher obligation or security was a contract of record, such as a judgment, it could grant relief where the higher contract or security was an obligation under seal; and wherever the common-law doctrines of merger would operate so as to defeat the intention of the parties, and to produce a serious injustice, equity would give relief.

§ 2568. Elements necessary to merger. In order to have the doctrine of merger operate, the subsequent specialty must bear the following relation to the prior written contract: (1) The specialty must be between the same parties as the prior simple contract and upon the same subject-matter.¹ A deed which is delivered after a contract for the sale of realty has been made, but which is not delivered by the vendor as in full performance of the contract, and is not accepted by the purchaser as in full performance of the contract, and which does not cover the entire subject-matter contracted for, does not operate as a merger of the prior contract.² The fact that a deed was surrendered to the grantee and that he took possession of the realty which was sold to him, does not operate as a merger of a contract for the sale of such realty or of a provision therein binding the grantor to deliver an abstract showing a good title satisfactory to the attorney of the purchaser, if the contract and deed were executed at the same time and if the parties did not intend to modify the original contract by the transfer of the possession of the deed and of the realty.³ A contract to convey a tract of land, is not merged in a subsequent deed conveying only a part of such tract, which is accepted by the grantee as part performance only of the contract.⁴ An agreement whereby the grantee is to pay a mortgage upon the premises conveyed as a part of the purchase price, is not merged in a subsequent conveyance.⁵ An agree-

¹ *Chetwynd v. Allen* [1899], 1 Ch. 353; *Cavanaugh v. Casselman*, 88 Cal. 543, 26 Pac. 515; *Read v. Loftus*, 82 Kan. 485, 108 Pac. 850 [sub nomine, *Loftus v. Read*, 31 L. R. A. (N.S.) 457]; *Jones v. Johnson*, 3 W. & S. (Pa.) 276, 38 Am. Dec. 760.

² *Cavanaugh v. Casselman*, 88 Cal. 543, 26 Pac. 515; *Atlanta v. Akers*, 145 Ga. 680, 89 S. E. 764; *Read v. Loftus*, 82 Kan. 485, 108 Pac. 850 [sub nomine,

Loftus v. Read, 31 L. R. A. (N.S.) 457]; *Close v. Zell*, 141 Pa. St. 390, 23 Am. St. Rep. 296, 21 Atl. 770; *Stockton v. Gould*, 149 Pa. St. 68, 24 Atl. 160.

³ *Read v. Loftus*, 82 Kan. 485, 108 Pac. 850 [sub nomine, *Loftus v. Read*, 31 L. R. A. (N.S.) 457].

⁴ *Cavanaugh v. Casselman*, 88 Cal. 543, 26 Pac. 515.

⁵ *Stockton v. Gould*, 149 Pa. St. 68, 24 Atl. 160.

ment whereby the grantor is to refund the consideration if the title to the land conveyed is not good, is not merged in a subsequent deed, which contains a covenant of special warranty but none of title.⁶ If a property owner petitions for an extension of a street on condition that he shall not be liable for the cost thereof, such conditions are not merged in his subsequent deed conveying land for the street.⁷

Since the recital of a consideration in a deed is ordinarily a mere recital of a fact,⁸ and since it is very generally understood that the true consideration is not therein expressed,⁹ a deed does not ordinarily merge the covenants of the original contract with reference to the consideration.¹⁰ If, through mistake in computation, the grantee has paid more than the amount provided for by the terms of the original contract, the grantee may recover such payment, although he has accepted the deed.¹¹ (2) The subsequent specialty will not merge the prior simple contract unless the specialty is valid.¹² A subsequent deed, which proves to be void by reason of mistake, does not merge the contract under which it was given.¹³ (3) The specialty will not merge the prior simple contract if it is not intended as satisfaction thereof, but merely as collateral security thereto.¹⁴ Assignment of a specialty by the debtor to the creditor does not operate as a merger.¹⁵ An agreement which is intended by the parties to be collateral to the deed when delivered, is not merged by such deed.¹⁶ Thus a written contract that a certain dam should be maintained adjoining the property

⁶ *Close v. Zell*, 141 Pa. St. 390, 23 Am. St. Rep. 296, 21 Atl. 770.

⁷ *Atlanta v. Akers*, 145 Ga. 680, 89 S. E. 764.

⁸ See § 2158.

⁹ See § 2161.

¹⁰ *Butt v. Smith*, 121 Wis. 566, 105 Am. St. Rep. 1039, 99 N. W. 328.

See §§ 2161 et seq.

¹¹ *Butt v. Smith*, 121 Wis. 566, 105 Am. St. Rep. 1039, 99 N. W. 328.

¹² *Gray v. Fowler*, 1 H. Bl. 462; *Hausman v. Burnham*, 59 Conn. 117, 21 Am. St. Rep. 74, 22 Atl. 1065; *Thurston v. Percival*, 18 Mass. (1 Pick.) 415.

¹³ *Hausman v. Burnham*, 59 Conn. 117, 21 Am. St. Rep. 74, 22 Atl. 1065.

¹⁴ *England. Emes v. Widdowson*, 4 C. & P. 151.

Connecticut. Tryon v. Hart, 2 Conn. 120.

Indiana. Heeg v. Weigand, 33 Ind. 289; *Grant v. School Town*, 71 Ind. 58.

Minnesota. Pillsbury v. Morris, 54 Minn. 492, 56 N. W. 170.

Pennsylvania. Wolf v. Wyeth, 11 S. & R. (Pa.) 149; *Kemp v. Pennsylvania R. R.*, 156 Pa. St. 430, 26 Atl. 1074.

Virginia. Witz v. Fite, 91 Va. 446, 22 S. E. 171.

¹⁵ *Grant v. School Town*, 71 Ind. 58.

¹⁶ *Pillsbury v. Morris*, 54 Minn. 492, 56 N. W. 170.

sold, is not merged in a subsequent deed of the property contracted for.¹⁷ A contract whereby a person agrees to convey a right of way to a railroad, and to release the railroad from all damages caused by taking and using such way, is not merged in a subsequent conveyance of such right of way, and the grantor can not subsequently maintain an action against the railroad for obstructing a right of way owned by the grantor by the use of the right of way thus conveyed to the railroad.¹⁸

A sealed instrument which recognizes a prior simple contract as existing, recites a dispute as to the method of ascertaining the amount due thereunder, and fixes the method of ascertaining such amount, does not waive such prior contract.¹⁹ A bond executed by a public officer does not merge his liability for money had and received.²⁰

It is not necessary that the specialty should show on its face that it is merely collateral to the original contract.²¹ An express agreement that a sealed contract delivered to the holder of a promissory note and executed by two out of three of the makers of such note, should be accepted as collateral and not as satisfaction, prevents merger, though the sealed contract contains no such provision.²²

In some jurisdictions it is said that the effect of the deed as a merger of a prior contract depends upon the intent of the parties that it shall so operate.²³ A contract by A, who owns an undivided interest in a tract of land, in common with B, whereby A agrees to convey to X a part of such tract, has been held not to be merged in a subsequent contract between A and B to convey the entire tract to X if not intended as a merger.²⁴

§ 2569. Merger of oral contract in written contract. The enforcement of the parol evidence rule, which was originally adopted by the courts in analogy to the rule of merger, whereby a sealed

¹⁷ *Shelby v. Chicago & E. Ill. R. Co.*, 143 Ill. 385, 32 N. E. 438. Tex. 66; 58 Am. Dec. 102 [s. c., 11 Tex. 694]; *Witz v. Fite*, 91 Va. 446,

¹⁸ *Kemp v. Pennsylvania R. R.*, 156 Pa. St. 430, 26 Atl. 1074. 22 S. E. 171.

¹⁹ *Bank v. Patterson*, 11 U. S. (Cranch) 290, 3 L. ed. 351. ²² *Witz v. Fite*, 91 Va. 446, 22 S. E. 171.

²⁰ *Walton v. United States*, 22 U. S. (9 Wheat.) 651, 6 L. ed. 182. ²³ *Sessa v. Arthur*, 183 Mass. 230, 66 N. E. 804; *Davis v. Lee*, 52 Wash. 330, 132 Am. St. Rep. 973, 100 Pac. 752.

²¹ *Van Vleit v. Jones*, 20 N. J. L. 340. ²⁴ *Henry v. Nubert* (Tenn. Ch. App.) 43 Am. Dec. 633; *Burke v. Cruger*, 35 S. W. 444.

instrument merged a prior simple contract, leads to the doctrine uniformly recognized and enforced at modern law, that a written contract merges all prior and contemporaneous oral negotiations.¹ This is not technically a rule of merger, since the written contract is of no higher grade than the oral contract. As far as a direct

¹ **United States.** McKinley v. Williams, 74 Fed. 94, 20 C. C. A. 312; Ryan v. Ohmer, 244 Fed. 31; Simonton v. Shaw, 246 Fed. 683; California Bridge & Const. Co. v. United States, 50 Ct. Cl. 40.

Arizona. Smith v. Mosbarger, 18 Ariz. 19, 156 Pac. 79.

Arkansas. Graves v. Bodecaw Lumber Co., 129 Ark. 354, 196 S. W. 800.

California. West Coast Lumber Co. v. Apfield, 86 Cal. 335, 24 Pac. 693; Remsberg v. Hackney Manufacturing Co., 174 Cal. 799, 164 Pac. 792; Smith-Booth-Usher Co. v. Los Angeles Ice & Cold Storage Co., 175 Cal. 136, 165 Pac. 430.

District of Columbia. Kinney v. McNabb, 44 D. C. App. 340.

Georgia. Polhill v. Brown, 84 Ga. 338, 10 S. E. 921; Gray v. Phillips, 88 Ga. 199, 14 S. E. 205; McElveen v. Southern Ry. Co., 109 Ga. 249, 77 Am. St. Rep. 371, 34 S. E. 281.

Illinois. Hutchinson v. Coonley, 209 Ill. 437, 70 N. E. 686; Covell v. Benjamin, 35 Ill. App. 297.

Indiana. Stewart v. Babbs, 120 Ind. 568, 22 N. E. 770; Shirk v. Mitchell, 137 Ind. 185, 36 N. E. 850.

Iowa. Indianapolis Terra Cotta Co. v. Murphy, 99 Ia. 633, 68 N. W. 898; Shea v. Cutler, 147 Ia. 366, 126 N. W. 366.

Kentucky. Kreitz v. Gallenstein, 170 Ky. 16, 185 S. W. 132.

Massachusetts. Hayden v. Shaw, 191 Mass. 533, 7 L. R. A. (N.S.) 525, 78 N. E. 110.

Michigan. Grand Rapids Wood Finishing Co. v. Hatt, 152 Mich. 132, 115 N. W. 714.

Minnesota. Cable v. Foley, 45 Minn. 421, 47 N. W. 1135; Hagstrom v. McDougall, 131 Minn. 389, 155 N. W. 391; Anderson v. Upper Cuyuna Land Co., 132 Minn. 382, 157 N. W. 581; Virginia & Rainy Lake Co. v. Helmer, 140 Minn. 135, 167 N. W. 355.

Mississippi. Odoneal v. Henry, 70 Miss. 172, 12 So. 154.

Missouri. Plumb v. Cooper, 121 Mo. 668, 26 S. W. 678; Boyd v. Paul, 125 Mo. 9, 28 S. W. 171; Tracy v. Iron Works, 29 Mo. App. 342.

Nebraska. Clarke v. Kelsey, 41 Neb. 766, 60 N. W. 138.

New Mexico. Locke v. Murdoch, 20 N. M. 522, L. R. A. 1917B, 267, 151 Pac. 298.

New York. Smith v. Lennon, 131 N. Y. 560, 29 N. E. 820; Societa Italiana v. Sulzer, 138 N. Y. 468, 34 N. E. 193.

North Carolina. American Potato Co. v. Jenette Bros. Co., 172 N. Car. 1, 89 S. E. 791; Caffey v. Oak Furniture Co., 175 N. Car. 387, 95 S. E. 619.

North Dakota. Gilbert Mfg. Co. v. Bryan, — N. D. —, 166 N. W. 805.

Oklahoma. J. M. Hoard, Jr., Co. v. Grand Rapids Showcase Co., — Okla. —, 173 Pac. 844.

Oregon. Muir v. Morris, 80 Or. 378, 154 Pac. 117 [rehearing denied, Muir v. Morris, 80 Or. 378, 157 Pac. 785]; Snow v. Beard, 82 Or. 518, 162 Pac. 258; Leavitt v. Dimmick, 86 Or. 278, 163 Pac. 292.

Pennsylvania. Williams v. Notopolos, 259 Pa. St. 469, 103 Atl. 290.

South Carolina. Hartsfield v. Chamblin, 44 S. Car. 110, 21 S. E. 798.

Tennessee. McCrary v. Bristol Bank & Trust Co., 97 Tenn. 469, 37 S. W. 543.

action upon the original oral contract is concerned, the result, however, is substantially the same as if the technical doctrine of merger were applied, since in an action upon the written contract neither party can resort to the prior or contemporaneous oral agreement as evidence of the intention of the parties direct.²

§ 2570. Merger of fraudulent representations. Fraudulent representations as to incumbrances¹ are not merged in a subsequent deed containing no covenants of warranty. Fraudulent representations as to title are not merged in a subsequent executory contract of sale under seal, which provides for a warranty deed.² Fraudulent representations as to the solvency of the makers of a note by the payee who thereby induces another to accept such note in payment for realty, are not merged in an indorsement by him without recourse.³

§ 2571. Merger by union of inconsistent rights in same party—Marriage of debtor and creditor. A party can not make a promise to himself,¹ and he can not be indebted to himself or under any obligation to himself which the law will recognize and enforce. Accordingly, if a valid obligation has been entered into, and subsequently the promisor acquires the interest of the promisee, such transfer of the promisee's interest to the promisor operates ordinarily as a merger or extinction of the original liability.²

Texas. *Pegues v. Haden*, 76 Tex. 94, 13 S. W. 171; *Jones v. Gilchrist*, 88 Tex. 88, 30 S. W. 442.

Utah. *Johnson v. Geddes*, 49 Utah 137, 161 Pac. 910.

West Virginia. *Mineral Ridge Mfg Co. v. Smith*, 79 W. Va. 736, 91 S. E. 817; *Paxton v. Benedum-Trees Oil Co.*, 80 W. Va. 187, 94 S. E. 472.

Wisconsin. *Chicago, M. & St. P. Ry. Co. v. Jewett*, 169 Wis. 102, 171 N. W. 757.

A distinct contract is not merged. *Clark v. Ulster and Delaware Railroad Co.*, 189 N. Y. 93, 121 Am. St. Rep. 848, 13 L. R. A. (N.S.) 164, 81 N. E. 766.

² See ch. LXIX.

¹ *Skinner v. Christie*, 52 N. J. Eq. 720, 29 Atl. 772.

² *Daly v. Bernstein*, 6 N. M. 380, 28 Pac. 764.

³ *Gates v. Moldstad*, 14 Wash. 419, 44 Pac. 881.

¹ See § 1568.

² **Alabama.** *Owings Lumber Co. v. Marlowe*, — Ala. —, L. R. A. 1918E, 155, 76 So. 926 (obiter).

Indiana. *Gosnell v. Jones*, 152 Ind. 638, 53 N. E. 381.

Kansas. *Security State Bank v. Clarke*, 99 Kan. 18, 160 Pac. 1149.

Kentucky. *Farley v. Farley*, 91 Ky. 497, 16 S. W. 129; *Dillon v. Dillon* (Ky.), 69 S. W. 1099.

Massachusetts. *Chapman v. Kellogg*, 102 Mass. 246.

Missouri. *Rogers v. Wolfe*, 104 Mo. 1, 14 S. W. 805.

At common law a marriage operated to some extent as a merger of the legal personality of both husband and wife. While this is sometimes spoken of as a legal merger of her personality, since the husband was in effect the managing agent of the new personality, the effect of marriage upon his personality was as well settled as its effect upon the personality of the woman, although the effects of such merger of personality were more frequently involved in the case of the wife than in the case of the husband. By reason of this merger of legal personality, neither of them could maintain an action at law against the other. Furthermore, at common law, upon marriage, the husband became the absolute owner of the wife's choses in possession, except her wearing apparel and the like; and he acquired a right to reduce her choses in action to possession and thus to make them his own. If, when the law was in this situation, a man married a woman to whom he was indebted, the law was obliged to hold either that the marriage operated as a merger or extinction of the debt, or else to deny to the husband under such circumstances the ordinary property rights which it gave to the husband in ordinary cases, since the only way in which the husband could reduce his own debt to possession would be by bringing an action against himself and compelling payment by himself to himself. As between these two theories, the law took the position that the marriage of a debtor to a creditor operated as a merger or extinction of the debt.³ This was not merely a suspension of the debt, for the debt did not revive on divorce,⁴ or on the death of the husband,⁵ even if the husband died before the debt had become due and payable.⁶

Even where the common-law rules were in force, however, equity did not regard marriage as discharging a contract made in con-

New Hampshire. *Burleigh v. Coffin*, 22 N. H. 118, 53 Am. Dec. 236.

Ohio. *Smiley v. Smiley*, 18 O. S. 543.

Tennessee. *Schilling v. Darmody*, 102 Tenn. 439, 73 Am. St. Rep. 892, 52 S. W. 291.

See also obiter in *Flenner v. Flenner*, 29 Ind. 564, and *Barton v. Barton*, 32 Md. 214.

³ *Gosnell v. Jones*, 152 Ind. 638, 53 N. E. 381; *Farley v. Farley*, 91 Ky. 497, 16 S. W. 129; *Dillon v. Dillon* (Ky.), 69 S. W. 1099; *Chapman v. Kellogg*, 102 Mass. 246; *Rogers v. Wolfe*,

104 Mo. 1, 14 S. W. 805; *Burleigh v. Coffin*, 22 N. H. 118, 53 Am. Dec. 236; *Smiley v. Smiley*, 18 O. S. 543; *Schilling v. Darmody*, 102 Tenn. 439, 73 Am. St. Rep. 892, 52 S. W. 291.

See also obiter in *Flenner v. Flenner*, 29 Ind. 564, and *Barton v. Barton*, 32 Md. 214.

⁴ *Farley v. Farley*, 91 Ky. 497, 16 S. W. 129.

⁵ *Suttles v. Whitlock*, 20 Ky. (4 T. B. Mon.) 451.

⁶ *Fox v. Johnson*, 4 Del. Ch. 580.

temptation of marriage.⁷ An ante-nuptial contract is not invalidated by the intermarriage of the parties.⁸ If a husband has settled his wife's property on her by a marriage settlement, the marriage does not operate as a discharge of a debt due to her from a partnership of which he is a member.⁹

The greater part of the common-law theory of the effect of marriage upon the legal personality of the parties thereto, and upon the property rights, seems to be at variance with modern ideas. On the one hand, it is felt to be unfair to compel the husband to pay his wife's ante-nuptial debts, and on the other hand, it is felt that she should control her property after marriage in the same way in which she controlled it before marriage. This feeling has expressed itself in legislation which, while varying in detail, provides in a general way that the husband shall be under no responsibility for his wife's ante-nuptial debts, and that the married woman shall control her property as if she were unmarried. Under such statutes the marriage of a debtor and creditor do not affect the obligation of the prior indebtedness,¹⁰ even in jurisdictions in which husband and wife can not enter into a contract with one another after marriage.¹¹ An indebtedness in favor of the woman,¹² such as an indebtedness secured by mortgage,¹³ or a judgment,¹⁴ are none of them discharged by her intermarriage with the debtor, even under a statute authorizing the husband to manage the wife's

⁷ *Hudnall v. Ham*, 183 Ill. 486, 75 Am. St. Rep. 124, 48 L. R. A. 557, 56 N. E. 172; *Bennett v. Read*, 51 Tenn. (4 Heisk.) 440.

⁸ *Hudnall v. Ham*, 183 Ill. 486, 75 Am. St. Rep. 124, 48 L. R. A. 557, 56 N. E. 172.

⁹ *Bennett v. Read*, 51 Tenn. (4 Heisk.) 440.

¹⁰ *Arkansas*. *McKie v. McKie*, 11 Ark. 68, L. R. A. 1915D, 1126, 172 S. W. 891.

Maine. *Carlton v. Carlton*, 72 Me. 115, 39 Am. Rep. 307.

Massachusetts. *Butler v. Ives*, 13 Mass. 202, 20 N. E. 654 [disapproving *Chapman v. Kellogg*, 102 Mass. 246, and *Abbott v. Winchester*, 105 Mass. 115]; *Spooner v. Spooner*, 155 Mass. 52, 2 N. E. 1121; *MacKeown v. Lacey*, 204 Mass. 437, 21 L. R. A. (N.S.) 683, 86

N. E. 799; *Delval v. Gagnon*, 213 Mass. 203, 99 N. E. 1095.

New York. *Power v. Lester*, 23 N. Y. 527.

Vermont. *Spencer v. Stockwell*, 76 Vt. 176, 56 Atl. 661.

¹¹ *Butler v. Ives*, 139 Mass. 202, 20 N. E. 654 [disapproving, *Chapman v. Kellogg*, 102 Mass. 246, and *Abbott v. Winchester*, 105 Mass. 115]; *Spooner v. Spooner*, 155 Mass. 52, 28 N. E. 1121; *MacKeown v. Lacey*, 200 Mass. 437, 21 L. R. A. (N.S.) 683, 86 N. E. 799; *Delval v. Gagnon*, 213 Mass. 203, 99 N. E. 1095.

¹² *Barton v. Barton*, 32 Md. 214; *Carlton v. Carlton*, 72 Me. 115, 39 Am. Rep. 307; *Power v. Lester*, 23 N. Y. 527.

¹³ *Bemis v. Call*, 92 Mass. (10 All.) 512; *Power v. Lester*, 23 N. Y. 527.

¹⁴ *Flenner v. Flenner*, 29 Ind. 564.

property.¹⁵ Even if she could not have brought an action against her husband during coverture, she can enforce such debt after coverture is ended,¹⁶ as by divorce.¹⁷

A statute which provides that the personal property of the wife shall not be affected by her marriage, is held not to change the remaining common-law consequences of marriage upon the legal personality of the parties; and, accordingly, the marriage to her creditor of a woman who is indebted, operates as a merger or extinction of the original indebtedness;¹⁸ and an assignee who claims under an assignment from the husband after marriage, can not enforce such debt.¹⁹

Statutes which preserve the property rights of a married woman, are held not to affect executory contracts between herself and her future husband; and while the marriage does not extinguish his indebtedness to her for services rendered before marriage,²⁰ it merges or extinguishes a continuous contract of employment,²¹ even if such employment requires services which are not necessarily involved in the duty of a wife to her husband,²² such as services as a law clerk.²³

§ 2572. Appointment of debtor as executor. At common law an executor was regarded as the owner of the personalty of the testator, subject to his duty to account for the proceeds of the estate. Accordingly, the appointment by a creditor testator of his debtor as executor, created a situation in which the debtor owed himself. No means of enforcing such liability of course existed. The law, then, had the choice between treating such appointment as a merger or extinction of the debt on the one hand, or of treating the executor as holding his debt to the estate as assets of the

¹⁵ *Wilson v. Wilson*, 36 Cal. 447, 95 Am. Dec. 194.

¹⁶ *Carlton v. Carlton*, 72 Me. 115, 39 Am. Rep. 307.

¹⁷ *Carlton v. Carlton*, 72 Me. 115, 39 Am. Rep. 307.

¹⁸ *Long v. Kinney*, 49 Ind. 235; *Gosnell v. Jones*, 152 Ind. 638, 53 N. E. 381.

¹⁹ *Long v. Kinney*, 49 Ind. 235.

²⁰ *In re Callister*, 153 N. Y. 294, 60 Am. St. Rep. 620, 47 N. E. 268 [affirming, *In re Callister*, 88 Hun 87, 34 N. Y. Supp. 628].

²¹ *In re Callister*, 153 N. Y. 294, 60 Am. St. Rep. 620, 47 N. E. 268 [affirming, *In re Callister*, 88 Hun 87, 34 N. Y. Supp. 628].

²² *In re Callister*, 153 N. Y. 294, 60 Am. St. Rep. 620, 47 N. E. 268 [affirming, *In re Callister*, 88 Hun 87, 34 N. Y. Supp. 628].

²³ *In re Callister*, 153 N. Y. 294, 60 Am. St. Rep. 620, 47 N. E. 268 [affirming, *In re Callister*, 88 Hun 87, 34 N. Y. Supp. 628].

estate. As between these two theories the common law adopted the theory that the appointment of the debtor as an executor operated as a discharge of the debt, if the estate were solvent, and the creditors were not prejudiced thereby.¹ Under the theory which controls the rights and liabilities of joint debtors,² the appointment of one of two joint debtors as executor operated as a discharge of the other.³ This rule is not recognized where the estate is insolvent and where the application of the theory of merger will operate to discharge the debtor so as to defeat the rights of the testator's creditors.⁴ Even at common law, the fact that the same person was executor of the debtor and of the creditor, did not operate as a discharge.⁵

At a rather early period equity doubted the propriety of the common-law rule,⁶ and it finally adopted the rule that the appointment of the executor did not operate as a merger of the debt, but that the debt of the executor became assets of the estate in his hands.⁷

The common-law rule has been changed by the general statutes with reference to the assets of decedents, which appear to contemplate an accounting on the part of the executor for all property received by him and for debts owing by him to the estate.⁸ It has also been changed by special statutes which provide specifically that debts owing by the executor are to be treated as assets of the estate in his hands.⁹ In some states the common-law rule was never adopted.¹⁰ In some states the equity rule has been followed in the settlement of decedents' estates,¹¹ although it has been said that the appointment of a debtor as executor operated as a quasi-release

¹ *Probate Judge v. Sulloway*, 68 N. H. 511, 73 Am. St. Rep. 619, 49 L. R. A. 347, 44 Atl. 720 (obiter); *Marvin v. Stone*, 2 Cow. (N. Y.) 781; *Gardner v. Miller*, 19 Johns. (N. Y.) 188.

It "is quasi a release at law, because he can not be sued." *Dorchester v. Webb*, Croke Car. 372.

² See §§ 2074 and 2456.

³ *Cheetham v. Ward*, 1 Bos. & P. 630.

⁴ *Robinson v. Hodgkin*, 99 Wis. 327, 74 N. W. 791 [disapproving, *Lynch v. Divan*, 68 Wis. 490, 29 N. W. 213].

⁵ *Dorchester v. Webb*, Croke Car. 372.

⁶ *Brown v. Selwyn*, Cas. Temp. Talbot 240.

⁷ *Hudson v. Hudson*, 1 Atk. 460; *Carey v. Goodinge*, 3 Bro. C. C. 111;

Berry v. Usher, 11 Ves. Jr. 88; *Simmons v. Gutteridge*, 13 Ves. Jr. 262; *Tomlin v. Tomlin*, 1 Hare 236; *In re Hyslop* [1894], 3 Ch. 522.

⁸ *Probate Court v. Merriam*, 8 Vt. 234.

⁹ *Probate Judge v. Sulloway*, 68 N. H. 511, 73 Am. St. Rep. 619, 49 L. R. A. 347, 44 Atl. 720; *Baucus v. Stover*, 89 N. Y. 1.

¹⁰ *Davenport v. Richards*, 16 Conn. 310; *Potter v. Titcomb*, 7 Me. 302; *Bassett v. Fidelity & Deposit Co.*, 184 Mass. 210, 100 Am. St. Rep. 552, 68 N. E. 205.

¹¹ *Bigelow v. Bigelow*, 4 Ohio 138; *Raab's Estate*, 16 O. S. 274; *Jones v. Willis*, 72 O. S. 189, 74 N. E. 166.

at law.¹² Whatever the theory, the general result in the United States is that the appointment of a debtor as executor does not operate as a merger or extinction of his debt.¹³

§ 2573. Sale or bequest of debt to debtor. If a debtor attempts to purchase his debt, the transaction is regarded as a merger or extinction of the original debt, rather than as a purchase.¹ However, a contract to sell the debt to the debtor before maturity at a discount, is regarded as valid;² and if the maker of a negotiable instrument takes it as collateral security for a debt due to himself, and reissues it before maturity, such instrument is valid.³

A negotiable instrument is not merged or extinguished by being acquired by the maker thereof as collateral security for a note given by a stranger to the original note.⁴

If a judgment debtor buys in his realty at an execution sale, it operates as a merger of the judgment on which such realty was sold. The judgment debtor is not subrogated to the priority of the lien of such judgment, but the inferior lien may then be asserted against such property in his hands.⁵

If a testator wishes to discharge his debtor, he ordinarily makes express provision in his will to that effect. In some cases, however, his attempt to discharge his debtor takes the form of a bequest, to the debtor, of the debt in question. If the rights of the creditors of the estate are not affected, such bequest operates as a merger or extinction of the indebtedness.⁶ Under the general principles which govern the liabilities of joint debtors,⁷ a bequest to one of two joint debtors of the bond upon which the two are liable jointly, operates as a discharge of the other.⁸

¹² Bigelow v. Bigelow, 4 Ohio 138.

¹³ California. In re Walker, 125 Cal. 242, 73 Am. St. Rep. 40, 57 Pac. 991.

Connecticut. Davenport v. Richards, 16 Conn. 310.

Maine. Potter v. Titcomb, 7 Me. 302.

Massachusetts. Bassett v. Fidelity & Deposit Co., 184 Mass. 210, 100 Am. St. Rep. 552, 68 N. E. 205.

Ohio. Bigelow v. Bigelow, 4 Ohio 138; Raab's Estate, 16 O. S. 273; Jones v. Willis, 72 O. S. 189, 74 N. E. 166.

New Hampshire. Probate Judge v. Sulloway, 68 N. H. 511, 73 Am. St. Rep. 619, 49 L. R. A. 347, 44 Atl. 720.

New York. Baucus v. Stover, 89 N. Y. 1.

Vermont. Probate Court v. Merriam, 8 Vt. 234.

¹ Owings Lumber Co. v. Marlowe, — Ala. —, L. R. A. 1918E, 155, 76 So. 926 (obiter); Exchange National Bank v. Chapline, 109 Ark. 242, 158 S. W. 151; Security State Bank v. Clarke, 99 Kan. 18, 160 Pac. 1149.

² Bell v. Pittman, 143 Ky. 521, 35 L. R. A. (N.S.) 820, 136 S. W. 1026.

³ Owings Lumber Co. v. Marlowe, — Ala. —, L. R. A. 1918E, 155, 76 So. 926.

⁴ Owings Lumber Co. v. Marlowe, — Ala. —, L. R. A. 1918E, 155, 76 So. 926.

⁵ McCarty v. Christie, 13 Cal. 79.

⁶ Pierson v. Berry (N. J. Eq.), 97 Atl. 275.

⁷ See §§ 2074 and 2456.

⁸ Pierson v. Berry (N. J. Eq.), 97 Atl. 275.

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